



Funded by
the European Union



Position Paper

on the draft laws:

- on the procedure of compensation for damages caused by unlawful acts committed in criminal and contravention proceedings (No. 895/MJ/2024); and
- for the amendment of some normative acts (the framework related to the Law on the procedure of compensation for damages caused by unlawful acts committed in criminal and contravention proceedings (No. 896/MJ/2024)).

AUTHOR:

Angela Popil and Pavel Cazacu, experts within the Group of Justice Experts.

Reviewed by:

Stanislav Ghiletschi,
IPRE Deputy Director

#Justice4Moldova

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



Disclaimer

This publication was produced with the financial support of the European Union and the Soros Foundation Moldova. Its content is the sole responsibility of the project "Ensuring the integrity, efficiency and independence of the justice system in Moldova – #Justice4Moldova", funded by the European Union and co-financed by the Soros Foundation Moldova. The content of the material belongs to the authors and does not necessarily reflect the views of the European Union and the Soros Foundation Moldova.

SUMMARY

This Opinion is formulated in response to the requests of the Ministry of Justice no. 03/9031 and no. 03/9032 of 11 October 2024, also addressed to the Institute for European Policies and Reforms.

The opinion is expressed on the following draft normative acts:

- *Draft law on the procedure of compensation for damages caused by unlawful acts committed in criminal and contravention proceedings (no. 895/MJ/2024); and*
- *The draft law for the amendment of certain normative acts (the framework related to the Law on the procedure of compensation for damages caused by unlawful acts committed in criminal and contravention proceedings (no. 896/MJ/2024).*

The authors of the opinion consider it necessary to promote a new legal framework regarding the manner and conditions in which the damage caused to litigants in criminal and/or contravention trials is to be recovered.

In order to improve the draft laws, the following recommendations are presented:

- *Clear definition of the state's responsibility for the damage caused by unlawful acts committed by public agents;*
- *Specifying the criteria for determining and evaluating the damage requested for compensation;*
- *Delineate as precisely and clearly as possible the cases in which exoneration from liability applies;*
- *Revision of draft laws in order to exclude technical errors in formulations.*

I. CONTEXT

According to the provisions of [art. 53 para. \(2\) of the Constitution of the Republic of Moldova](#), the state is financially responsible, according to the law, for the damages caused by the errors committed in criminal trials by the investigative bodies and the courts.

In Decision [no. 185/2022](#) on the inadmissibility of the complaint no. 139g/2022 on the exception of unconstitutionality of Articles 1, 3 and 6 of Law no. 1545 of 25 February 1998 on the manner of repairing the damage caused by the unlawful actions of the criminal prosecution bodies, the prosecutor's office and the courts, the Constitutional Court held that the text "according to the law" of Article 53 of the Constitution does not expressly claim that the State's patrimonial rights for the errors caused by the investigative bodies and the courts of law should be regulated only by Law no. 1545 /1998. The statutory provisions must be read in conjunction with the other relevant provisions as forming part of a coherent legal system (see [HCC No 37 of 7 December 2021, § 55](#)).

The promotion of a new law on compensation for damage caused by unlawful acts committed by criminal prosecution bodies and courts is justified by several essential premises, mentioned in the legislative documents and reflecting the current needs of the justice system.

We understand that currently [Law no. 1545/1998 on the manner of repairing the damage caused by the unlawful actions of the criminal prosecution bodies](#), does not adequately cover all forms of damages caused by the unlawful acts of the judicial bodies, being sometimes

ambiguous or insufficiently detailed. Current procedures for obtaining compensation are considered inefficient, time-consuming and difficult to manage for injured persons.

Under the current provisions, there is often confusion as to who is responsible for compensating for damages caused by miscarriages of justice or unlawful actions by the authorities. The lack of clear and effective legislation to redress the damage caused by prosecution bodies can undermine public trust in the justice system.

The last intervention in the text of Law no. 154/1988 took place through [Law no. 212/2017 for amending and supplementing certain legislative acts](#), with the republication on January 5, 2018 of Law no. 1545/1998. Other interventions in this law after 2017 were not made.

Starting from these premises, we agree that the promotion of a new law on compensation for damages caused by unlawful acts of criminal prosecution bodies and courts is based on essential reasons, meant to strengthen and streamline the national legal system in accordance with international requirements.

In the context of the Republic of Moldova's membership in the European human rights system, the state has the obligation to comply with the ECHR standards in the field of fundamental rights. From this perspective, the new law is necessary to ensure that national legislation reflects the requirements of the ECHR on compensation in case of miscarriages of justice and abuses by criminal prosecution bodies, thus preventing repeated convictions at the European Court of Human Rights.

Although art. 2007 of the Civil Code (in its current wording) determines, in principle, what are the situations when the state is liable for the damage caused by the actions of the criminal prosecution bodies, the prosecutor's office or the courts, the elaboration of a new law on this subject – the procedures and the manner of effective reparation of the damage caused by unlawful actions in criminal and contravention proceedings was necessary to eliminate the existing gaps in the Law no. 1545/1998.

As long as current compensation procedures are perceived as excessively complicated and often inaccessible to injured persons, it is necessary to develop a new law that provides a coherent set of rules for compensation procedures for victims of abuse and miscarriage of justice, thus ensuring access to clear and uniform legal remedies.

We note that the new law aims to simplify the mechanisms for compensating damages caused by abuses and judicial errors, aiming to provide an efficient and operative framework for reparation, adapted to the needs of citizens in order to facilitate the obtaining of fair compensation.

The background notes accompanying these bills describe the reasoning behind their drafting and promotion, and we share these reasons, understanding that these bills will contribute to the protection and restoration of fundamental rights, thus providing a solid guarantee that victims of institutional abuses will benefit from adequate reparations.

II. SUMMARY OF THE PROVISIONS OF THE DRAFT LAWS

The draft law on the manner of repairing the damage caused by unlawful acts committed in criminal and contravention proceedings (no. 895/MJ/2024), hereinafter referred to as the Framework Draft Law, regulates the following aspects:

Clear definition of the state's responsibility – emphasizing that the state must compensate for the damage caused by the unlawful acts committed in criminal and contravention trials, without taking into account the guilt of the person responsible.

Deadlines for initiating actions for compensation of damage – according to the draft, the initiation of civil action for compensation of damage can be made within three years from the appearance of the right to compensation.

Determination of the criteria for assessing non-material damage – the draft details the criteria for granting financial compensation for non-material damage, establishing a basis for a fair approach in cases of rights violations.

Official apology regime – the draft provides that the responsible persons within the authorities must present an official apology on behalf of the state for the unlawful acts, within 15 days from the pronouncement of the final decision.

Exemption from liability – the draft mentions that the state can be exonerated from liability in the cases expressly provided for by law.

Correspondingly, the main provisions of the draft law on the amendment of certain normative acts (the framework related to the Law on the manner of repairing the damage caused by unlawful acts committed in criminal and contravention proceedings) (no. 896/MJ/2024) – hereinafter referred to as the Draft Law – the related framework, refer to:

Presentation in a new wording of Article 2007 of the Civil Code by which the list of cases of errors that attract the liability of the State is extended.

Amendment of the Code of Criminal Procedure which refers to the exposition in a new wording of Chapter VII on the procedure for reparation of the damage caused by the unlawful acts committed in criminal trials.

Amendment of the Code of Civil Procedure in the part that refers to the territorial jurisdictional jurisdiction to settle disputes aimed at repairing damages caused by judicial errors (art. 39 para. (7)).

Amending the Contravention Code by supplementing it with Article 451 on the reparation of the damage caused by unlawful acts committed in contravention trials.

Amendment of Law no. 3/2016 on the prosecutor's office with reference to the reformulation of art. 53 para. (1), para. (3) and para. (3), which refers to the liability of the state for the unlawful acts committed by the prosecutor in the exercise of his duties.

III. ANALYSIS OF THE MAIN PROPOSALS OF THE DRAFT LAWS

3.1. Definition of State responsibility – Article 4

According to the provisions of the draft framework law, the state must repair the damage caused by the unlawful acts in criminal and contravention trials, without assessing the guilt of the officials involved. This implies that when damage has occurred/caused, the state must compensate for this damage regardless of the intention or negligence of the person responsible and this speaks of a strict liability regime.

According to art. 4 para. (1) letter b) and letter c) of the draft framework law, distinct grounds for reparation of the damage caused by the unlawful acts committed in criminal and contravention trials are:

- b) the application of medical coercive measures contrary to the provisions of the law;
- c) application of safety measures contrary to the provisions of the law.

In the context of ensuring the predictability of the law and since according to the provisions of art. 98 of the Criminal Code, medical coercive measures are safety measures, we recommend the elimination of letter b) from para. (1) art. 4 of the draft framework law because this basis is already provided for in letter c) of the same paragraph.

Likewise, although the name of the normative act shows that it provides for a mechanism for compensating the damage including for unlawful acts committed in contravention lawsuits, art. 4 para. (1) does not refer to the state's liability for illegal contravention liability, reasons for which it is recommended to supplement art. 4 para. (1) letter e) at the end with the text "or contravention". Or, according to the provisions of art. 441 of the Contravention Code, *the termination of the contravention process determines the reinstatement of the rights of the person in respect of whom it was initiated*.

At the same time, in art. 4 para. (1) We propose an additional analysis of the provisions of letter e) and letter f), according to which, in accordance with the provisions of this law, the material and moral damage caused to the individual or legal person shall be repaired as a result of: e) being held criminally liable contrary to the provisions of the law; f) conviction contrary to the provisions of the law or application contrary to the provisions of the law of a criminal or contravention penalty.

We note that, in judicial practice, the courts have used the basis of "criminal liability" including in the context of the initiation of the criminal case.

However, taking into account that in accordance with the provisions of art. 50 of the Criminal Code, the criminal liability is the public condemnation, in the name of the law, of the criminal acts and of the persons who committed them, a conviction that may be preceded by the coercive measures provided by the law, it is necessary to exclude letter e) from para. (1) art. 4, as long as letter f) already provides for the basis of "conviction".

However, if the authors intend to keep the basis of art. 4 para. (1) letter e), the wording of this rule is to be correlated with the reasoning/argumentation envisaged in the substantiation note dedicated to this subject. Moreover, keeping this wording without the necessary clarifications in the substantiation note creates considerable confusion of interpretation.

Our recommendations in Article 4 of the draft framework law also refer to the draft law – the framework related to Art. I proposing the exposition in a new wording of art. 2007 of the Civil Code.

3.2. Disclaimer – Article 5

Through Article 5 of the draft framework law, the authors reveal the cases when the state is exempt from the obligation to compensate for the damage caused by unlawful acts in criminal and contravention proceedings.

In our opinion, the substantiation note does not contain sufficient arguments that would justify the exemption of the State from liability for possible damages caused by unlawful acts if the complaints have been withdrawn, reconciliation settlements, guilty plea agreements or collaboration agreements have been concluded, as listed in Article 5 of the draft.

However, both the withdrawal of the prior complaint and the conclusion of a reconciliation settlement or the guilty plea agreement do not exclude potential violations committed by state agents against persons. Moreover, these actions have a distinct legal nature, respectively they have no causal link between them. Through these grounds, a hypothesis is created to legitimize potential violations of fundamental human rights, but which cannot be penalized by incurring state liability. (E.g. by concluding a reconciliation transaction with the victim). We consider that these procedural actions are distinct and should not limit the right of persons whose rights have been violated to initiate an action under the proposed law for consideration.

In addition, with reference to Article 5 para. (2) of the draft framework law, we draw attention to the fact that in accordance with the provisions of art. 2026 para. (2) and para. (3) Civil Code, *if the serious fault of the injured person has contributed to the production of the damage or to its aggravation, the compensation shall be reduced according to the degree of guilt of the injured person. The serious fault of the injured person does not constitute a basis for reducing the compensation in the cases provided for in art. 2007 or in cases where the damage was caused to a minor who has not reached the age of 14 or to a person in respect of whom a judicial protection measure has been instituted.*

From our perspective, the text of art. 5 para. (2) which provides for the exclusion of persons who have constituted themselves as an injured party or civil party in criminal cases where the object of examination are the unlawful acts listed in art. 4 para. (1) of the draft, committed in relation to it, is not in accordance with the reasoning set out in the substantiation note to the draft framework law, and it is necessary to revise the text of the law in correlation with the author's intention.

In addition, the substantiation note must clarify to what extent the provisions of art. 5 para. (3) is connected to art. 264 para. (3) Code of Criminal Procedure, without taking into account the provisions of art. 2026 para. (3) Civil Code.

As a consequence, we recommend that Article 5 be revised in order to exclude ambiguous and incoherent wording.

3.3. The starting point of the time limit for initiating actions for compensation - Article 6

The draft framework law, in Article 3, allows the initiation of the civil action for compensation of the damage within a period of three years, calculated from the date on which the right to compensation arose. Also, this term is generally applicable in all situations of requesting compensation for material damage or moral damage.

At the same time, the draft law – the related framework clarifies this term by amending Article 525 of the Code of Criminal Procedure and Article 451 of the Contravention Code, indicating that the action can be initiated before the court of the applicant's territorial area of residence.

At the same time, we note that according to Article 6 of the draft framework law, the *right to compensation for the damage caused by the unlawful acts committed in criminal and contravention proceedings arises from the moment **of the becoming final** of the procedural acts by which the unlawful nature of the acts provided for in Article 4 para. (1).*

We do not consider that the option of using the term "definitive" in the context of Article 6 of the draft is successful. According to the case-law of the Constitutional Court, the concept of a 'final' decision, which can be appealed, must be distinguished from that of an 'irrevocable' decision, which cannot be challenged by an ordinary or extraordinary remedy ([see HCC no. 32/2016, § 61](#)).

In the aforementioned judgment, the Constitutional Court noted that, unlike the constitutional and civil procedural text, both Law no. 87/2011, as well as Law no. 181/2014 enforce court decisions against the state only at the stage of acquiring irrevocable character and that in the view of the European Court, the execution of mandatory and enforceable court decisions involving the payment of monetary compensation by the state authorities is not considered to be a complex procedure. Consequently, the Court declared unconstitutional the phrases "after it becomes irrevocable", "issued on the basis of an irrevocable court decision", "issued on the basis of an irrevocable court decision", "issued on the basis of an irrevocable court decision" in paragraphs (1), (2) and (3) of Article 6 of Law no. 87/2011 on the compensation by the state of the damage caused by the violation of the right to a reasonable time trial of the case or of the right to the execution of the court decision within a reasonable time and the phrases "only after the court decision remains irrevocable" and "on the basis of an irrevocable court decision" in paragraphs (1) and (2) of Article 68 of the Law on Public Finance and Budgetary-Fiscal Responsibility no. 181/2014.

Without disregarding the reasoning of the Constitutional Court of HCC no. 32/2016, in the context of the draft framework law analyzed, we are not in the presence of situations for which the Constitutional Court has given resolution by the aforementioned decision.

On the contrary, the draft framework law does not refer to a simple execution of a court decision, but to the legal opportunity to initiate another judicial process – an action for reparation of damages, claims that can arise only when the unlawful nature of the facts reviewed in art. 4 para. (1).

From the text of art. 6 of the draft framework law we understand that in order to be able to initiate an action for compensation of the damage caused, the holder of the right of action must have a procedural act by which the unlawful nature of the facts causing damage is ascertained, beyond any doubt.

Respectively, in order to be able to make claims for damages on the basis of a procedural act that establishes the unlawful nature of the facts, that act must enjoy the effects of *res judicata*, that is, it must be an irrevocable act, because one of the fundamental aspects of the pre-eminence of law is the principle of legal certainty, which requires, *inter alia*, so that when the courts give a final assessment of a matter, their finding can no longer be called into question. The certainty of legal relationships presupposes compliance with the principle of *res judicata*, i.e. the principle of irrevocable nature of judicial decisions (see [HCC no. 4/2016, § 61](#)).

Thus, since the draft framework law does not refer to the execution of a court decision, but to the possibility of initiating another judicial procedure for the collection of damages following the finding, beyond any doubt, of the unlawful nature of the facts provided for in art. 4 para. (1), we recommend replacing the term "definitive" in art. 6 with the term "irrevocable".

Moreover, this recommendation is valid for the entire text of the draft framework law, including for compliance with the quality standard of the law (art. 3, art. 4, art. 6, art. 11, art. 18), except for art. 12 para. (1) of the draft framework law where the term "definitive" is used in the context of the execution of the court decision, thus complying with the considerations of the Constitutional Court of HCC no. 32/2016, reproduced before.

3.4. Quantification of damage – Article 8

From the analysis of the provisions of art. 8 para. (1) and para. (3) we note that the author deviated from the provisions of art. 2029 of the Civil Code.

In the case, according to the provisions of art. 2029 para. (1) Civil Code, the compensation for loss of salary or lost income shall be determined according to the net monthly income recorded by the injured person in the last year (last 12) before the damage was caused.

Respectively, we recommend the adjustment of the provisions of art. 8 para. (1) and para. (3) letter a) and letter b) of the draft to the provisions of art. 2029, so that it is obvious and clear that the lost

income from the victim's salary will be determined starting from the net monthly income obtained by the victim during the last 12 months until the injury. In addition, we believe that it is necessary to reformulate the text "persons who have not worked for good reasons" from art. 8 para. (3) letter c) so as to exclude any different treatment towards persons who have not carried out activities or work without having a reason for their inactivity. However, it follows from the current wording of that provision that a person who is not employed or who does not earn income from other non-work-related activities, without reasons, would not be entitled to compensation within the meaning of that law.

With reference to art. 8 para. (2), we consider it essential to specify the amount of the conventional unit envisaged for the purposes of this law.

In the event that Annex no. 1 of [the State Tax Law no. 213/2023](#) refers to the conventional unit, which is equal to 50 lei, the Contravention Code, in art. 34 para. (1), determines that the conventional unit is equal to 50 lei, and the Code of Criminal Procedure at art. 201 para. (2) establishes that the conventional unit is equal to 50 lei, in the spirit of the predictability of the law, we recommend the indication in art. 8 para. (2) of the draft law – framework the size of the conventional unit applied in the context of this draft law.

3.5. Individual liability – Article 18

Examining the constitutionality of the recourse mechanism in Decision [no. 23/2016](#), the Constitutional Court made some findings that are also relevant to this draft law:

- The institution of regression *per se* is not contrary to constitutional principles, as long as the guarantees inherent in the independence of judges are respected through the mechanism of material liability.
- The Court recognized as constitutional Article 27 of the Law on the Government Agent no. 151 of 30 July 2015, insofar as the action for recourse is based on a judgment handed down in a separate judicial proceeding at national level, by which it is found that the judge or another person has committed or admitted, intentionally or through gross negligence, actions or inactions that have led to or have contributed significantly to the violation of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which has been established by a judgment of the European Court, or has required the amicable settlement of the case pending before the European Court or the formulation of a unilateral declaration.

Because the circle of institutions/authorities that can be competent is limited, we recommend amending art. 18 para. (2) and the replacement of the text "as the case may be, and other competent authorities" with the name of the competent authorities necessary to be notified in these individual situations (*e.g. the Ministry of Internal Affairs, the Superior Council of Magistracy/Prosecutors, etc.*).

According to art. 18 para. (3), the authorities notified in accordance with the provisions of para. (2) shall inform the Ministry of Justice of the results of the actions taken by them.

In order to make the authorities responsible and speed up the recourse procedures, we consider it appropriate to establish a reasonable period (for example 10/15 days) within which these authorities are obliged to inform the Ministry of Justice, as well as to make available to it all relevant documents. The lack of a precise deadline within which to execute the obligation to inform the Ministry of Justice lacks the substance of the provision of art. 18 para. (3), making it ineffective.

3.6. Unification of wording and terminology

We recommend the revision of the text of the draft framework law in order to correct the technical errors of formulation, omission of words, verb conjugation, etc. (art. 1 para. (1), Art. 10 para. (3), Art. 13, Art. 14 para. (1), art. 18 etc.).

Distinctly, we recommend carrying out an analysis of the terminology used in the draft framework law that reveals some subtle but important differences in the definition of the terms and concepts used in this draft law in relation to the terminology used by the Civil Code in Chapter XXXIII, intended for tort liability, especially in the situation where this is the hearing of the matter, including in the part that refers to the liability of the state for the unlawful acts of public agents.

For example, in art. 2025, para. (1) Civil Code, which explains how to repair the damage in tort liability, the term "compensation" is used.

Taking into account that the draft framework law refers to the mechanism of compensation for persons injured as a result of the commission by state agents of unlawful acts in criminal trials and contravention trials, which may attract the liability of the state under the conditions of art. 2007 of the Civil Code, it is therefore appropriate to use the term "compensation" in the text of the draft framework law to the detriment of the term "compensation" or "financial compensation".

As long as the Civil Code establishes the general framework and fundamental rules for the reparation of damages caused by actions resulting from crimes, including in criminal and misdemeanor trials, the essential terms of this liability used in the draft law should be uniform, so as to be clear and complete for all those who will apply or interpret the law.

The use of unified terminology in the draft framework law ensures that all relevant aspects are covered by law, thus preventing multiple interpretations and eliminating discrepancies or uncertainties that may arise from differences in wording.

IV. CONCLUSIONS

Therefore, **taking into account our observations made above, in order to improve the quality of the draft laws, it is recommended:**

1. **Draft law on the manner of repairing the damage caused by unlawful acts committed in criminal and contravention proceedings (no. 895/MJ/2024):**

In Article 4:

- removal of letter b) from para. (1);
- the completion of letter e) of para. (1), at the end, with the text "or contravention";
- additional analysis of the provisions of letter e) and letter f) para. (1) in order to clarify the basis "criminal liability contrary to the law".

In Article 5:

- revision of the substantiation note in order to argue the exemption of the state from liability in case of withdrawal of complaints, conclusion of the reconciliation transaction, guilty plea agreement or collaboration agreement;
- the connection of the text para. (2) to the provisions of art. 2026 of the Civil Code.

Articles 3, 4, 6, 11 and 18 recommend replacing the term 'definitive' with the term 'irrevocable'.

In Article 8:

- The connection of the provisions of para. (1) and para. (3) to the provisions of art. 2029 para. (1) Civil Code;
- the completion of para. (2) with a provision regarding the amount of the conventional unit.

In Article 18:

- in para. (2), replacing the text "as the case may be, and other competent authorities" with the name of the competent authorities necessary to be notified in these individual situations (*e.g. the Ministry of Internal Affairs, the Superior Council of Magistracy/Prosecutors, etc.*);
- in para. (3) the inclusion of the term within which the authorities from para. (2) must inform the Ministry of Justice.

Correction of formulations and technical errors in art. 1 para. (1), Art. 10 para. (3), Art. 13, Art. 14 para. (1), art. 18 etc.

Connection of the project terminology to the provisions of Chapter XXXIII of the Civil Code.

2. **Adjustment of the Draft Law on the amendment of certain normative acts (framework related to the Law on the manner of reparation of the damage caused by unlawful acts committed in criminal and contravention proceedings) (sole no. 896/MJ/2024), where relevant, according to the recommendations for amending the Draft Law on the manner of reparation of the damage caused by unlawful acts committed in criminal and contravention proceedings (sole no. 895/MJ/2024).**