
Proposed separate procedure for handling compensation claims by injured parties

*Financial consequences for the State of the Advance payment scheme
(Voorschotregeling)*



20821

Summary

Cebeon, 26 October 2021

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S Summary

S.1 Objective and approach of the research

background

The proposed new Criminal Procedure Code (*Wetboek van Strafvordering*) provides the possibility of distinguishing complex claims for compensation by victims of violent or sexual crimes from the main case and dealing with them in a separate criminal procedure.¹ The reason for this is that, currently, a criminal judge does not have to hear a civil claim by the injured party if, in the court's judgment, this would place a disproportionate burden on the criminal proceedings. In such case, the injured party would not be granted compensation in the criminal proceedings. There is still the option of bringing the case before a civil judge, but barriers exist in civil proceedings that are not present in criminal proceedings.² Treating such claims in a separate compensation court should still allow them to form part of the criminal proceedings, thereby allowing the victim to enjoy the benefits of a criminal procedure. A criminal judge may impose a compensation measure on someone convicted of a criminal offence or someone on whom a measure is imposed because of an offence committed. The State is responsible for collecting the compensation awarded. Furthermore, the Advance payment scheme (*Voorschotregeling*) applies. Under this scheme, the State pays the remaining amount of compensation to the victim if the person convicted has not fully complied with their obligations within eight months of the compensation payment deadline. There is no maximum amount for the most serious violent and sexual offences. The State seeks to collect the compensation sum from the person convicted, but in practice this is not always possible. Any amount not recovered is then borne by the State. In this proposed new procedure in which claims for compensation are heard by a separate compensation court, if more is awarded than under the existing procedures, this means an increase in the amount ultimately borne by the State.

research question

The core research question is:

What would be a reasoned estimate of the annual public costs of handling compensation claims for violent and sexual offences in a separate procedure, as envisaged in the proposed new Criminal Procedure Code?

For this purpose, the following sub-research questions were formulated:

1. How many civil claims are estimated to be brought annually by an injured party within criminal proceedings?
2. How many civil claims by an injured party are ruled to be inadmissible in whole or in part by a criminal judge each year because of disproportionate burden on the criminal proceedings? What specifically is this reason for this?
3. What is the financial volume of these inadmissible claims or the inadmissible parts of claims, i.e. the total amount claimed that could be transferred to the compensation court?
4. What is the estimated part of the claim that could be assigned to the compensation court?

¹ Article 563, paragraph 1, Criminal Procedure Innovation Law (*Innovatiewet Strafvordering*, consultation version, 19-7-2021), basis for this research

A new draft of the Criminal Procedure Code (*Wetboek van Strafvordering*) was published on 6 April 2021 with a slightly different article 4.4.9.

² Civil procedure thresholds: initiative and burden of proof lie with the victim, court fee is payable, specialist legal aid is required, compensation awarded must be recovered privately, while the person convicted does not usually have sufficient financial means to pay the compensation and there is no State support for recovering this amount.

5. What is the estimated risk that the State would bear under the proposed separate procedure, i.e. how much would be paid out as an advance that would ultimately not be recovered from the offender, in addition to the risk as it currently stands?

At the request of the Dutch National Scientific Research and Documentation Centre (*Wetenschappelijk Onderzoek- en Documentatiecentrum, WODC*), the estimates had to be drawn up under the same conditions and circumstances, referred to as *ceteris paribus*. This means that no consideration has been given to the potential effects of changing regulations on claims made by victims or judgments handed down by judges. Nor has consideration been given to the potential consequences of the opinion issued by the commission investigating the compensation system for victims of criminal offences, published in March 2021.³

research approach

Claims made by victims cannot be obtained from an existing database. Therefore, a database of claims was built up as part of this research, containing a sample of 500 court rulings on criminal proceedings involving civil claims by injured parties handed down from 2017 to 2019. More than one injured party may make a claim within a single case. All claims covered in these rulings were systematically identified by means of text analysis, including the characteristics of the case, the offence, and the claim (amounts and judgment). There is actually a complete national database of cases dealt with by the criminal court, which does mention whether claims were made, but it does not include any further information on individual claims. The national data on court cases was taken from the RAC-min database, managed by the WODC, which contains data provided by the Dutch Public Prosecution Service (*Openbaar Ministerie, OM*).

On the basis of the number of criminal cases in which civil claims were made, the sample data on claims collected for the research was increased in each offence category in proportion to the national figures, on the basis of the national data on the total number of cases in the RAC-min database

Experts were consulted to correctly interpret the text analyses of court rulings. Some of the inadmissible claims (both wholly and partly) in fact seemed to have been ruled against, but were nonetheless declared inadmissible. In order to estimate the impact of handling these claims separately, it was essential to distinguish genuinely inadmissible claims from those that were in effect ruled against. So as to understand the factors that determine this distinction, interviews were arranged and an expert meeting took place, involving judges, lawyers and, victim support staff from Slachtofferhulp Nederland.

S.2 Current practice: adding civil claims to criminal cases and admissibility

adding civil claims to criminal cases

The national database (RAC-min) shows that, on average, there are 16,300 criminal cases per year in which at least one civil claim is made by an injured party. However, this number does not tell us anything about the number of claims per criminal case. The estimated total number of civil claims made in criminal proceedings, on the basis of the sample, amounts to 36,000 per year, i.e. approximately 2.2 claims per case. This consists of around 13,000 violent or sexual offence cases and 24,000 other cases.

Most of the claims (31,000) were filed by individuals. Only individual persons who are victims of violent or sexual crimes would be eligible for the separate court envisaged. For victims of violent and sexual crimes, the vast majority of claims were made by individuals (12,000 out of 13,000).

³ Donner Commission. Towards a balanced, consistent, and affordable system for compensating victims of a criminal offence. March 2021.

inadmissible claims: what would be eligible under a separate procedure?

On the basis of the formal judgments handed down by judges, it appears that two-thirds (20,000) of the claims submitted by individuals were partially or totally inadmissible (11,000 in part, 9,000 in whole). More claims for violent and sexual offences were ruled *partly inadmissible* (about 44%) compared with other offences (about 31%). In the case of *claims ruled totally inadmissible*, the opposite is true: this is less for violent and sexual offences (24%) than other offences (34%).

Partial or wholly inadmissible claims constitute the maximum potential number of claims that could be handled separately. This is only the case, however, if the handling the claim would entail a disproportionate burden on the criminal proceedings. Other reasons for inadmissibility (e.g. suspect acquitted) mean that a separate procedure would not produce any other outcome. The reasons for inadmissibility come into play here, and we distinguish between (a) no reason for a separate procedure, (b) clear reason for a separate procedure, namely disproportionate burden on criminal proceedings, and (c) unclear or doubtful whether there is reason for a separate procedure.

For more than half (54%) of all partially or totally inadmissible claims, the reasons do not give justify having a separate compensation court to handle the claim. This is lower for violent and sexual crimes (39%), meaning that, in the case of violent and sexual crimes, the remaining 61% of claims inadmissible under the present system could be handled separately. Of these, 25% (approximately 2,000 claims) have a clear reason (i.e. disproportionate burden on criminal proceedings), and for 36% (approximately 3,000 claims) the reason is questionable, unclear, or unknown.

These cases of doubt arise from the question of how to interpret the inadmissibility ruling by the court. The analysis of the judgments shows that a claim could well have been assessed in full and the judge ruled in the claimant's favour for part of the claim, but the other part of the claim that was in effect ruled against was actually declared inadmissible. This means that a part of all claims declared partially or totally inadmissible in formal terms were indeed admissible but ruled against. Since the claims that would be handled by the proposed compensation court are ones deemed inadmissible under the present system, it is important to be able to distinguish between truly inadmissible claims and those that were in effect ruled against, despite being declared inadmissible.

A distinction based on factual information in statements could not be accurately made. Having consulted experts, we now have an insight into situations in which claims improperly deemed inadmissible will become more frequent than those that are genuinely inadmissible.

Experts have indicated that inadmissibility is more frequent in cases of partially inadmissible claims, for example in the case of damages for pain and suffering, future loss of income, and insufficient substantiation of a claim. Claims that were truly inadmissible and, if handled separately, may have additional significance relate to: damage suffered later on (in particular, loss of financial support, if the claim is completely inadmissible), the requirement of an expert opinion, the victim also being at fault, the suspect being incapacitated, and claims being very broad or submitted late. However, the information contained in the judgments is not sufficiently specific to enable the claims to be characterized further.

S.3 Future practice: handling claims separately

caseload of a separate compensation court

The estimated caseload of a separate compensation court depends on the interpretation of the claims declared inadmissible by judges. Four definitions of a way to distinguish between genuinely inadmissible claims and claims improperly judged inadmissible were studied. These are:

- I. only claims deemed wholly inadmissible for obvious reasons
- II. only claims deemed wholly inadmissible for obvious or doubtful reasons

- III. all claims deemed wholly or partially inadmissible for obvious reasons
- IV. all claims deemed wholly or partially inadmissible for obvious or doubtful reasons.

Applying these four interpretations results in a caseload handled by a separate compensation court concerning an estimated total annual compensation of at least 26 million euros up to a maximum of 217 million euros.

success rate of compensation claims under a separate procedure

As things stand, the chance of a compensation claim being successful seems to be related to the amount being claimed. The percentages of successful claims in the sample examined vary from 65% for the lowest claims (up to 1,100 euros) to 18% for the highest claims (over 31,000 euros). There may be several reasons for the low success rate of the highest claims: the judge considers the assessment to be too complex and considers that further investigation or discussion is necessary, or the judge considers the claim to be too high and therefore only awards a part of it (and therefore rules against the remainder). As the first reason is more common, this suggests an underestimation if we assume that a separate procedure – *ceteris paribus* – would produce the same success rate as it does now. Therefore, two variations of the success rate were used in the calculations: A) equal to the current success rate, and B) a success rate of 50% for claims above 12,000 euros.

The minimum total amount expected to be awarded (using definition I for caseload and variant A for success rate) is estimated at approximately EUR 5 million per year. Assuming a higher caseload (definition IV for caseload) and a higher success rate (50%) for high-value claims (variant B for success rate), this produced an expected amount awarded of approximately 110 million euros. These estimates are based on numbers of cases and sample findings from 2017 to 2019. We note that the outcome is highly dependent on extremely high claim amounts and success rates. This depends partly on chance: it might be the case that the sample contains a disproportionate number of high-value claims. But it could also be that there are some extremely high claims awarded and also a high success rate in a given year, which would have a substantial impact on the risk borne by the State. A clear example of this is the claim for 3 million euros made by an American tourist who was stabbed at Amsterdam Central Station in 2018, of which more than 2.8 million euros was awarded by the court.

S.4 Advance payment scheme

The estimated recoverability of advance payments is based on parameters from Cebeon's research (2018) into the evaluation of the Advance payment scheme for sexual and violent crimes. This research showed that the amount of the compensation awarded is a major factor in how recoverable it is from the offender. The non-recoverable part of an advance payment is estimated on the basis of the amount of the damage. Amounts not collected within six years are regarded as non-recoverable and are therefore borne by the State.

On the basis of the assumptions and data used in the research, the risk to the State is estimated at between 4 million and 92 million euros per year. Applying a stricter approach to *ceteris paribus* (variant A for success rate), the estimate is smaller, namely 4 million to 39 million euros per year. These are estimates of the amount of additional risk incurred by the State compared with the current situation.