

# METHODS OF DIVERSION USED BY THE PROSECUTION SERVICES IN THE NETHERLANDS AND OTHER WESTERN EUROPEAN COUNTRIES

*Dr. Peter J.P. Tak\**



## I. INTRODUCTION

One remarkable feature of present day criminal law enforcement in the Netherlands is that only a small percentage of all the crimes recorded by the police are actually tried by a criminal court. Although the number of registered crimes increased more than fivefold between 1970 and 2005, the number of cases tried in court merely doubled.

One important reason for the discrepancy between the number of registered crimes and crimes tried by the courts is that public expenditure for the law enforcement agencies at large has not kept pace with the rising crime rate. Consequently, the police have been increasingly forced, because of resource considerations, to fix priorities in detecting and investigating cases. This is clearly illustrated by the sharp decline in cases which are solved. Between 1970 and 2005, the percentage of all registered crimes which were cleared up fell dramatically from 41% to 19%.

A second reason why relatively few cases are tried by criminal courts is that an increasing number of cases are settled out of court by the prosecution service. While this movement originally was driven by efforts to socialize, humanize and rationalize the administration of criminal justice, the emphasis has increasingly shifted towards the need to reduce the pressure on the criminal law administration. One consequence has been that the prosecution service has been gradually allocated adjudicatory powers, which were formerly the exclusive domain of the judiciary.

The prosecution service plays a pivotal role in the administration of criminal justice. That role derives from the prosecution service's power over the police, its prosecution monopoly and the expediency principle underlying its decisions on (non-)prosecution.

When utilizing these powers the prosecution service exercises discretion. The discretionary prosecutorial power has been considerably expanded over the past twenty years in the Netherlands, both in law and in practice.

The police do not make an official report of every established offence, but may confine themselves to dismissal with a warning, or to the issuing of a formal caution. They, too, have discretionary powers. This practice is not based on an explicit provision in the law. On the contrary, the law contains the principle that the making of an official report by the police is obligatory. The discretionary powers exercised by the police are derived from the discretionary powers of the public prosecutor not to prosecute.

The department of public prosecutors can issue general and special directives on the detection and investigation of the entire range of offences. Obviously, it is impossible to detect and investigate all crimes. Thus, priorities have to be established. Investigative activities must be concentrated on certain types of crime, while police activities in respect of other types of crime will have a low priority.

The detection and investigation policy of the police and the prosecution policy of the public prosecutor are complementary. In respect of the investigation of criminal offences, all investigating police officers are subject to the prosecution service. Formally, the public prosecutor is the senior investigator (Sects. 148 CCP and 13 Police Act). In practice, however, the police deal with most cases without prior consultation with the public prosecutor, except in more important criminal cases, where they may give detailed instructions.

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\* Professor of Law, Radboud University Nijmegen, the Netherlands.

Otherwise, consultation takes place at a more abstract level, in order to determine the policy for the investigation of certain types of crime and for the use of special investigation methods (undercover agents, infiltrators etc.). This is due to the rather restricted strength of the prosecution service as well as to the recognition that with regard to investigative techniques and tactics the police possess more expertise than the prosecution service.

## II. THE FILTER FUNCTION OF THE PROSECUTION SERVICE

The present report deals with the 'filter function' of the prosecution service. It is concerned with the extent of the service's discretionary powers to divert a case out of the formal flow of criminal justice.

The prosecution service generally receives its cases from the police. Many offences, primarily petty cases, do not come to the attention of the police and in fact remain outside the criminal justice system entirely, to be absorbed by society.

This is also the case when the prosecution service decides to waive a case and not to proceed further with it. Thus, although such acts deviate from the norms of acceptable social behaviour, and go beyond the boundaries of tolerance set by society for acts and actions, society is nevertheless able to deal with such acts without formal legal procedure. Society is capable of absorbing some types of crime without harm.

The offence can also be dealt with outside formal court procedures. For example, the offence can be diverted to a settlement or reconciliation between the victim and the offender, without the further involvement of the criminal justice system.

Other such methods include the use of a caution, an oral or a written admonition, a transaction, a simplified procedure, a referral to legal bodies other than the criminal courts, and various other forms of diversion. These methods aim at diverting the suspect out of the criminal justice system at the earliest possible stage. Once such an alternative method has been applied in a case, prosecution can no longer take place.

The extent to which the prosecution service diverts cases away from the criminal justice system primarily depends on the legal basis for the prosecutorial power.

Two basic principles provide the basis for prosecutorial policies: the legality principle, and the opportunity principle (the expediency principle).

The primary premise of the legality principle is that prosecution must take place in all cases in which sufficient evidence exists of the guilt of a suspect, and in which no legal hindrances prohibit prosecution.

The principle of opportunity, on the other hand, does not demand compulsory prosecution. Instead, it allows the prosecution service discretion over the prosecutorial decision, even when proof exists as to the occurrence of the criminal offence and the identity of the offender, and when there is no legal hindrance bar proceeding with the matter.

In the Netherlands, the expediency principle has only recently (1926) been expressed in the Code of Criminal Procedure.

Section 167 subs. 2 of the Dutch Code of Criminal Procedure reads: "the public prosecutor shall decide to prosecute when prosecution seems to be necessary on the basis of the result of the investigations. Proceedings can be dropped on grounds of public interest".

In the Netherlands the alternatives to prosecution are diverse but two major methods of diversion are used by the prosecution service: non-prosecution and transaction, which will be discussed.

### A. Non-Prosecution

The prosecution service may decide not to prosecute in a case where a prosecution would probably not lead to a conviction, due to lack of evidence or for technical considerations (technical or procedural waiver).

The prosecution may also decide not to prosecute under the expediency principle. The expediency principle laid down in Section 167 CCP authorizes the prosecution service to waive (further) prosecution “for reasons of public interest”.

In appropriate cases, the prosecutor can decide to suspend prosecution conditionally. The suspended non-prosecution has no statutory footing, and is therefore theoretically dubious, but it is generally accepted that the prosecution service is allowed to suspend a prosecution. Explicit general or special conditions for a suspended prosecution do not exist, but in practice the prosecutor imposes conditions similar to the conditions attached to a suspended sentence.

To harmonize the utilization of this discretionary power the top of the prosecution service, the Board of Prosecutors-General, issued national prosecution guidelines. Public prosecutors were directed to follow these guidelines except when special circumstances in an individual case were spelled out.

Under these guidelines, a public prosecutor could waive prosecution for reasons of public interest if, for example:

- a response other than penal measures or sanctions is preferable, or would be more effective (e.g. disciplinary, administrative or civil measures);
- prosecution would be disproportionate, unjust or ineffective in relation to the nature of the offence (e.g. if the offence caused no harm and it was inexpedient to inflict punishment);
- prosecution would be disproportionate, unjust or ineffective for reasons related to the offender (e.g. his age or health, rehabilitation prospects, first offender);
- prosecution would be contrary to the interests of the State (e.g. for reasons of security, peace and order, or if new applicable legislation has been introduced);
- prosecution would be contrary to the interests of the victim (e.g. compensation has already been paid).

The grounds for non-prosecution due to technicalities may be:

- wrongly registered as suspect by the police;
- insufficient legal evidence for a prosecution;
- inadmissibility of a prosecution;
- the court does not have legal competence over the case;
- the act does not constitute a criminal offence; and
- the offender is not criminally liable due to a justification or excuse defence.

Public prosecutors are not obliged to motivate their decisions not to prosecute due to technicalities or due to policy considerations. They are, however, obliged to categorize their decisions under one of the reasons or grounds for non-prosecution previously mentioned. This categorization is no guarantee of a uniform application of the reasons for non-prosecution. However, it provides information on the prosecution policy pursued in each of the nineteen prosecutorial jurisdictions and provides insight into the difference in these prosecution policies. It is one of the means to harmonize these prosecution policies.

In 2000, the proportion of unconditional waivers on policy considerations was relatively high. Approximately 14% of all crimes cleared were not further prosecuted for policy reasons. The rationale was that prosecution should not be automatic, but should serve a concrete social objective. Such a high proportion of waivers on policy grounds was seriously criticized. The prosecution service was instructed to reduce the number of unconditional waivers by making more frequent use of conditional waivers, reprimands or transactions.

Today the percentage of unconditional policy waivers has dropped to around 3%.

The decrease in the percentage of unconditional waivers did not lead to an increase in the number of cases tried by a criminal court. This is because an increasing number of cases were either waived conditionally or settled out of court with a transaction.

## **B. Transaction**

Transaction can be considered a form of diversion in which the offender voluntarily pays a sum of money to the Treasury, or fulfils one or more (financial) conditions laid down by the prosecution service in order to

avoid further criminal prosecution and a public trial.

The opportunity to settle criminal cases by way of a transaction has long existed. Until 1983 this opportunity to settle a case financially was exclusively reserved for misdemeanours in principle punishable only with a fine. Following the recommendations of the Financial Penalties Committee, the Financial Penalties Act of 1983 expanded the scope of transactions to include crimes which carry a statutory prison sentence of less than six years (Sect. 74 CC).

The restriction that the transaction is excluded for crimes carrying a statutory prison sentence exceeding six years has a limited impact. The overwhelming majority of crimes carry a statutory prison sentence of less than six years.

The following conditions may be set for a transaction:

- a. the payment of a sum of money to the State, the amount being not less than €3 and not more than the maximum of the statutory fine;
- b. renunciation of title to objects that have been seized and that are subject to forfeiture or confiscation;
- c. the surrender of objects subject to forfeiture or confiscation, or payment to the State of their assessed value;
- d. the payment in full to the State of a sum of money or transfer of objects seized to deprive the accused, in whole or in part, of the estimated gains acquired by means of or derived from the criminal offence, including the saving of costs;
- e. full or partial compensation for the damage caused by the criminal offence;
- f. the performance of non-remunerated work or taking part in a training course lasting 120 hours.

Acceptance of the public prosecutor's offer to settle a case financially out of court is, as a rule, beneficial for the offender: he or she avoids a public trial, the transaction is not registered in the criminal record, and he or she is no longer uncertain about the sentence. On the other hand, by accepting the transaction he or she gives up the right to be sentenced by an independent court with all legal guarantees (Sect. 6 ECHR).

The almost unlimited power given to the prosecution service in 1983 to settle criminal cases by a transaction without the intervention of a court has been strongly criticized. The most important criticism was that the increased transaction opportunities introduced a kind of plea bargaining system, represented a real breach of the theory of the separation of powers, undermined the legal protection of the accused, favoured certain social groups, and entrusted the prosecution service with powers which should remain reserved for the judiciary. Furthermore, it was feared that with nearly ninety percent of all crimes brought within the sphere of the transaction, the public criminal trial, with its protections for the accused, would become the exception and not the rule.

Despite this criticism, the introduction of the broadened transaction was a great success. More than one third of all crimes dealt with by the prosecution service are now settled out of court by a transaction. This is in line with the criminal policy plan, which formulated the target that one-third of all prosecuted crimes be settled by way of a transaction.

Transactions for crimes seem to be very popular both for the prosecution service and the offender. They save the prosecution service and the offender time, energy and expenses and furthermore protect the offender against stigmatization. Quite often high transaction sums for environmental crimes committed by corporations are accepted in order to avoid negative publicity.

To minimize the risk of arbitrariness and lack of uniformity in the application of transactions, the Board of Prosecutors-General has over the years issued guidelines for the common crimes for which transaction is most frequently used, relating to the principles to be taken into consideration regarding transaction and prosecution.

The role of the prosecution service in the Netherlands has changed considerably in the last decades. Increasingly, the prosecution service has been vested with dispositional powers. Whenever a prosecutor dismisses a case under conditions or settles a case through a transaction, the decisions of the public prosecutor are similar to the decisions of the judge.

So far these have been the Dutch experiences with processes aimed at avoiding the need to go to trial. Some of these processes have a beneficial effect on the reduction of the prison population but the main aim of the development of these processes was to reduce the caseload of the courts.

In the second part of this report I will deal with the experiences of diverting cases in other prosecutorial services in continental Europe.

### III. PROSECUTORIAL DISCRETION IN EUROPE

As you may know, there are more than 50 States in continental Europe, each with its own criminal procedural law system. In almost each one of these criminal procedural law systems there are processes aimed at avoiding the need to go to trial; in short, diversion processes are applied.

Dealing with all these countries and with all the various diversion processes would lead to a very lengthy text or almost to a book. Therefore I have selected some European countries whose systems in particular are interesting. The selected countries are Austria, England and Wales, Finland, France, Germany, Italy, and Sweden.

In England and Wales the Crown Prosecution Service has a wide discretionary power to divert cases from court. The system of England and Wales in particular is interesting because unlike in other European criminal justice systems, the Crown Prosecution Service has a weak position, compared to the police, concerning settlements out of court or diversion.

The second group of systems I would like to deal with are the French and Finnish systems, in conjunction with the Italian system, where criminal mediation and various ways of imposing penalties without a court trial have been developed.

Other major criminal justice systems in Europe are German procedural law oriented systems like the systems of Sweden, Austria and Germany itself. It is interesting to see that in these systems little diversion is known, with the exception of Austria which has recently developed a comprehensive package of new diversion measures.

This makes a total of seven criminal justice systems to address. As we will see, there is a large variety of diversion processes.

#### A. England and Wales

Let us start with England and Wales.<sup>1</sup> England and Wales have a common law-based adversarial criminal justice system, in contrast with most European systems which are civil law-based inquisitorial systems. The police have complete discretion regarding prosecution decisions and can independently decide not to prosecute or to prosecute. In the latter case, prosecution is carried out by the Crown Prosecution Service, established in 1985. The CPS may continue the prosecution or may drop it. Both the police and the CPS may divert a case from court through a caution.

Under which conditions may the CPS or the police divert a case and what are the criteria for diversion?

The preconditions and criteria for diversion have been modified by recent legislation (Sect. 23 CJA 2003). The first requirement is that the authorized person has evidence that the offender has committed an offence. The second requirement is that a relevant prosecutor decides:

- a) that there is sufficient evidence to charge the offender with the offence; and
- b) that a conditional caution should be given to the offender in respect of the offence.

The third requirement is that the offender admits to the authorized person that he or she committed the offence.

The fourth requirement is that the authorized person explains the effect of the conditional caution to the

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<sup>1</sup> See J. Sprack, *Emmins on Criminal Procedure*, Oxford University Press 2004, p. 64 ff.

offender and warns him or her that failure to comply with any of the conditions attached to the caution may result in being prosecuted for the offence.

The fifth requirement is that the offender signs a document which contains:

- a) details of the offence;
- b) an admission by him or her that he or she committed the offence;
- c) his or her consent to being given the conditional caution; and
- d) the conditions attached to the caution.

These pre-conditions are intended to ensure that, because a caution is a statement of guilt (which can be cited in court), the offender really is guilty and would be convicted if prosecuted. They are due process safeguards, intended to inhibit the police from cautioning whenever they adjudge a suspect to be guilty but they cannot, or would rather not, collect sufficient evidence to support a prosecution.

Caution is in England and Wales the most frequently used method of diverting a case from court. It is applied on a very large scale. Almost 30% of all suspects are cautioned by the police. What is the position of the CPS in this situation?

One of the functions of the CPS is to exercise control over the 'public interest' dimension of prosecutions, although it cannot do anything about cases which were cautioned by the police when they should have been prosecuted. Indeed, the police can even tie the hands of the CPS by promising that a case will be dropped. Although discontinuance is the prerogative of the CPS alone, it has been held to be an abuse of process for prosecution to be continued after a promise, even from the police, that it will be dropped (*R v Croden Justice ex p Dean*, 1993, QB 769). In this case the 'deal' was discontinuance in exchange for the suspect giving evidence for the prosecution in a murder trial. This illustrates both the structurally weak position of the CPS compared to the police, and the way the police use prosecution and non-prosecution in the 'public interest' as part of broader policing strategies.

The CPS can, in principle, ensure that cautionable cases are not prosecuted by discontinuing them. Nearly one-third of discontinuances are on 'public interest' grounds. However, the CPS only rarely recommends that a caution be substituted. A realistic view of the proportion of cases discontinued by the CPS that should be cautioned by the police on public interest grounds (rather than marked for prosecution) would be somewhere between around 6% and a third.

How is the substantial number of 'public interest' discontinuances to be explained? Well over half of them are because a nominal penalty is expected, the defendant is charged with other serious offences or the offence is in some other way too trivial to be prosecuted. At a time of managerial-style constraints on public expenditure, Crown Prosecutors have become increasingly focused on issues of cost-effectiveness in prosecutions.

## **B. Finland and France**

In Finland and France mediation is widely applied as settlement out of court but in both countries mediation has a very different meaning.

### 1. Finland

In Finland some 5,000 cases annually are referred to mediation and about half of these cases have been sent to mediation by the prosecutor.

Mediation has been used since 1983, starting from local experiments and slowly expanding from there. However, the system does not cover the whole country. Today, all towns with a population over 25,000 and most over 10,000 offer mediation services. Eighty percent of Finns live in a municipality that has an agency for mediation.

Mediation does not form part of the criminal justice system but co-operates with the system as far as the referral of cases and their further processing is concerned. There is no legislation on the organization of mediation, but plans and proposals are being prepared. The Criminal Code has also been revised recently, so that it now mentions an agreement or settlement between the offender and the victim as a possible ground

for non-prosecution, non-punishment by the court or mitigation of the sentence.

Mediation is based on volunteer work. Participation in mediation is always voluntary for all the parties. The municipal social welfare authorities usually assist in co-ordinating the mediation services, but mediators are not considered public officials.

Mediation can start at any time between the committing of the offence and the execution of the sentence, and can be initiated by any one of the possible parties. Three-quarters of all cases are referred to mediation either by the prosecutor (44%) or by the police (30%).

In cases where the initiative for mediation comes from the prosecutor, he or she sends the case to the mediation office with an announcement that the decision whether or not to prosecute will be made within a short period of time (usually one to three months). In other respects, the prosecutor remains fairly passive during the mediation process.

Once the process has started, it normally leads to a written contract. The contract contains the type of offence, the content of a settlement, e.g. how the offender has consented to repair the damages, place and date of the restitution as well as the consequences for a breach of the contract.

## 2. France

In France,<sup>2</sup> the law of 4 January 1993 created the *médiation pénale*. There are two kinds of mediation: one for crimes and another for misdemeanours. Since the law of 23 June 1999, Sect. 41-1 CCP states that: Where it appears that such a measure is likely to secure reparation for the damage suffered by the victim, or to put an end to the disturbance resulting from the offence or contribute to the reintegration of the offender, the district prosecutor may, directly or by delegation:

- 1) bring the duties imposed by law to the attention of the offender;
- 2) direct the offender towards a health, social or professional organization;
- 3) require the offender to regularize his situation under any law or regulation;
- 4) require the offender to make good the damage caused by the offence;
- 5) with the consent of the parties, initiate mediation between the offender and the victim.

The 1999 law created another system called *composition pénale* as mediation for misdemeanours (Sects. 41-2 and 41-3 CCP). This is not a kind of mediation in the strict sense but a kind of financial settlement out of court as also is known in the Netherlands under the technical term 'transaction'.

Section 41-2 CCP states that prior to any public prosecution being instituted, the district prosecutor may propose, directly or through an authorized person, criminal mediation to an adult person who admits having committed one or more designated misdemeanours such as destruction, domestic violence and abuse of trust. This would involve one or more of the following orders:

- 1) to pay to the Public Treasury a mediation fine. The amount of such a mediation fine, which may not exceed either €3,750 or half of the amount of the maximum fine for the offence, is fixed in accordance with the gravity of the facts as well as the income and expenses of the offender. Payment may be made by instalments, in accordance with a schedule of payments fixed by the district prosecutor, within a period which may not exceed one year;
- 2) to hand over to the State the object which was used to or intended to be used to commit the offence or which is the product of it;
- 3) to surrender a driving licence for a maximum period of six months, or a permit to hunt for a maximum period of four months to the clerk's office of the first instance court;
- 4) to perform unpaid work for the benefit of the community for a maximum of sixty hours, over a period which may not exceed six months or to follow training within a health, social or professional organization for three months maximum.

Where the victim is identified, the district prosecutor must propose to the offender that he or she compensates the damage caused by his or her offence, unless the offender can show that the damage has already been compensated. The prosecutor must require that this happens within a period which may not exceed six months. He or she informs the victim of this proposal.

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<sup>2</sup> See J. Pradel, *Procédure Pénale*, Editions Cujas, 13<sup>e</sup> édition, 2006.

The district prosecutor's proposal for criminal mediation may be brought to the attention of the offender through a judicial police officer. Here it takes the form of a written decision signed by the prosecutor, which specifies the nature and the measures proposed and which is endorsed on the file.

Criminal mediation may be proposed in a public centre for legal advice. The person to whom criminal mediation is proposed is informed that he or she may be assisted by a lawyer before giving his or her consent to the district prosecutor's proposal. This consent is recorded in an official record. A copy of the official record is given to the offender.

Where the offender consents to the measures proposed, the district prosecutor addresses the President of the *Tribunal de Grande Instance* by way of a petition seeking approval of the mediation. The district prosecutor informs the offender of this and, where necessary, the victim. The President of the *Tribunal* may proceed to hear the offender and the victim, assisted, where necessary, by their lawyers. The decision of the President of the *Tribunal de Grande Instance*, which is notified to the offender and, where necessary, the victim, is not open to appeal.

Where the offender does not accept mediation or, after having given his or her consent, does not fully comply with the measures decided upon, or where the approval required is not given, the district prosecutor decides what further action to take. In the case of prosecution and conviction, account is taken, where appropriate, of the work already accomplished and sums already paid by the offender.

Prosecution is suspended between the dates when the district prosecutor proposes criminal mediation and the expiry of the time granted for the mediation to be carried out.

Successful completion of criminal mediation terminates prosecution.

Finally, the law of 9 March 2004 created a French kind of plea bargaining. This principle is contained in Sect. 137 and the procedure of plea bargaining in the Sects. 495-7 to 495-16 CCP. According to this Section, the offender can ask for the use of this procedure. The public prosecutor receives the offender's declaration of guilt and proposes a penalty to him or her:

- if he or she accepts, the judge can approve the penalty and his or her decision will be read during a public hearing. If the judge refuses to approve the punishment, the public prosecutor will then initiate prosecution according to the normal rules;
- the offender should have ten days to give an answer to the public prosecutor;
- if the offender refuses, the public prosecutor can present the offender in court or before the liberty and custody judge.

### C. Italy

Similar diversionary measures have been developed in the 1988 Code of Criminal Procedure of Italy<sup>3</sup> which has been a model for many diversionary measures in other Codes of Criminal Procedure in Europe.

In Italy, according Sect. 112 of the Constitution, the prosecutor is obliged to prosecute whenever there is sufficient evidence to charge the offender. According to this section the prosecutor has no other choice than prosecution or dismissal due to lack of evidence. It follows that the prosecutor cannot be vested with the right to settle a case out of court. Nevertheless room for discretion of the prosecutor is left with regard to the cases in which the penalty can be imposed without trial: the sentence agreement (*patteggiamento*) and the penal order (*procedimento per decreto*).

The sentence agreement consists of an agreement between the prosecutor and the offender on the sentence to be imposed. This form of diversion is characterized by an exchange between a sentence discount and the defendant's waiver of the right to stand trial. In other words, by means of a sentence discount, the accused is encouraged to waive his or her right to have his or her case dealt with in a public trial. This saves time and expense for the system. Since the policy criteria according to which the prosecutor should give his or her consent are not defined by the law, the decision depends on his or her choice, which is not always based only on technical reasons. Anyway, it is important to underline that, once the parties have

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<sup>3</sup> See G. Conso/V. Grevi, *Compendio di Procedura Penale*, 3<sup>a</sup> Editione, CEDAM, Padova 2006.



reached an agreement, the judge must verify whether the conditions to pronounce the requested sentence have been met.

There are three prerequisites for this proceeding without trial: the request of one party (prosecutor or defendant), the consent of the other party, and judicial supervision. In order to reach an agreement, the initiative can be taken both by the prosecutor and the defendant. If the request is made by the defendant, it is necessary to get the consent of the prosecutor and vice versa. The request must express the will of ending the proceeding with a sentence, the contents of which must be specified. In particular, the parties must indicate the legal basis of the offence, the aggravating and mitigating circumstances and their balancing, the type and level of penalty.

The penalty may be a fine, a non-custodial sanction or a custodial sanction. The defendant's request or consent can be tied to the pronouncement of a suspended sentence. In any case, the sanction is to be reduced up to a maximum of one-third as regards the applicable one, provided that the sentence does not exceed five years' imprisonment; but, if the sentence exceeds two years' imprisonment, the *patteggiamento* is not admitted for Mafia crimes and organized crime. Once the request has been made by one party, the other party must declare to accept it.

Of course, neither the prosecutor nor the defendant is bound by the other party's request. Nevertheless, it is important to underline that the prosecutor's dissent, unlike the defendant's, shall be justified.

In order to avoid the collapse of the trial and a useless waste of time and expense, the request shall be made and the consent be given during the investigation stage or at the latest within the preliminary hearing; it can be said that the law presses the parties to reach an agreement at the earliest stage, as that allows the maximum saving for the system.

Once the parties have reached an agreement concerning the appropriate level of penalty, the judge must verify whether there are the conditions to pronounce the requested sentence or not. The powers of the judge are substantial.

First, he or she must check that there is sufficient evidence. Otherwise, the accused must be acquitted *ex officio*, notwithstanding his or her request or his or her consent to be sentenced. It means that the agreement between the parties is not exactly like a plea bargain. In fact, the defendant is not required to plead guilty, as his or her request to be sentenced, or his or her consent to the prosecutor's request, does not involve a guilty plea.

Secondly, the judge must verify that the charge corresponds to the facts alleged; that the application of the aggravating and mitigating circumstances and their balancing have a legal basis; that the requested penalty does not exceed five years' imprisonment and its level is commensurate with the seriousness of the offence.

Only if both tests are satisfied does the judge pronounce the requested sentence, otherwise, unless there are conditions for an acquittal, the judge rejects the request and the proceeding will continue.

If the request is granted, the agreed sentence is imposed. The judge can refuse to impose the sentence but cannot change it.

A trial is also avoided when the proceeding ends with the issuing of a penal order to pay a fine (*procedimento per decreto*).

There are two conditions required by law. Firstly, the offence shall be prosecuted *ex officio*. Secondly, the fine must be commensurate with the actual offence.

If the prosecutor considers these conditions met, he or she may request the judge to issue such a penal order. The request shall be motivated and shall indicate the level of the fine, which can be reduced up to one half of the minimum fixed by law.

As in the case of the sentence agreement the judge must check the sufficiency of the evidence and verify that the charge corresponds to the alleged facts and that the fine is commensurate with the seriousness of the offence.

Only if both tests are satisfied the judge pronounces the penal order as requested by the prosecutor. The judge has no power to change it. The order shall contain the charge and a reasoned motivation for the decision, including those related to the penalty discount.

The order is notified to the accused, who instead of paying the fine can ask to be tried in a public court trial.

Let us now turn to the systems which are German procedural law oriented and start with Germany<sup>4</sup> itself.

#### **D. Germany**

Leaving the ample option of conditional dismissal (Sects. 153a ff CCP) aside, the German prosecutor has no authority to settle the case with a suspect or defendant out of court. The prosecutor is nevertheless frequently involved in negotiations designed to dispose of a criminal case by consent. Such negotiations with the defence can occur in the context of preparing a penal order (*Strafbefehl*), i.e., a written judgment drafted by the prosecutor and issued by the court without a hearing (Sect. 407 CCP). Penal orders can be used for adjudicating *Vergehen* when the sanction consists of a fine, the suspension of a driver's licence, and/or a suspended prison sentence of not more than one year. The defendant's prior consent is not required, but he or she can make the penal order ineffective by filing an appeal and demanding a trial. It is therefore useful, at least in non-routine cases, for the prosecution and the defence to discuss the possible sanction in advance and to make sure that the defendant will accept the penal order. Many defendants are strongly interested in having their cases resolved without a public trial, and defence lawyers then approach the prosecutor in charge of the case and raise the possibility of a penal order. Especially in cases where there is a white-collar defendant, there can be extensive negotiations before a penal order acceptable to all sides is drafted and submitted to the court. Courts have the authority to reject a proposed penal order and order a trial but very rarely do so.

Prosecutors are also involved in negotiating consensual judgements before, or during, trial. Since the 1980s, a German version of plea bargaining has developed and quickly proliferated although there is no legal basis for it. The Federal Court of Appeal in 1997 effectively approved of the practice if certain conditions are met (*Entscheidungen des Bundesgerichtshofes in Strafsachen*, Band 43, p. 195). In many cases, defence counsel and the court engage in negotiations either in advance of a contested trial, or when the trial has progressed to some extent, with a view toward finding an amicable settlement, the defendant offering a (partial) confession and the court indicating its willingness to impose a lenient sentence. Although these negotiations are conducted mainly between the defence and the professional judge(s), the prosecutor usually takes part and in effect has a veto power. If he or she decides to file an appeal against a negotiated judgment he or she can negate most of the efficiency benefits associated with the proposed 'deal'. This kind of negotiated justice has been heavily criticized by scholars but has been embraced by practitioners. 'Deals' occur in all kinds of cases, most frequently in drug and white-collar cases. This, however, is not a process aimed at avoiding the need to go to trial and the conclusion is that in Germany there is little opportunity to settle cases out of court.

#### **E. Sweden**

The same is applicable to Sweden. Like Germany, in Swedish law, the principle of legality is applied, but there are many exceptions to this principle.

The prosecution service has possibilities to waive prosecution or to terminate a case, more or less similar to those in Germany. All possibilities are based on the absence of public interest to prosecute or where prosecution would be in conflict with public interest, for example: if continued inquiry would incur costs not in reasonable proportion in relation to the importance of the matter and the offence, if prosecuted, would not lead to a penalty more severe than a fine. Like in Germany, in Sweden a kind of penal order is known but applied in a different way.

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<sup>4</sup> See L. Meyer-Gossner, *Strafprozessordnung*, in *Beck'sche Kurz-Kommentare*, 47. Auflage, 2005.

According to chapter 48 Sect. 1 – 12a CJP, a prosecutor may impose a punishment on the suspect by means of a summary penal order (*strafföreläggande*). A summary penal order means that the suspect is, subject to his or her approval, ordered to pay a fine according to what the prosecutor considers the offence deserves. A summary penal order may even concern a conditional sentence or such a sanction coupled with a fine. The conditional sentence according to the Swedish law differs from the punishments with similar names in other legal systems.

The summary penal order may be used as a sentencing form as regards all the offences in respect of which fines are included in the range of penalties. There are no limits as to the severity of the fine, which means that the prosecutor may impose the same sum as permitted by a court. A conditional sentence may be imposed even for more serious offences, which is for offences which do not have fine in the range of penalties, but only imprisonment, provided that it is obvious that the particular offence does not deserve a more severe punishment than a conditional sentence.

The summary penal order may also include a decision on compensation of damages to the victim of the crime, that is, a decision on a civil law matter, provided that the compensation consists of a payment.

The summary penal order is a final decision in a particular case and has the same validity and consequences as a judgment of the court. It may be issued only if the offender confesses to the offence and accepts the order. Otherwise, the prosecutor has to bring the case to court after all.

There is no legal possibility for a settlement out of court in Swedish law. Something which could be called the first step in this direction is perhaps represented by the Mediation Act 2002 (*Lag, 2002:445, om medling med anledning av brott*). The Act contains basic rules concerning mediation between victim and offender. A possible agreement on compensation for damages, reached on the basis of mediation, cannot replace a sentence for the crime. However, the fact that the offender has undergone mediation may influence the decision of the prosecutor in waiving prosecution. The prosecution service itself is not engaged in mediation activity.

#### **F. Austria**

Unlike Germany and Sweden, Austria<sup>5</sup> in 2000 reformed the Code of Criminal Procedure and introduced a comprehensive package of new diversion measures to be applied under general criminal law.

Diversion as understood in Austria means the early termination of criminal proceedings by the public prosecutor or the court, in minor or, at least, less severe cases. Diversion is possible from the moment the public prosecutor has official knowledge of the offence, until the end of the main trial. Laws do not allow diversion by the police. The main agent in the field of diversion is the public prosecutor, but it may also be applied or offered by the court.

I concentrate on diversion by the public prosecutor because this report deals with measures enabling the avoidance of a court trial.

Legal prerequisites for application of diversion are:

- the crime in question is not a petty offence and also not one requiring traditional criminal penalties in the interest of special and general prevention;
- the offence has to fall within the jurisdiction of the district court or of the single judge at the regional court (*Landesgericht*); this basically means that the offence is to be sanctioned by not more than five years of confinement;
- the offence falls under the remit of the public prosecutor;
- crimes resulting in fatalities are excluded from diversion;
- the guilt of the suspect should not be severe;
- the public prosecutor deems the circumstances of the case clear and settled with no outstanding evidence; and
- the suspect should voluntarily accept the diversion offer.

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<sup>5</sup> See E.E. Fabrizio, *Die Österreichische Strafprozessordnung*, Manz Verlag, Wien 2004, p. 173-198.

The CCP provides four different measures of diversion:

- payment of an amount of money (diversion fine);
- community service;
- determination of a probationary period (1-2 years) possibly combined with supervision of the probationer and/or the compliance with obligations; and
- victim offender mediation (which actually means out of court conflict resolution).

According to the CCP, the consent of the victim is an essential precondition for Victim Offender Mediation (VOM). This declaration of consent, however, is not necessary if it is refused on grounds that are not to be taken into consideration within criminal proceedings, like retribution or revenge.

Conflict resolution is carried out by specially trained social workers (mediators). The mediator informs the public prosecutor about the progress made as well as about the outcome of the conflict resolution. The decision whether the VOM has been successful as a prerequisite for the waiver of the prosecution, has again to be made by the prosecutor. The public prosecutor does not demand in advance a specific procedure or a specific outcome of the VOM. The participants, as well as the mediators, are free to decide upon their way of solving the conflict. Apart from the monetary payment, VOM is the only diversion measure where the public prosecutor may additionally require the payment of a lump sum up to €145,-.

To stress the importance of restorative elements within criminal proceedings, the Austrian legislature has decided that the other diversion measures (the diversion fine, community service and the probationary period) must be combined with a compensation order.

#### IV. CONCLUSION

As we have seen, there exists a large set of diversionary measures in the various procedural criminal law legislations of the Western European countries. The main aim of these diversionary measures is to reduce the caseload of the courts by avoiding court trials for trivial or less severe criminal cases. It gives criminal courts more room for an in-depth investigation of the truth at the court session in the most serious cases.

Many of the diversionary measures also aim to serve as an alternative to imprisonment. This is in particular the case for diversionary measures such as mediation, community service, financial settlement or the order to participate in a training course which in many systems can be imposed by the public prosecutor or which may be proposed by the public prosecutor and imposed by a judge in a non-full-fledged court procedure.

In many cases indeed diversionary measures may lead to a reduction of the prison population but it is difficult, if not impossible, to determine whether these non-custodial sanctions actually have this function. Other circumstances such as increased crime could lead to more, and to more severe, prison sentences so that an overall reduction in incarceration cannot be determined.

Another question is whether the measures applied in order to avoid a trial have an effect on crime rates.

Some would argue that the diversionary measures, because of their leniency, do not deter people from committing offences. Others would argue that there is no clear empirical evidence that the degree of imprisonment is decisive for the general level of crime control in society. Based on published research it may thus be that high rates of imprisonment do not curtail crime in general nor do low rates encourage crime.<sup>6</sup>

But one conclusion may be drawn from the use of diversionary measures: reducing the number of cases that have to be processed in the trial phase decreases the workload of the courts which in many countries are overburdened. Diversionary measures give the courts room to concentrate on cases which deserve full court attention.

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<sup>6</sup> See U. Zvekic, *Alternatives to Imprisonment in Comparative Perspective*, UNICRI, Nelson-Hall Publishers, Chicago 1994, p. 8-9.