THE NETHERLANDS

by ***Ms. Mirjam den Haan***

LL.M.-HS Law attorneys

Robbert-Jan Lugard

LL.M.-Emstermate Muizenbergje Risk and Compliance

SUMMARY: 1. Introduction into the Dutch criminal justice system – 2. Measures adopted to implement the PIF Directive in the domestic legal system and other criminal rules on financial crimes adopted at the domestic level – 3. Relevant provisions on ADR-Alternative Dispute Resolution- in Criminal Matters and on simplified procedures for the non-judicial settlement of disputes – 4. The accused and the damaged party in the ADR procedure – 5. Observations on the functioning of the *ne bis in idem* principle – 6. The evaluation of the concrete impact of the ADR procedures – 7. Final remarks – 8. References

1. Introduction into the Dutch criminal justice system

For the purpose of understanding the remainder of this report, a general notion of the Dutch criminal justice system is required in advance. Therefore, in this chapter a brief overview of the Dutch criminal justice system is presented.

The Netherlands

The Kingdom of the Netherlands is a sovereign and constitutional monarchy with territory and population on two continents: in Europe (98%) and in the Caribbean (2%).

The Dutch legal system is based on the French Civil Code with influences from Roman Law and traditional Dutch customary law.

The main sources of criminal law are the Criminal Code (hereafter: CC), the Code of Criminal Procedure (hereafter: CCP), which together form the general criminal law and special criminal law.[1]

General criminal law

The general criminal law consists of two books: the Criminal Code (*Wetboek van Strafrecht*) (hereafter: "CC") and the Dutch Code on Criminal Procedure (*Wetboek van Strafvordering*) (hereafter: "CCP"). [2] The CC consists of three books. The first book is a general part concerning the scope of application of the code, sanctions and measures, defenses, attempt and conspiracy, the extension of criminal liability through participation, the reduction of sentences in case of concurrence, the statute of limitations, and the *non bis in idem* principle. In the second and third book, the core crimes and infractions are defined.

The CCP consists of five books, which contain provisions on the competence and powers of judicial authorities, the pre-trial and trial stages, legal remedies, special procedures (e.g. trials against juveniles and corporate bodies), the implementation of court decisions, etc.

Special criminal law

Although the general criminal law contains many definitions of core crimes and infractions, it does not define all criminal offences. Numerous separate acts, statutes and by-laws were created throughout the years, in addition to the general criminal law. Together these acts, statutes and by-laws form the 'special' Dutch criminal law. The main examples are the 1950 Economic Offences Act; the 1994 Road Traffic Act; the 1928 Narcotic Drug Offences Act and the 1989 Arms and Munitions Act.[3] A violation of any these Acts constitutes a criminal offence.

[1] In Dutch: Commuun strafrecht and Bijzonder strafrecht.
[2] The Dutch Criminal Code of 3 March 1881, The Dutch Code on Criminal Procedure of 15 January 1921.
[3] P. J. P. Tak, 'The Dutch criminal justice system' (Wolf Legal Publishers 2008) page 27-30.

The principle of legal certainty plays a fundamental role in the Dutch legal system. Therefore the general provisions of the CC are applicable on all other criminal laws and acts (art. 91 CC). This serves to ensure that all criminal rules are clear, precise and that the legal situations and implications (e.g. sanctions and other measures) are foreseeable.[4] The only exception to this rule is when a criminal law dictates otherwise.[5]

Committing of criminal offences

Criminal offences can be committed by both natural persons and by legal persons[6]. A legal person can be regarded as the perpetrator of a criminal offence if the criminal conduct can reasonably be attributed to him. This is the case if the conduct took place within its sphere. Intention and guilt can also be attributed to the legal person, but can also be established independently of the natural persons affiliated with the legal person, or those who gave the orde to commit the offence, the *defacto* managers.[7]

Before criminal proceedings can be instituted against a legal person, it must be determined whether the legal person can be regarded as the perpetrator and whether the criminal conduct can be reasonably attributed to the legal person. The Dutch Supreme Court[8] ruled that a reasonable attribution to the legal person depends on the circumstances of the case. The criterion used for this purpose is the working atmosphere of, which means that the conduct was carried out or took place in the working atmosphere of the legal person.[9]

After the determination of the attribution of a crime to a legal person, criminal proceedings can be instituted.

[4] J.P. Cnossen, 'De verhouding tussen commuun strafrecht en bijzonder strafrecht belicht vanuit codificatieperspectief' (2018) Tijdschrift Strafblad.
[5] The general provisions in the CC take a central position in the Dutch criminal legal system as they are also applicable on all other offences from acts, statutes and by-laws (art. 91 CC).
[6] Art. 2:3 Civil Law jo. Art. 51 CC
[7] Art. 51 (2) CC.
[8] HR 21 oktober 2003, ECLI:NL:HR:2003:AF7938 (Drijfmest)
[9] Gelder, van,en Ryngaert 2017,TBS&H, p. 119.

Classification of offences

The Dutch criminal justice system all criminal offences are divided in two categories; crimes (*misdrijf*) and infractions (*overtreding*). The (perceived) seriousness of the offence greatly determines the categorization.

In the Dutch legal system the classification of an offence is necessary for deciding the court in first instance before which the offender must be tried. As a general rule crimes are tried by a police judge or a full-bench panel with three judges. The full-bench panel deals with more complex cases and all cases in which the prosecution demands a sentence of more than one year's imprisonment.[10] Infractions, which are often less complex, are tried by a cantonal judge (art. 382 CCP). [11]

Furthermore, the classification of offences in crimes and infractions is relevant, because an attempt to commit an infraction, or complicity as an accessory to an infraction, does not trigger criminal liability. Solely an attempt to commit a crime or complicity as an accessory to a crime can trigger criminal liability.

In addition, a key principle of Dutch criminal law is that there is no criminal liability without culpability or blameworthiness.[12] The Dutch statutory definition of crimes defines that a mental element such as intent or negligence must be present in order to trigger criminal liability. The mental element must therefore be proven by the public prosecutor in court. The absence of evidence of a mental element leads to an acquittal. For infractions the mental element is, as a rule, not part of the statutory definition, and is presumed to be present unless there are indications to the contrary. The absence of the mental element in such cases leads to a discharge due to the absence of criminal liability.

[10] Article 369 CCP.
[11] The Netherlands is divided into eleven districts, each with its own court. Each court has a number of sub-district venues. The district court is made up of a maximum of five sectors. These always include the administrative sector, civil sector, criminal sector and sub-district sector. Family and juvenile cases are often put into a separate sector, as is sometimes the case with the administration of the law concerning aliens. The court board is free to determine such matters.
[12] In Dutch: "geen straf zonder schuld" decided by the Dutch Supreme Court in: *HR 14 februari 1916, ECLI:NL:HR:1916:BG9431*.

Prosecution of criminal offences

The Public Prosecution Service (*het OM)*[13] is the body of public prosecutors in the Dutch criminal justice system. The Public Prosecution Service exclusively decides who has to appear in front of the judge and for which offence or crime.[14] It is the body that can decide to prosecute someone.

The Public Prosecution Service may decide to bring a case before the court, however, the Dutch Legal system also provides simplified procedures and non-jurisdictional settlement as an alternative to prosecution. The public prosecutor decides based on the so-called opportunity principle (*opportuniteitsbeginsel*).[15] This arbitrary power allows the public prosecutor to, instead of a prosecution, impose a sanction (*strafbeschikking*), a payment in lieu of prosecution (*transactie*) or even cancel the prosecution (*sepot*).[16]

The European Public Prosecutors Office (EPPO)

On the 23rd of April 2021, an implementation law made some, although minimal, changes to the Dutch criminal law, in the context of the involvement of the EPPO in criminal cases in the Netherlands.[17] In particular, the implementation law alters article 144a and 144b of the law on Judicial Organization (*Wet op de Rechterlijke Organisatie)* and embeds the legal competence of the delegated European public prosecutor and the European public prosecutor in Dutch Law. In short the law of 23 April 2021 dictates that the delegated public prosecutor, in the performance of its duties, has assimilated powers to the Dutch public prosecutors and attorney-generals. The same applies *mutatis mutandis* for the competence of the European prosecutor in article 144b of the law on judicial organization.[18]

[13] OM is short for "het Openbaar Ministerie".
[14] Art. 124 Act on the Judicial Organization (*Wet op de rechterlijke organisatie*).
[15]The **principle of opportunity** is a principle in Dutch law, which says that a crime will be punised only i f its prosecution is considered opportune.
[16] "Public Prosecution service",https://www.prosecutionservice.nl/organisation/netherlands-public-prosecution-service/what-does-the-public-prosecution-service-do. Retrieved on 24-06-2022.
[17] Wet van 17 maart 2021 tot aanpassing van enkele wetten ter uitvoering van de Verordening (EU) 2017/1939 van de Raad van 12 oktober 2017 betreffende nauwere samenwerking bij de instelling van het Europees Openbaar Ministerie («EOM») (PbEU 2017, L 283) (Invoeringswet EOM).
[18] Articles 144a and 144b (Wet Rechterlijke Organizatie).

Furthermore, the implementation law further regulates the institutional position, in terms of independency, of the EPPO, the relative competence of Dutch courts in cases prosecuted by the EPPO and which investigative services have authority in EPPO-cases. The Dutch European prosecutors are part of the National Public Prosecutors Office for Financial, Economic and Environmental Offences (*het Functioneel Parket*).[19] When exercising their competences, the European public prosecutor and the delegated public prosecutor have the same prosecutorial and investigative powers as other public prosecutors.

The brevity of the Dutch Legislator on the subject of the EPPO and its embedding in Dutch law is noteworthy. One might argue that this brevity is a direct result of Regulation 2017/1939 and therefore, its immediate applicability in Dutch laws.[20]

The judiciary system of the Netherlands

When the Public Prosecutor decides to prosecute a suspect of a criminal offence, the case will appear before a judge or multiple judges in first instance. After the court in first instance has reached a verdict, the parties can go in appeal against the ruling with the appellate court (*Gerechtshof*). The highest court of the Netherlands, as well as Aruba, Curacao and Sint Maarten, is the independent Supreme Court (*Hoge Raad*).[21] The Supreme Court has the authority to overturn rulings by appellate courts (cassation) and therefore establishes case law, but only if the lower court applied the law incorrectly or the ruling lacks sufficient reasoning; facts are no longer subject of discussion and will therefore not be re-assessed.[22] If the Supreme Court decides to annul the contested judgment, the case will subsequently be referred to another court of the same level as the one that rendered the annulled judgment.

[19] Kamerstukken II 2019/20, 35429, nr. 3, p. 7, 16.
[20] M.J.J.P. Luchtman oktober 2021, Het Europees Openbaar Ministerie in Nederland. Over zijn prioritaire bevoegdheid, verhouding tot het OM en de bestuursrechtelijke handhavingskolom. DD 2021/54.
[21] Nederlandse Antillen en Aruba", Rechtspraak.nl (in Dutch). Retrieved on 24-05-2022.
[22] "Supreme Court", https://www.hogeraad.nl/english/. Retrieved on 24-04-2022.

2. Measures adopted to implement the PIF Directive in the domestic legal system and other criminal rules on financial crimes adopted at the domestic level

The PIF Directive[23] was designed with the purpose to establish minimum rules for criminal definitions and penalties in the field of combating fraud and other illegal activities affecting the Union's financial interests. The deadline for the implementation of the directive came to pass on July 6th of 2019.

An overview of the measures adopted to implement the PIF directive in the Dutch legal system is given hereunder.

Dutch national laws implementing the PIF Directive (Directive EU 2017/1371)

To a large extent the Netherlands already complied with what the PIF directive required. Therefore, the implementation of the directive only required a change at the level of formal law.[24]

Nonetheless, in order to fully comply with the PIF directive the Dutch legislator deemed it necessary to make some legislative amendments by creating one implementing law and two decrees.

Implementation law

On July 3rd 2019 the law implementing the PIF directive into Dutch law came into force.[25] According with article corrected the length of the maximum prison sentence received for committing an offence as described in article 323a of the Dutch CC. Said article criminalizes the misuse of national and international grants. The length

[23] Directive (EU) 2017/1371 of the European Parliament and of the Council on the fight against fraud to the Union Financial interests by means of criminal law.

[24] Kamerstukken/2019/35160, nr. 3, p. 3 (Memorie van Toelichting). kst-35160-3.pdf (officielebekendmakingen.nl)

[25] In Dutch: Wet van 3 juli 2019, houdende implementatie van de richtlijn (EU) 2017/1371 van het Europees parlement en de Raad van 5 juli 2017 betreffende de strafrechtelijke bestrijding van fraude die de financiële belangen van de Unie schaadt (PbEU 2017, L 198). Publication: *Staatsblad (Bulletin des Lois et des Décrets royaux)* ; Number: *257*; Publication date: *2019-07-15* ; Page: *00001-00002.*

of the abovementioned prison sentence, after implementation, changed from 3 to 4 years.

Decrees

The implementation of the PIF directive into Dutch national law, required two amendments of the Decree on international obligations extraterritorial jurisdiction[26].

Firstly, the Decree of October 11 2019 implements directive EU 2017/1371 into Dutch criminal law by amending the Dutch Decree on international obligations towards treaties and decrees of intergovernmental organisation to establish extraterritorial jurisdiction.

The amendment was intended to implement article 11(1) (b), which relates to jurisdiction based on the (active) principle of personality. This ground for jurisdiction had already been regulated in the Dutch CC in article 7 (1). However, this ground for jurisdiction was subject to the requirement that the offence was also punishable in the country in which the offence was committed.

Since the PIF directive does not allow this condition to be levied, the provisions in the Dutch CC giving effect to the obligations stated in the articles 3, 4 and 5 of the Directive are added to the Decree on International Obligations Extraterritorial Jurisdiction.

Consequently, this amendment allows the unconditional establishment of extraterritorial jurisdiction on the basis of the active personality principle. The jurisdiction thus established will, incidentally, in line with article 7 (3) of the Criminal Code, relate to both Dutch nationals and foreign nationals who have a permanent place of residence or abode in the Netherlands.

In short, the mentioned crimes in articles 3, 4 and 5 of the PIF directive are;

- Article 177 CC: bribing a public official;

[26] Besluit van 11 oktober 2019 tot vaststelling van het tijdstip van inwerkingtreding van het Besluit van 11 oktober 2019 tot wijziging van het Besluit internationale verplichtingen extraterritoriale rechtsmacht in verband met de implementatie van de richtlijn (EU) 2017/1371 van het Europees parlement en de Raad van 5 juli 2017 betreffende de strafrechtelijke bestrijding van fraude die de financiële belangen van de Unie schaadt (PbEU 2017, L 198) (Stb. 2019, 356). Official publication
Staatsblad (Bulletin des Lois et des Décrets royaux) ; Number: 357 ; Publication date: 2019-10-23 ; Page: 00001-00002.

- Article 178 CC: bribing a judge;
- Art. 225 (1) CC: forgery;
- Art. 225 (2) CC: the use or possession of forged evidence;
- Art. 227a CC: making false or incomplete statements;
- Art. 227b CC: intentionally withholding information;
- Art 323a CC: intentional and illegal use of government means for purposes other than those for which they were originally granted;
- Art. 326 CC: fraud;
- Art. 363 CC: the acceptance of a bribe by public officials;
- Art. 364 CC: the acceptance of a bribe by a judge;
- Art 420bis CC: money laundering;
- Art 420bis.1 CC: the possession or use of property, knowing that these are derived from criminal activity;
- Art. 420ter CC: money laundering as a habitual crime;
- Art. 69 Tax law: not or incorrectly filling a tax return;
- Art. 69a Tax law: the refusal of paying taxes.

Secondly, the Decree[27] issued by the Dutch Legislator on the implementation of Directive (EU) 2017/1371 declared the date upon which the previous would enter into force, which is October 11th, 2019.

[27] Besluit van 11 oktober 2019 tot wijziging van het Besluit internationale verplichtingen extraterritoriale rechtsmacht in verband met de implementatie van de richtlijn (EU) 2017/1371 van het Europees parlement en de Raad van 5 juli 2017 betreffende de strafrechtelijke bestrijding van fraude die de financiële belangen van de Unie schaadt (PbEU 2017, L 198).
Official publication: Staatsblad (Bulletin des Lois et des Décrets royaux) ; Number: 356 ; Publication date: 2019-10-23 ; Page: 00001-00003.

3. Relevant provisions on ADR-Alternative Dispute Resolution- in Criminal Matters and on simplified procedures for the non-judicial settlement of disputes

3.1 Introduction

In criminal matters the Dutch legal system offers several alternative settlement procedures which can be considered as "*simplified prosecution procedures aiming at the final disposal of a case"* as referred to under art. 40(1) of Regulation 2017/1939.

Principle of opportunity

The starting point within the Dutch criminal process is the procedural obligation: criminal facts are tried by the judiciary (art. 113 Constitutional law). At the same time it should be noted that this starting point has never been fully implemented. Already, at the entry into force of the current CCP in 1926, the Public Prosecution Service was given the necessary room to deal with criminal offences independently.[28]

As mentioned in the introduction of this report, the Public Prosecution Service is solely responsible for the prosecution of criminal offences. In the Dutch criminal procedure the principle of opportunity applies which gives the public prosecutor room to deal with criminal offences independently. The Dutch 'opportunity principle' can be defined as a discretionary power of the Dutch Public Prosecution Service to select from all criminal cases those suitable for prosecution or for other settlements (e.g. dismissal, sanction or transaction).

3.2. Alternative settlement procedures

In the Netherlands there are four types of alternative settlement procedures in criminal cases. These procedures are proposed by a public prosecutor to a defendant. In

[28] J.F. Nijboer, De doolhof van de Nederlandse strafwetgeving. De systematische grondslag van het algemeen deel van het W.v.Sr., Groningen: Wolters-Noordhoff 1987.

short, the alternative settlement procedures are the transaction (*transactie*), the conditional dismissal (*voorwaardelijk sepot*), the unconditional dismissal (*onvoorwaardelijk* sepot) and the criminal sanction (*strafbeschikking*).

a) Transaction

Firstly, the public prosecutor may offer a transaction to the suspect in lieu of prosecution.[29] Pursuant to Article 74 CC, the Public Prosecutor may set one or more conditions before the commence of a court hearing to prevent prosecution for infractions and crimes punishable by imprisonment for a term not exceeding six years. By complying with these conditions (e.g. other settlements), the right to prosecution lapses (art. 74 (1) CC) and prosecution is thus prevented without formally establishing the defendant's guilt.[30]

In order to propose a transaction, there must be sufficient grounds, in terms of both evidence and policy, in the criminal case on which the transaction is based. The Public Prosecution Service must make the decisions to propose a transaction based on an autonomous assessment. Also, the interests of those involved, in particular the victims and injured parties, are explicitly taken into account by the public prosecutor in these deliberations.

When the prosecutor has made the defendant a transaction offer, the suspect has the option to accept or refuse the transaction. The legal validity of the transaction depends on the voluntary acceptance of the offer by the suspect and the fulfilment of the attached conditions. When the suspect refuses the transaction offer, the case will still be submitted to a criminal court. If the suspect accepts the transaction offer and also complies with it, the right to prosecution of the Public Prosecutor pursuant to article 74 paragraph 1 of the Criminal Code lapses. The transaction system therefore has a two-sided legal character, since the Public Prosecutor is authorized to issue a transaction and the suspect must agree to it.[31] Hence, the transaction can be thought of as an agreement between the prosecution and the defendant.

[29] Art. 74 CC.
[30] J.I.P. Hofstee, 'Buitenlandse corruptie in Nederland en de VS: een geschikte aanpak?', *TBS&H* 2017, p. 29.
[31] Verschaeren en Schoonbeek 2015, TBS&H ,p. 192.

The proposed transaction is usually a fine, a compensating for the damage caused by the offence, a deprivation of illegally obtained benefits and surrender of seized goods or amounts of money.

Scope of the transaction

The legal limit of crimes, punishable by up to six years of imprisonment[32], allows the transaction to be used for the out-of-court settlement of entirely different types of crimes, namely economic, financial or environmental crimes. The use of the transaction can therefore be a means to ensure the European financial interest. The social damage caused by such offences can be particularly extensive, but the penalty for such offences rarely exceeds the aforementioned limit of six years of imprisonment and therefore within the scope of the transaction.

Especially, when the suspect is a legal person, settlement in the form of a transaction is often an attractive option for both parties.

After all, from the perspective of the Public Prosecution Service, a prison sentence is not an option in such cases anyway, while a transactional settlement is a faster, (in terms of litigation risk) safer and(in terms of procedural risk) and sometimes even better than prosecution of the legal person.[33]

It is relevant to underline that the Public Prosecution Service is increasingly using the transaction as a means to settling large criminal cases, often against legal persons, which has led to much debate.[34]

Some examples of these transactions are the record agreements in the cases of Rabobank (LIBOR/EURIBOR fraud[35]), SBM Offshore[36] and the transactions agreed

[32] Art. 74 CC.
[33] C.M.I. van Asperen de Boer & M.L. van Duijvenbode, 'Openheid in schikkingspraktijk OM', NJB 2015/1, p. 21-22.; J.H. Crijns, "rechterlijke toetsing van hoge transacties in strafzaken: contracteren onder toezicht" p.393. Retrieved from view (universiteitleiden.nl) on 25 juni 2022.
[34] See for more on this subject: Asperen, van, en Van Duijvenbode 2014, NJB ,p. 641.; M.S. Groenhuijsen & A.M. van Kalmthout, 'De wet vermogenssancties en de kwaliteit van de rechtsbedeling', DD 1983a, p. 26, Th.W. Van Veen, 'Het nieuwe artikel 74 Sr, een aardverschuiving', DD 1987, p. 539-541, G.J.M. Corstens, 'Transactie bij misdrijven', in: G.J.M. Corstens e.a. (red.), Straffen in gerechtigheid (gedenkbundel Jonkers), Arnhem: Gouda Quint 1987, p. 76-77, 82, G.J.M. Corstens, 'Consensualiteit', DD 1994, p. 8 en G.J.M. Corstens, 'Consensualiteit en strafsancties', AA 1997, p. 139.
[35] In the Euribor scandal of 2012, the interest rates that banks charge each other when they lend money to each other were rigged. They suggested the rate that they themselves expected to pay, too high or too low. The bank's traders then profited from this, by capitalizing on it with their investments.

with VimpelCom and Telia[37] in the context of bribery on entering the Uzbek telecom market.

High transaction

The aforementioned cases are transactions which are defined as 'high transactions'(*hoge transactie*). The Instructions[38] for high and other special transactions provide rules for the procedure to be followed by the public prosecutor when offering high transactions and transactions in special cases. The term 'high transaction' has been further defined in the Instruction, and includes all transactions involving a fine of at least € 200,000 as well as transactions involving a total amount of € 1,000,000 or more. According to the Instructions, no conclusive definition can be given of a 'special transaction', but it may exist if the case has resulted in major national social concern or unrest.

To offer a high transaction the same criteria for any transaction proposed by a public prosecutor apply. In addition, by offering a high transaction as referred to in paragraph 3 of the Instruction, the condition that the actual conduct, that forms the basis for the transaction, must be acknowledged by the suspect applies. After all, without acknowledgement of that actual conduct, there will be no realization that changes must be made within the suspect's legal entity in order to prevent the mistakes being made in the future.[39]

The requirement of acknowledgement explicitly does not imply an acknowledgement of guilt; agreement with the penalization deemed applicable by the public prosecutor is not necessary.

The condition of acknowledgement shows that the high transaction, especially for legal persons, as an out-of-court procedure, aims at prevention of recurrence of criminal offences.

[36] Tweede Kamer der Staten-Generaal, 2017-2018. See: ah-tk-20172018-2209.pdf (officielebekendmakingen.nl)
[37] See: Internationale strijd tegen corruptie: Telia Company betaalt Nederland 274.000.000 US Dollar | Nieuwsbericht | Openbaar Ministerie. The companies accepted a transaction offered by the Dutch Public Prosecutor's Office of US $274,000,000.
[38] Aanwijzing hoge transacties, 2020A005. Consulted at: wetten.nl - Regeling - Aanwijzing hoge transacties - BWBR0044047 (overheid.nl)
[39] Kamerstukken II 2018/19, 29 279, nr. 502.

Publication

In case of a high transaction, the Public Prosecution Service announces the high transaction by means of a press release.[40] In doing so, the prosecution is publicly accountable for the handling and disposition of the case. This press release also compensates for the lack of publicity resulting from a public hearing and a publicly pronounced judgment. The inclusion of a press release as a condition to the high transaction, disables legal persons to, simply put, 'buy off' their criminal offences and avoid prosecution without damaging their reputation. This press release, which also includes the amount of the high transaction, is therefore also aimed at the prevention of recurrence of criminal offences.

In conclusion, the (high) transaction is a frequently used tool by public prosecutors in the out-of-court settlement of crimes, in particularly those covered by the PIF directive (Directive (EU) 2017/1371). Especially, when the suspect is a legal person, settlement in the form of a transaction is often an attractive option for both parties. However a high transaction does require the acknowledgement of the actual conduct and a public announcement.

b) Conditional dismissal

Secondly, the public prosecutor can attach conditions to the decision not to prosecute, which is known as the conditional dismissal (art.167 (2) CCP). The conditional dismissal is the oldest form of extrajudicial settlement in the Netherlands, born of the need for a termination of criminal cases midway between prosecution and unconditional dismissal.[41] It provides opportunities for behavioural influence that cannot be achieved to the same extent, by other disposal modalities.

If the case is conditionally dismissed, the person is expected to refrain from committing criminal offenses for a specified period of time and to comply with the

[40] For example: Transaction Settlement agreement | Decree, order or decision | Public Prosecution Service (eng).
[41] A.L. Melai, M.S. Groenhuijsen e.a., Wetboek van strafvordering, Deventer: Wolters Kluwer, aant.17.1 op art. 167.

conditions or instructions of a person assigned by the prosecutor's office.[42] If the suspect abides by the conditions, prosecution is prevented.

Conditions

The request for a conditional dismissal can be done by the defendant, though it may also be imposed directly by the Public Prosecution Service. In principle, a decision to dismiss only imposes the general condition that the suspect does not commit any criminal offence within a probationary period of one year.

Before the end of 2020, the public prosecutor could impose additional conditions that related to the defendant's way of life and conduct (e.g. no contact with the victim, therapy etc.), with the exception of conditions that could restrict the defendants constitutional and religious freedom.[43]

Since the 1st of March 2021, the new Instruction of dismissal and use of grounds for dismissal by the board of General Prosecutors came into force.[44] Under the new instruction, a dismissal with additional conditions is, in principle, no longer used. For the extrajudicial imposition of behavioural conditions the criminal sanction should be used (behavioural instruction as referred to in article 257a (3) of the CCP).[45]

Probation period

The probation period of the conditional dismissal may not exceed the duration of one year.

Within this period the suspect must refrain from committing a criminal offence. On the 16th of June 2020, the court of appeal of the Hague published a judgement in a case regarding the scope of the general condition of a conditional dismissal.[46] In this judgment the court had to decide if the emergence of a suspicion of a criminal offence ending in an acquittal, within the probation period of a condition dismissal, was

[42] W.E.C.A. Valkenburg, Commentaar op artikel 167 Sv, aant. 7.a, in: *Tekst & Commentaar Strafvordering*, Deventer: Wolters Kluwer 2017.
[43] W. Geelhoed 19 September 2013, Het opportuniteitsbeginsel en het recht van de Europese Unie 2014/4.4.1.
[44] Aanwijzing sepot en gebruik sepotgronden (2020A013) van het College van procureurs-generaal. Offical Publication: Staatscourant 2020, 62570.
[45] This topic will be discussed later in this report.
[46] Gerechtshof Den Haag 16 june 2020, ECLI:NL:GHDHA:2020:1408.

sufficient for the public prosecutor to prosecute the suspect for failing to comply with the conditions pf the conditional dismissal.

The defense opted that, due to the acquittal of the criminal offence, the Public Prosecution Service should be declared inadmissible in the prosecution.

However, the court of appeal decided that in view of earlier case law by the Supreme Court[47], the emergence of a reasonable suspicion of a new criminal offence is sufficient to still proceed to prosecution despite a previous conditional dismissal, as in the present case. The fact that the accused was subsequently acquitted of that new offence does not mean that the Public Prosecution Service should still be declared inadmissible in the prosecution of the offence that was initially dismissed conditionally.

Therefore, the court of appeal rejected the defense and declared the Public Prosecution Service admissible in the prosecution.

In conclusion, scope of the general condition of the conditional dismissal of a criminal offence is not limited to the committing of criminal offences. The suspicion of a criminal offence is sufficient for the public prosecutor to prosecute for failing to comply with general condition of a conditional dismissal.

c) Unconditional dismissal

The prosecutor can dismiss a matter entirely according to grounds for dismissal provided by the law, or grounds provided by the general interest. The Dutch CCP does not provide for a list of grounds for opportunity dismissal and neither does it establish what the general interest comprises.

Types of unconditional dismissals

In the Dutch criminal justice system two types of unconditional dismissal exist.

Firstly, if the criminal investigation leads to the conclusion that prosecution is not an option or that there is insufficient prospect of a conviction, then case will be dismissed by means of a 'technical dismissal'.

[47] Hoge Raad 22 december 2015, ECLI:NL:HR:2015:3639.

Secondly, if theoretically the case could lead to a conviction but the prosecutor decides that prosecutions is not in the general interest of the Dutch society, the case will be dismissed by means of a 'policy' dismissal.

Evidently, the technical dismissal by the prosecutor is not an alternative to a procedure in court, rather the only option based on the criminal investigation. Subsequently, is does not qualify as a "*simplified prosecution procedures aiming at the final disposal of a case"* as referred to under art. 40(1) of Regulation 2017/1939. Therefore the technical dismissal will not be further discussed in this report.

Policy dismissal

Despite their discretionary power based on the principle of opportunity, prosecutors rely on instructions and policy provided by the Board of General Prosecutors[48] (e.g. *vervolgrichtlijnen, sepotrichtlijnen etc*). The instructions are aimed to ensure the uniformity of the decisions made by prosecutors.

The prosecution policy focusses on the question what is in the general interest of Dutch society.[49] The grounds for dismissal are a reflection of this question. Examples of grounds for dismissal of prosecution are:[50]

- A different type of procedure prevails such as administrative or civil law, in which case the prosecutor refers the case to the relevant institution.
- The insufficiency of national interest due to the impact of the criminal offence on the legal order;
- The criminal offence itself is minor, or the facts are old;
- There are particular circumstances to the accused such as advanced age or poor health.
- The conflict has been resolved by reconciliation or compensation to such an extent that prosecution is no longer meaningful.

The last example is of particular interest cause it allows the unconditional dismissal of a criminal offence based on some form of reconciliation or compensation.

[48] This Board is the functional head of the prosecution service. See also: Article 134 of the 1827 Act as amended in 1999.
[49]An example of instructions given by the Board: Aanwijzing gebruik sepotgronden van het College van procureurs-generaal 6 augustus 2007.
[50] Aanwijzing sepot en gebruik sepotgronden 2020A013, 1 March 2021. Offical Publication: stcrt-2020-62570.pdf (officielebekendmakingen.nl). All the grounds for dismissal are named in attachment 1 (*Bijlage 1)*

In cases where the conflict underlying the criminal offence has been resolved after an apology has been made or through reconciliation, for example by means of mediation, or compensation, has been resolved to such an extent that there is no longer any point in prosecuting for this reason, the dismissal under general condition with code 70 is also used. with dismissal code 70 is used.[51]

d) Criminal sanction

Thirdly, the criminal sanction was introduced into criminal law with the OM Settlement Act which came into effect on February 1, 2008.[52] With this regulation, the legislator introduced a non-judicial procedure for the extrajudicial settlement of the aforementioned offenses, with the aim of unburdening the criminal court. Art. 257a CCP allows the public prosecutor to settle relatively simple criminal offences by himself, without the intervention of a judge.[53] Only crimes with a penalty up to 6 years of imprisonment and offences can be settled by means of a criminal sanction.[54] These are offenses such as: threats, simple assault, shoplifting, public drunkenness, driving under the influence, disturbance of order and vandalism.[55]

Issuing a criminal sanction

In principle, the issuing of a criminal sanction shall only takes place when it is possible by law and when the facts and circumstances of the criminal lends itself to it.

[51] This part of this instruction constitutes the policy-based elaboration of the advice of the Commission 'Judicial borders
and possibilities in the disposal of criminal offences by the Public Prosecution Service'. In Dutch: 'Rechtstatelijke grenzen
en mogelijkheden bij het afdoen van strafbare feiten door het Openbaar Ministerie' zie bijlage 5 J. Bijlsma, Het voorwaardelijk sepot. Normering, praktijk, evaluatie (OM-reeks nr. 4), Den Haag: Boom Juridisch 2019.
[52] Wet van 7 juli 2006 tot wijziging van het Wetboek van Strafrecht, het Wetboek van Strafvordering en enige andere wetten in verband met de buitengerechtelijke afdoening van strafbare feiten.
[53] C.P. Posthuma, August 2020, De (bestuurlijke) strafbeschikking: bezint eer ge betaalt, in: Recht & Regel. Online publication: RMB 5 aug. 2020 - Charlotte - Bestuurlijke strafbeschikking.pdf (vil.nl)
[54] Art. 257a (1) CCP.
[55] https://www.prosecutionservice.nl/organisation/netherlands-public-prosecution-service/what-does-the-public-prosecution-service-do, consulted on 25 June 2022.

However, the discretionary powers of the public prosecutors to choose a different disposal modality remain.[56]

To support the unequivocal settlement of criminal cases, the Public Prosecution Service has guidelines for criminal procedure.[57] The starting point for the imposition of a criminal sanction is a sentence that is more favourable for the suspect than the expected sentence at the hearing. When determining the sanction, the public prosecutor takes into account the judicial sentencing practice.2).In the Instructions for the Public Prosecution Service on criminal sanctions, a non-limited list of *contra*-indications has been included.[58] This lists aids public prosecutors in the assessment of a criminal case before deciding on a modality to settle the criminal case.

Guilt

As far as its legal nature is concerned, the Public Prosecutors Service' criminal sanctions correspond to a judicial conviction.[59] Thus the criminal sanctions, a non-judicial punishment, is only possible if it is preceded by an adequate assessment of guilt. In determining guilt, the public prosecutor will have to take into account the decision scheme of article 348 and 350 of the CCP. This is the same scheme a judge is obligated to use in handling a criminal case in the 'traditional' manner. In this manner the assessment of guilt is based on the law.

The penalties and measures that can be imposed by means of a criminal sanction are not dependent on the cooperation of the suspect. Therefore, a suspect cannot refuse a penalty decision, but can only object to it pursuant to Article 257e of the CCP. [60] The article stipulates that the suspect may oppose a criminal sanction (also referred to as lodging of a statement of objection) within 14 days of receiving the copy.[61]

[56] Paragraph 2 Instructions OM-criminal sanctions (*Aanwijzing OM-strafbeschikking*): wetten.nl - Regeling - Aanwijzing OM-strafbeschikking - BWBR0046521 (overheid.nl) consulted on 26 June 2022.
[57] Instruction OM- criminal sanctions 2022A003 (Aanwijzing OM-strafbeschikking). Aanwijzing OM-strafbeschikking (2022A003) | Beleid en Straffen | Openbaar Ministerie, consulted on 26 June 2022.
[58] Annex 1, Instructions OM-criminal sanctions (*Aanwijzing OM-strafbeschikking*): wetten.nl - Regeling - Aanwijzing OM-strafbeschikking - BWBR0046521 (overheid.nl) ,consulted on 26 June 2022.
[59] Kamerstukken II2004/05, 29849, nr. 3, p.2.
[60] Kamerstukken II 2004/05, 29849, nr.3, p.1.
[61] In Dutch: http://www.cjib.nl/Onderwerpen/Strafbeschikking/niet-eens-met-de-strafbeschikking.aspx

If the suspect does not cooperate with the measures or punishments that have been imposed, the Public Prosecutor's Office is forced to bring the case before the criminal court.[62]

Sanctions and conditions

The Public Prosecution Service may not impose a prison sentence; only a court can rule a prison sentence.

The sanction may be in the form of a:[63]

- Fine;
- Community service up to 180 hours;
- Disqualification from driving motor vehicles (up to max 6 months);
- Payment of compensation to the victim;
- Behavioural instructions (e.g. location ban);
- Payment of a sum of money into the damage fund for violent crimes;
- Withdrawal of confiscated goods;
- Disposal of confiscated goods (forfeiture)

For juveniles, additional rules can be found in Art. 77f of CC regarding directions (paragraph 1) and community service (paragraph 2).

Ultimately, a criminal sanction may result in the entry of the suspects judicial documentation (also known as a criminal record).

3.3. Additional remarks

Scope of the alternative settlement procedures

The scope of the aforementioned alternative settlement procedures is not limited to natural persons. Legal persons can resort to the same alternative settlement

[62] Stb. 2006, 330. Zie Kamerstukken II 2004/05, 29849, 3, p. 53-55 (MvT).
[63] A list can be found on the website of the Public Prosecution Service: Strafbeschikking | Openbaar Ministerie (om.nl)

procedures to avoid prosecution under the same conditions as natural persons. However, in practice the criminal sanction is preferred less by the involved parties than the other alternative settlement procedures. Strictly speaking, the alternative settlement of offences committed by legal persons could be achieved by means of the criminal sanction, but this instrument appears to be a more difficult form of out-of-court settlement, since the criminal sanction entails a finding of guilt, which is significantly less attractive from the perspective of both parties involved.

For the Public Prosecution Service this would require additional effort in substantiating the allegation of guilt, while for the legal person involved the establishment of guilt would entail additional damage to its reputation. Hence, it is unlikely for a legal person to resort to the criminal sanction.

Nevertheless, the alternative settlement procedures in the Dutch legal system can be used by both natural and legal persons.

Settlement modalities in financial-economic crimes

Before the further outlining of the Dutch alternative settlement procedures in chapter 2.2., special attention must be paid to the discretionary power of the Dutch Public Prosecution Service in financial-economic cases, also in regard to PIF crimes.

When a financial-economic criminal case comes to light, the Public Prosecutor's Office cannot simply proceed to a extrajudicial settlement. On the basis of the Covenant to prevent the unlawful concurrence of administrative and criminal sanctions[64](hereafter: Covenant), consultations

Must first be held on the method of settlement between the supervisors in question, the Netherlands Authority for the Financial Markets (*AFM*), the Dutch Central Bank (*DNB*), the Tax and Customs Administration/FIOD-ECD (*FIOD*) and the Public Prosecution Service (*OM*). Article 4 of this Covenant stipulates that without consultation, no administrative or criminal sanctions may be imposed. If it is determined, after the consultation, that the disposition of a financial-economic criminal case is left to the prosecutor, the prosecutor has the choice, based on the principle of opportunity under Article 167 of the CCP whether or not to proceed with prosecution or

[64] Convenant ter voorkoming van ongeoorloofde samenloop van bestuursrechtelijke en strafrechtelijke sancties.

resort to another settlement. Since several PIF crimes qualify as financial-economic crimes, it is relevant for the criminal settlement that the consultation of the financial-economic crimes, takes place in line with the provisions of the Covenant.

4. The accused and the damaged party in the ADR procedure

4.1. The accused

Introduction

The alternative settlement procedures as described in the previous chapter, shows that a judge plays no role whatsoever between the Public Prosecution Service and the suspect. After the (former) accused has agreed, either by voluntarily accepting a transaction or dismissal, or by not objecting to a criminal sanction, the right of prosecution lapses.

However, to imply that the accused, by agreeing to an alternative settlement procedure, forfeits all procedural safeguards for a fair procedure, would be wrong. This paragraph will outline the procedural safeguards for the accused in alternative settlement procedures.

Article 6 ECHR

This paragraph focusses on article 6 ECHR and the numerous safeguards that serve to protect the accused against arbitrary government action. Pursuant to article 93 of the Dutch Constitution (Grondwet) the ECHR has a direct effect in Dutch law. Hence the safeguards of article 6 ECHR are applicable on Dutch (extra)judicial procedures.

Among the extra judiciary procedures the public prosecutor can utilize in criminal cases, the criminal sanction is the only extra judiciary procedure that falls

within the scope of article 6 ECHR. [65]As is stated in the name, the criminal sanction is a sanction for committing a criminal act. First and foremost, it aims to inflict suffering through means of sanctioning. The test that must be applied in order to determine whether article 6 ECHR also applies to the criminal settlement is the question whether the criminal settlement can be regarded as a 'criminal charge' within the meaning of the ECHR.

Right to access to a judge

Because the criminal sanction is an extrajudicial procedure, it may seem that it infringes on the right to access to a judge. However, in the *Deweer vs Belgium* case[66] the ECHR ruled that if a defendant agrees, a case can be settled out of court without a violation of the right to access to a judge. A defendant in such a case namely waives his right of access to a judge. This is only possible if there is no custodial sanction and the suspect consents of his own free will. He may therefore not be forced to agree to an out-of-court settlement.

Also, the ECHR ruled that in non-judicial proceedings a violation with the ECHR only occurs if the accused has no opportunity to present his case to an independent judge. The possibility of objecting to the penalty order means that the defendant can present the case to an independent judge.

In the Netherlands such an opportunity is presented with the ‘article 12 CCP procedure’. In article 12 in conjunction with article 12k of the CCP, the legislator has created the possibility for suspects and directly involved parties to ask the court of appeal for an opinion on the decision of the prosecutor to not prosecute, by means of a complaints procedure. Subsequently, article 74b of the CC in conjunction with article 12i (1) CCP provides that the right to prosecution is revived when the court of appeal orders the institution of the prosecution. The public prosecutor is obliged to follow the decision of the court.

[65] The transaction and the dismissal (conditional or unconditional) do not fall within the scope of art 6 ECHR. The transaction is a voluntary contract between the public prosecutor and the suspect and therefore cannot be qualified as a ‘criminal charge’. Neither is the dismissal.
[66] EHRM 27 februari 1980, nr.6903/75 (Deweer/België)

The article 12 CCP procedure is the only mechanism of control and possible correction of the prosecution's decision not to bring individual criminal cases before the criminal courts.

The possibilities for the Public Prosecution Service to dispose of criminal cases outside the criminal courts have expanded enormously, culminating in the introduction of the Public Prosecutors Service Settlement procedure in 2008.[67] Therefore, the importance of the article 12 CCP procedure has only increased since its introduction.[68]

In conclusion, despite the principle of opportunity and discretionary powers of a prosecutor, a suspect remains the right to access to a judge, even after agreeing to an alternative settlement procedure based on the art. 12 CCP.

The presumption of innocence

In Dutch law the *praesumptio innocentiae*, has been codified in article 271 (2) CCP. This article states: *"Neither the presiding judge nor any of the judges at the hearing shall express any opinion as to the guilt or innocence of the accused."*

One of the most important features of the criminal procedure is that no judge is involved.

is involved. The question that then arises is whether the presumption of innocence applies to the extrajudicial procedure, despite the fact that there is a 'criminal charge' involved.

The ECHR has ruled in the case of *Allenet du Ribermont vs France* that the presumption of innocence applies not only to courts, but also to other public authorities.[69]

Based on this ruling by the ECHR the Dutch public prosecutor will have to take the presumption of innocence into account when determining the criminal sanction, and therefore determining guilt. Afterall, when the Dutch public prosecutor imposes a criminal sanction, he has to establishes the guilt of the suspect. As stated in chapter 2 of this report, the public prosecutor has to take into account the decision scheme of article

[67] Instruction OM- criminal sanctions 2022A003 (Aanwijzing OM-strafbeschikking). Aanwijzing OM-strafbeschikking (2022A003) | Beleid en Straffen | Openbaar Ministerie, consulted on 26 June 2022.
[68] M.J.A. Duker, 'De toetsingsruimte van het hof in beklagzaken ex artikel 12 Sv', Delikt en Delinkwent 2009, afl. 5/32, p. 451.
[69] EHRM 10 februari 1995, nr. 15175/89 (Allernet du Ribermont/Frankrijk).

348 and 350 of the Dutch CCP, when determining the guilt of a suspect. This is also the scheme a judge uses if a criminal case is handled in the 'traditional' way. [70] Also the public prosecutor must consider the legal rules of evidence. If these circumstances are met and the public prosecutor arrives at a guilty verdict, the guilt of the suspect has been determined according to the presumption of innocence.

Again the article 12 CCP procedure applies for a suspect, that disagrees with the imposed criminal sanction.

The right to sufficient time and facilities

The short time frame in which a criminal sanction is imposed and the short period of time the suspect has to object can be seen as problematic.[71] The time between the lodging of an objection and the hearing of the case will usually be longer than two weeks. If the suspect wishes more time to defend himself, he can lodge an objection. This right relates to the period of time between filing an objection and the hearing of the case against the suspect in court. How quickly this happens depends on the capacity of the prosecution and the court. The question of whether the right to sufficient time is being violated cannot be answered in a general sense. This will have to be examined separately for each case.

Right to legal assistance

The right to (free) legal assistance in the Netherlands exists for suspect from the moment of arrest and prior to the first police interrogation. The extrajudicial settlement in the form of a criminal sanction is in line with this guarantee.

For the right to legal assistance of a suspect who has been imposed with a criminal sanction, Article 257c of the Dutch CCP is applicable. This article stipulates that the assistance of a legal counsel in certain cases is mandatory. The cases in question are criminal orders where a fine or compensation measure is imposed that exceed the

[70] F.A.J. Koopmans, F.W. Bleichrodt, J.H.J. Verbaan, R.J. Verbeek, Het beslissingsmodel van 348/350 Sv. Deventer: Wolters Kluwer.
[71] Article 257c CCP.

amount of €2,000.[72] The mandatory assistance of a lawyer is important because, with a lawyer, the defendant can make a more balanced assessment of his interests.

Before February 6, 2015 a defendant, receiving a criminal sanction in the form of a fine, was given the opportunity to pay immediately. This, however often resulted in the payment of the criminal sanction without legal aid, and was met with critique.[73]

As of February 6, 2015, a defendant will only be given the opportunity to immediately pay a criminal fine if the defendant has had the opportunity to consult with counsel prior to doing so. The right to legal aid has thus been further clarified for these cases. If the suspect is not assisted by counsel, settlement by the court is appropriate.[74]

4.2. The damaged party

In the Dutch criminal legal system the role of the victim is defined in article 51h CC.

Within the alternative settlement procedures the role of the victim in the Dutch criminal justice system is relatively small.

The transaction, the (un)conditional dismissal and the criminal sanction are mainly characterized by the pursuit of an efficient use of scarce resources and take place primarily in the relationship between the Public Prosecutor's Office and the suspect, with the victim and the judge at some distance as 'involved parties'.[75]

Indeed, with a primary focus on efficiency, there is only little room for the pursuit of more substantive goals such the concrete conflict between the defendant and the victim.

As an party directly involved with the alternative settlement procedure a, victim can start an art. 12 CCP procedure requesting a revival of the prosecution, by means of a complaint.

[72] Article 257c (2) CCP.
[73] Reactie Openbaar Ministerie op rapport strafbeschikkingen van de PG Hoge Raad, www.om.nl/reactierapportPG, consulted on 25 June 2022.
[74] D. Wiedeman, 29 June 2015, De buitengerechtelijke afdoening en de waarborgen van artikel 6 EVRM.
[75] J.H. Crijns en R.S.B. Kool, Afdoening buiten de rechter om, Afscheid van de klassieke procedure (NJV 2017-1) 2017/III.1.1.

Furthermore, the interest of the victim are explicitly taken into account by the prosecutor, when deciding on a transaction or a criminal sanction. In fact, he is forced to do so based on the Instructions form the Board of General Prosecutors.[76]

However, much needed change is on the way regarding the position of the victim in the Dutch criminal system. Currently the Dutch Legislator is in the final stadium of the ongoing modernization of the new CCP. The new Code of Criminal Procedure will, in title 11 contain a more general legal basis for restorative justice.[77]

5. Observations on the functioning of the *ne bis in idem principle*

Article 68 (1) of the CC is the codification of the *ne bis in idem* principle into the Dutch criminal justice system and stipulates that no one can be prosecuted again for an offence which has been irrevocably decided in his regard by the Dutch court.

The principle implies a guarantee against double prosecution for the same factual event for which one has been previously convicted, acquitted or discharged.

A fact is considered to have been prosecuted if:

1. A transaction offer has been made and the defendant has paid;
2. A criminal sanction has been imposed and has been fulfilled;[78]
3. A foreign criminal court has already considered the case;
4. The judge at the criminal trial has reached a substantive assessment of the case: i.e., there are no formal grounds for prevention such as lack of jurisdiction or nullity of the summons. The judge has answered one of the four substantive questions.

An (un)conditional dismissal by the Public Prosecutor is not a prosecution. In theory this is problematic as a (former) suspect will expect to be free of any criminal accusations due to the dismissal. Hence, in accordance with the principles of good

[76] For example: Paragraph 2 Instructions OM-criminal sanctions (*Aanwijzing OM-strafbeschikking*): wetten.nl - Regeling - Aanwijzing OM-strafbeschikking - BWBR0046521 (overheid.nl) consulted on 26 June 2022.
[77] Ambtelijke versie juli 2020 van het Wetsvoorstel tot vaststelling van het nieuwe Wetboek van Strafvordering, rijksoverheid.nl.
[78] Art. 255a paragraph 1 of the CCP

procedural order (specifically: the principle of trust) the public prosecutor may no longer proceed to prosecute after notification of the dismissal to the suspect. Exceptions to this rule are the disclosure of new facts and an order to prosecute pursuant to article 12i of the CCP.[79]

A fact is deemed not to have been prosecuted if:

1. The criminal court at the criminal trial has declared the nullity of the summons, lack of jurisdiction of the judge or inadmissibility of the prosecution;
2. The suspect has not responded or has rejected the transaction offer;
3. A successful appeal has been filed against a dismissal;
4. The suspect is or has been tried only under civil law for the offence;
5. The suspect has only been confronted with administrative law measures, such as a reduction in benefits.

In these cases, the Public Prosecutor may start a new prosecution, unless the offence is statute-barred. In the latter two cases, however, the judge often takes the civil and administrative sanctions into account. Dutch tax law does have the principle of una via (one way), which means that in the event of certain undesirable tax actions that can be dealt with under both criminal and administrative law, the tax authorities must choose one of the two options. For example, if the tax authorities are unable to settle a criminal prosecution of tax fraud, they may not try again later under administrative law.[80]

6. The evaluation of the concrete impact of the ADR procedures

After outlining the different types of alternative settlements in the Dutch legal system, hereunder the major advantages and disadvantages are stated.

The main advantages of the ADR, for the defendant are the fact that public trial is avoided and there is certainty about the transaction or dismissal condition(s) rather than

[79] See also art.257e (8), CCP.
[80] W. Albers, T.M. de Groot, De uitzondering bevestigd: het ne bis in idem-beginsel in recente rechtspraak van de Hoge Raad in het licht van de ratio van het ne bis in idem-beginsel en vanuit Europees perspectief. NTS 2020/7.

uncertainty about the sanction to be imposed by the court. A major advantage of the transaction for society and the actors in the criminal process is that the backlogs in the criminal justice system are considerably reduced by this method of settling cases. In general the alternative settlement procedures are flexible and can be used for a wide variety of offences and crimes.

But there are disadvantages to the alternative settlement. The defendant, by accepting a transaction offer, relinquishes the interest in public trial by an independent and impartial judge. Also, the voluntariness with which the defendant makes the choice of transaction is relative. In many cases, there is no room for negotiation and an (unwitting) defendant might feel compelled to cooperate in the transaction. Afterall the it is the prosecutor who occupies a more powerful position and has more expertise and resources at his disposal than the defendant. Leaving little room for negotiations. Consequently, the defendant often feels compelled to cooperate in the transaction.[81] Despite the fact that the transaction is an avoidance of criminal prosecution, the 'ordinary' citizen often experiences the transaction as a punishment. A solution to this problem could be found in widening the possibilities of hearing a suspect. In this way, the room for negotiation would be better exploited. However, it should immediately be noted that this will entail more costs, so that this solution is not very realistic.

7. Final remarks

It must be noted that within the Dutch legal system the options for more Alternative Dispute Resolutions is currently investigated.

Especially, mediation in the criminal process has taken off during the last fifteen years. Post-trial mediation has existed since 2007 in the form of victim-offender discussions that are primarily aimed at emotional and relational recovery. And after a pilot within the District Court of Amsterdam in 2010-2011[82] and a pilot within six districts in the Netherlands in 2013-2016, there has been a national rollout and practice of mediation in the criminal process since the beginning of 2017, with recovery of various forms of harm possible.

[81] Crijns 2002, p. 517.
[82] S. Verberk oktober 2011, Mediation naast strafrecht in het arrondissement Amsterdam: Een beschrijving van het proces en een verkenning van de effecten. EvaluatierapportMediationStrafrecht.pdf.

In addition, the new CCP, which is in its final stage, will contain a new title called “Restorative Justice Facilities”. With this new title, restorative justice will be codified in the Dutch criminal justice system, which will bring about much needed change.

8. References

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