Alternative disposal of criminal cases by the prosecutor: Comparing the Netherlands and South Africa
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Chapter 3

Prosecutorial disposal of criminal cases in the Netherlands

3.1 Introduction and overview

The Dutch prosecutor has for a long time had other alternatives available to deal with criminal behaviour than just presenting a case for trial before a judge. Already in the 19th century the practise of waiver of prosecution, on grounds related to expediency, was utilised by prosecutors on a local level but it has only been since the 1960s that one can really talk of a directed “policy” regarding waiving of prosecution. Increasingly the O.M. disposes of criminal cases through various processes whereby the accused is “penalised” without the need to bring the matter before a judge. With a penalty is meant a juridical reaction to a transgression of law that affects the transgressor’s interests. In this chapter the armoury of alternatives available to the prosecutor will be presented.

The prosecutor is not only left with a choice between a trial before a judge or a withdrawal. He may choose to charge the accused with a “lesser” offence, whilst a “more serious” offence could be proven.239 The prosecutor may withdraw a case in totality [seponeren]. Such withdrawal (or waiver) of prosecution may be conditional or unconditional. If the withdrawal is conditional, a number of possible conditions may be set. The prosecutor may also enter into a transaction [transactie] with the accused, or may decide to deal with certain charges by not taking it to trial in itself as separate charges but to “add” it to another trial case for purpose of sentencing only [voeging ad informandum]. Negotiation and mediation initiatives in the realm of criminal justice have also sometimes resulted in prosecutorial disposal. Huge developments in administrative law, commencing with the WAHV, have created alternative methods of “penalising” conduct which is (or has previously been), crime without the necessity of proceeding with a criminal trial. These developments are in line with the international trend towards alternative disposal already referred to in chapter 1. In addition to these long-standing methods, a recent legislative introduction is the punishment order 240 [strafbeschikking] which is envisaged to replace the transactie in the long run. Whatever choice the prosecutor makes, the accused must be informed thereof. So must victims of the crime (or other persons with an interest in the matter) since they may challenge a decision not to continue with an open trial before a judge. If the prosecutor decides to proceed with a trial,

239 The distinction between grades of seriousness of offences is more clearly defined in Dutch law between overtredingen (misdemeanours) and misdrijven (felonies). South African law does not have this formal distinction. Whenever this distinction is not relevant, I will use the terms “crime” or “offence”.

240 This punishment order should not be confused with the so-called Penal Order which is used in some other countries. The Penal Order must be authorised by a judicial officer before it becomes valid, which is not the case with the strafbeschikking.
the process is commenced by delivery of a summons \textit{[dagvaarding]} to the accused. The prosecutor remains \textit{dominus litis} until the time when the case is called in court - so he can make decisions about alternative disposals or can set conditions for withdrawals until then. But once the case has been called in court, the prosecutor relinquishes control to the judge.

3.2 \textit{Sepot} – waiver or discharge from prosecution

The term \textit{seponeren}, which is the verb to describe the waiver of prosecution by the prosecutor (called a \textit{sepot})\textsuperscript{241} is derived from the Latin \textit{seponere}, meaning: setting aside.\textsuperscript{242} Distinction is made between waivers for reasons of feasibility (also known as technical waivers) and waivers based on policy or expediency. The grounds for waiver in both cases have been standardised over the years and are widely recognised.\textsuperscript{243} Whenever a prosecutor declines a prosecution based on a waiver, he must indicate the respective ground upon which it is done on the case docket \textit{[strafdossier]} as well as in the criminal records \textit{[justitiële documentatie]} and statistics form.

\textbf{Technical waiver/sepot}

If a prosecutor is of the opinion that a conviction is not possible due to technical or evidential problems, the case is withdrawn through what is known as a technical waiver. One cannot really speak of a discretionary waiver \textit{in stricto sensu} since any reasonable prosecutor would have come to the same conclusion that there is no reasonable prospect of success. In effect the prosecutor “prejudges” the matter to determine if a judge will be able to convict the accused in the circumstances.\textsuperscript{244} On the case docket the prosecutor must indicate his decision as well as the ground upon which he decides that a successful prosecution will not be possible. Since 1980 a national list exists of grounds for technical waiver. The following reasons can lead to a technical waiver:

* the wrong person is charged\textsuperscript{245}; \textit{[ten onrechte als verdachte vermeld]}
* there is no or insufficient legal proof of guilt; \textit{[geen of onvoldoende wettig bewijs]}

\textsuperscript{241} A sepot is the decision not to prosecute. It may entail not presenting the matter for trial, not issuing a strafbeschikking or transactie, as well as the cancelling of a strafbeschikking, or not taking further action with regard to an uncompleted transaction or strafbeschikking.


\textsuperscript{243} Aanwijzing gebruik sepotsgronden, 2009A016.since 1 September 2009. Also BWBR0026284 applicable since 22 June 2011.

\textsuperscript{244} Other aspects can also play a role for example in a so-called “klachtdelict” where the required complaint is absent. This relates to certain offences where a formal complaint is required before the prosecutor may institute prosecution.

\textsuperscript{245} This may be as result of a administrative mistake or it may be because a false charge was laid, or the innocence of the person has been determined after investigation. Only when the sepot is on this ground is the matter not registered in the judicial documentation.
The withdrawal by the prosecutor brings the case to a close. But further prosecution is not excluded. If more evidence becomes available that serves to prove the guilt of the accused, or if the reason that existed for the charge to be dropped falls away, then the case can be considered again. If prosecution policy prescribes that the O.M. (and police) must reduce the number of technical waivers, this has some possible consequences. It means either the prosecutor must go to court (or offer a transaction or institute a strafbeschikking) with questionable cases, must take steps to improve the quality of police investigation, or instruct the police to drop dead-horse cases early and to present only proper dockets to the O.M. for further action.

Waiver/sepot based on policy

Once the prosecutor has determined that sufficient evidence exists to secure a conviction against the particular accused and that the court and prosecutor have competence or authority in the matter, the next factor to consider is whether (further) prosecution would indeed be in public interest. Does policy demand a trial before a judge, or can the matter be dealt with in another way? A waiver based on policy takes place where the prosecutor decides not to proceed with a trial in circumstances where a successful prosecution is possible. The decision not to prosecute is based on policy grounds. There can be many possible reasons why prosecution policy determines not to proceed with prosecution. It may be factors that are directly related to the person of the accused (ill-health, youth or old age, other harm resulting from the facts). Or factors that relate to the offence (the crime may have been committed long ago, be of a minor nature, there may be societal conflicts of interest). Or factors relating to the relationship between the accused and the victim. Or it may be factors that are purely determined by the policy of the O.M., for example because of lack of

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246 For example because of prescription, or a “klachtdelict” without a formal complaint etc.
247 For example because of private defence or any other ground of justification.
248 For a complete list of possible waiver grounds, see the guideline - Aanwijzing gebruik sepotsgronden, 2009A016 since 1 September 2009. Also BWBR0026284 applicable since 22 June 2011.
(investigative, prosecutorial or judicial) capacity or the preference for victim-offender restitution etc. Waivers based on policy may be unconditional, or there may be conditions attached to the waiver which must be met before the case is withdrawn by the prosecutor.

**Unconditional waiver/sepot**

If the prosecutor concludes that prosecution does not serve any useful purpose, he can withdraw the matter forthwith without any further sanction or condition attached. This is the simplest way of dealing with a case - by withdrawing it unconditionally. This form of waiver is mostly used in dealing with minor offences or offences committed on huge scale, for example jay-walking. The decision to prosecute or not is led by what general interests would demand. The prosecutor may sometimes deem it necessary to give the accused a warning before continuing to waive prosecution. Such warning has little effect other than to caution the accused that he has transgressed the law and should consider himself lucky that more serious consequence did not follow. Since the prosecutor is required to register his decision (to withdraw the charge), the unconditional waiver (with or without warning) is not completely without consequence. It is most certainly something that will be taken into consideration when subsequent delinquent behaviour of the same accused is evaluated and decisions taken whether or not to prosecute. Although this method of dealing with minor/petty offences was used extensively in the past, it has fallen out of favour. As with technical waivers, the percentage of unconditional waivers was regarded as being unacceptably high, and it was determined that it should be replaced by other juridical reactions where some sanction or the other follow the transgression of the criminal norm.

**Conditional waiver/sepot**

The legal justification for conditional waiver is found in the principle of expediency - if one can waive prosecution in total, one can also waive it conditionally. Corstens suggests that the conditional waiver (and transaction) stands between prosecution and the unconditional waiver of prosecution. The prosecutor refrains from prosecution in exchange for the accused complying with the condition(s) prescribed by the prosecutor. If the accused does not comply, the prosecutor will continue with a summons and trial. The leverage of the prosecutor is the threat of prosecution upon non-compliance. The conditional waiver has evolved into a separate method of disposing of criminal cases. It can be used regardless of whether a

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249 Also referred to as a “kaal sepot” - naked waiver.
250 *Samenleving en Criminaliteit*, p. 43 and 44.
251 *Wie het meerdere mag, mag ook het mindere* - Ruller & Fast, p. 56
preliminary investigation or preliminary arrest took place. In practice it seems to be used mostly for those cases where a transaction in terms of art 74 Sr. cannot be used because of the limited conditions allowed under art 74, or where the seriousness of the offence also excludes the possibility of a transaction. It seems as if the only remaining difference between the conditional waiver and the art 74 Sr. transaction lies in the fact that the conditional waiver is not restricted in respect of the conditions that may apply or the offences for which it may be applied. By consulting the BOS/Polaris database, the prosecutor can determine whether a conditional waiver may be applied.

Requirements for a waiver/sepot based on policy

A conditional (policy) waiver may only be considered in circumstances where there is a reasonable prospect of conviction of the accused, should the matter proceed to trial. Unlike the transaction, the conditions for a conditional waiver are not prescribed in legislation, although the explanatory memorandum (when the sections were debated in parliament) referred to conditions relating to lifestyle and conduct [levenswijze en gedrag]. The only condition that may not be set is the imposition of a sanction of incarceration, since in terms of the Dutch Constitution a custodial sentence may only be handed down by a judge. The prosecutor may set such conditions as he would regard fair but the result of the conditions may not be more severe than what the court would have imposed if the matter did go to trial. The prosecutor also prescribes the time-frame for fulfilment of the condition(s). It’s also possible that the conditions set by the prosecutor can actually have a double interval: the time within which the accused must fulfil some condition, and a further period for which the prosecution will be suspended on condition that the accused does not commit a similar offence again. The latest guideline on conditional sanctions stresses the importance of clear and unequivocal formulation of the conditions imposed so as to assist in determining if it is, or is not, met.

There is a further distinction between a “formal” and an “informal” waiver. Art 167 Sv. deals with the so-called informal waiver. No notice to the accused of the waiver is necessary since he might not even have been aware of criminal investigation or the possibility of a charge against him. Art. 242 lid 2 deals with the so-called formal waiver and refers to the

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254 Art 113 lid 3 GW.
255 I’m not going to go into detail regarding the time-frames applicable to conditional waivers and transactions - to an extent it depends on whether it is a so-called formal or informal waiver. See P Osinga, Transactie in strafzaken, (dissertatie KUB) Arnhem, 1992 for more detail.
257 Aanwijzing advies, toezicht en naleving van voorwaardelijke sancties (2010A013).
prosecutor deciding to waive prosecution, conditionally or not, after a preliminary investigation or preliminary arrest. In this case a notice of waiver must be served on the accused. The notice need not contain the ground/reason for the waiver, but it may be helpful to include it and it is certainly not prohibited by art 247 Sv. The period within which the prosecutor must take decisions regarding (further) prosecution or waiver of prosecution depends on whether its a formal or informal waiver and whether a preliminary investigation has preceded it or not. For a discussion of the various periods and extensions thereof see Van den Biggelaar chapter 2.

**Legal character and consequence of policy waiver**

The question is: if a criminal charge against a suspect has been withdrawn on policy grounds, can he be charged with that offence again? This depends on the nature of the waiver. In the case of a conditional waiver, once the accused has complied with the conditions (within the determined time-frame) the prosecutor cannot prosecute on that charge again because of the *vertrouwensbeginsel* [legitimate expectation]. The prosecutor is bound by the agreement that he made with the accused if the latter has complied.\(^258\) Another important factor is whether the accused was given a notice of “non-prosecution” or not. Regardless whether the waiver was conditional or not, if the accused was given a notice of non-prosecution, no further criminal action may be taken (whether by trial, conditional waiver, transaction or *strafbeschikking*) on the same facts unless the court of appeal orders it after art. 12 proceedings, or after new objections come to light.\(^259\) In the case of informal waivers where no notice of non-prosecution was issued, there is no specific provision in the Code of Criminal Procedure. The accused can, however, on the basis of legitimate expectation, rely that the O.M. will not be able to prosecute unless good grounds (e.g. new objections) exist.\(^260\) A waiver is, however, not completely without consequence since the prosecutor must register the manner in which he dealt with the matter. Record is thus kept of waivers of prosecution which may influence future decisions regarding prosecution of a particular individual.

**Waiver/sepot by the Police**

Practice has developed where it is accepted that the O.M. has the authority to waive prosecution. The next question to consider is, where does the right to waive prosecution stop? Do the police also have the right to decide not to investigate specific charges or to (conditionally) waive prosecution? In


\(^{259}\) Art 255 Sv *Bezwaren* – objections refer to evidence or statements that was not known or investigated at the time when the case was waived.

theory, every complaint [aangifte] must be investigated and if criminal conduct is constituted, a proces-verbaal must be completed and sent on to the prosecutor. The reality is, however, quite different. Police waiver takes place and, although not in terms of any express legislative provision, the Hoge Raad has recognised the capacity of the police to waive specific cases as a consequence of the principle of expediency.261 This may entail that the police avoid investigating certain types of offences from the start, or (conditionally) waive prosecution after investigation and (before or) after a proces-verbaal has been completed. In essence the police derives its authority by delegation from the prosecutor – since the prosecutor is entitled to waive prosecution, he can delegate his authority to waive prosecution to the investigating functionary.262 It would be a tremendous waste of valuable resources if it is required of the police to spend time and money in investigating a charge, reducing the investigation results in a proces-verbaal only then for the O.M. to withdraw the case. We see that the police waiver is something that has developed in practice and also as result of developments in the police’s capacity to enter into a transaction. If the police has expressly waived prosecution, the O.M. is bound by the declaration of a waiver as long as it is done in circumstances where one can expect that the police does have the implicit consent of the O.M.263 It is therefore of the utmost importance that the O.M. has clear, unequivocal arrangements with the police as to when they may, or may not, waive prosecution, and on what conditions.

3.3 Transaction

The Criminal Code (not the Code of Criminal Procedure where one would normally expect it) provides a statutory form of out-of-court disposal of offences called a transactie (transaction). Transaction is a method of dispensing with relatively minor cases at an early stage of the proceedings without involving the judge. This form of extra-judicial dispensation has a long history in Dutch criminal law.264 The current transaction system found statutory introduction in 1921 when it was first included in the Criminal Code.265 At first it only applied to minor offences or misdemeanours [overtredingen]. In 1983 the application of transaction was expanded so that transactions could also be entered into in cases of serious crime or felonies [misdaad] with a maximum sentence of up to 6 years incarceration.266 Ten years later the power of the police with regard to

262 GJM Van den Biggelaar, De buitengerechtelijke afdoening van strafbare feiten door het openbaar ministerie (dissertatie RUL), Arnhem, 1994, p. 42 argues contra that the right to delegate to the police is derived from the mandate construction in the administrative law.
264 For an in dept discussion of the origin and historical development of transactie, see P Osinga, Transactie in strafzaken, (dissertatie KUB) Arnhem, 1992.
transactions was also expanded.\footnote{267 Wet van 16 september 1993, Stb.1983.} A transaction is an agreement between the prosecution and the accused that (further) criminal prosecution will be waived by the prosecutor if the accused complies with certain conditions. It is a quick and inexpensive method of dispensing with a case. Transaction is used extensively in the Netherlands - of approximately 3 million misdemeanour cases in 1988 only 4% appeared before a judge, and in felony cases less than 40%.\footnote{268 Osinga - p8 figures for 1988.} In the year 2000 a quarter of all reported felony cases were finalised by way of a transaction.\footnote{269 Jaarverslag O.M. 2000, p. 24.} In 2007 transaction and conditional sepot accounted for 30% of all completed cases and in 2010 it amounted to 25%.\footnote{270 Jaarbericht 2010 O.M.} The reason for its popularity is clear: the prosecutor does not waste time in court, the accused gets a discount on what will probably be the penalty at trial and avoids a public trial, and the interests of the community is satisfied in that an offence is countered with a juridical reaction and penalty. The effective disposal of criminal cases by way of transactions was one of the factors that influenced the development of policy determination by the O.M. Where initially the purpose of the transaction was to reduce the number of short custodial sentences, it has developed into an alternative to a trial before a judge.\footnote{271 MS Groenhuijsen & AM Kalmthout, De wet vermogensancties en de kwaliteit van de rechtspleging, DD 1983, p. 11.} One can argue that the transaction is in fact a specific form of conditional waiver.

### Legislative framework: Art. 74 Sr.

Art. 74 Sr. contains the transaction provisions.\footnote{272 In addition to sec 74 Sr, see also Besluit OM-afdoening van 4 juli 2007, Stb.255 (applicable since 1 February 2008). Also CPM Cleiren & MJM Verpalen (eds), Tekst & Commentaar Strafrecht, 9e druk, 2011, p. 530.} The prosecutor can, before the start of the hearing, set certain conditions for avoidance of a trial. It applies to all offences except those where a prison sentence of more than 6 years is prescribed. The act then lists the conditions that may be set. Persons who have a direct interest in the case and who have requested so, must be informed of the date on which the accused has complied with the conditions. Art. 74a contains a compulsory transaction: if a fine is the only sentence that may be applied to an offence, and the accused offers to pay the maximum prescribed fine, then the prosecutor is compelled to accept the offer and enter into a transaction.

Previously the accused had to apply for the transaction to be considered. Now the prosecutor takes the initiative to suggest a transaction. This is rather important from a policy and planning point of view - the O.M. can determine in advance which cases to (try to) dispose of by way of transaction, and does not have to wait for the accused to take the initiative. The Act does not prescribe the manner in which a transaction
offer should be done, but in practise it has been standardised to consist of a notice which is presented to, or sent to the accused, which includes an “accept-giro”\textsuperscript{273} indicating the transaction amount. The letter/notice also indicates what will happen if the accused decides not to accept - namely that a summons will be issued and the matter taken to trial where a fine for a higher amount will be requested. The notice should also indicate that the accused is not compelled to accept the transaction offer\textsuperscript{274} and that he can insist on the matter being heard by a judge. In practice the accused, or his lawyer, can obviously also request the possible consideration of a transaction and consult with the prosecutor about it. Although the initial intention with the transaction was (and still by far the most frequent use is) for petty and frequently occurring crimes, in principle it can be applied to all offences with a punishment ceiling of 6 years’ jail-time. There are also guidelines for “high” transaction amounts and transactions in particular cases.\textsuperscript{275} Although it is an option that can be considered, Corstens\textsuperscript{276} argues that strict control should apply when the transaction is utilised for non-standard cases. High transactions\textsuperscript{277} or particular transactions must be approved at a higher level, depending on the details thereof. Some transactions must be approved at the level of the Board of Attorneys-General or even that of the Minister of Justice. For high and particular transactions it is also obligatory that the O.M. issues a media release explaining the circumstances and details of the transaction.\textsuperscript{278}

**Transaction Conditions**

The conditions that may be set are limited to those prescribed in the Act. The prosecutor may set one or more condition or any combination thereof. The prescribed conditions are:

a. a fine - payment of an amount of money to the State with as maximum the maximum fine prescribed for the particular offence;

b. relinquishing/renunciation of title to objects that have been seized and that are subject to forfeiture or confiscation;\textsuperscript{279}

c. surrendering (or payment of the estimated value) to the state of objects subject to forfeiture or confiscation;\textsuperscript{280}

\textsuperscript{273} Bank payment advice - instruction to bank to pay a certain amount to a certain beneficiary – in this case in favour of the treasury.

\textsuperscript{274} Osinga argues that this is very important to ensure that the accused enters into the transaction voluntarily and not because of duress or ignorance see P Osinga, Transactie in strafzaken, (dissertatie KUB) Arnhem, 1992.

\textsuperscript{275} Aanwijzing hoge transacties en bijzondere transacties (2008A021). See also P Osinga, Transactie in strafzaken, (dissertatie KUB) Arnhem, 1992, p. 103.

\textsuperscript{276} GJM Corstens, Het Nederlandse strafprocesrecht, 7e druk, bewerkt door MJ Borgers, Arnhem: Gouda Quint,2011.

\textsuperscript{277} Not only the amount of the fine is relevant whether it is regarded as a “high” transaction, but also the amount forfeited.

\textsuperscript{278} This relates to transactions above € 50 000 or in sensitive cases. Sensitive would relate to either the nature of the offence or the person of the offender (or victim).

\textsuperscript{279} Art. 33 Sr. prescribes the articles that are open for forfeiture whereas Art. 36c and 36d Sr. prescribes which articles may be confiscated.
d. payment of a sum of money (or transfer of seized objects) to the state with the aim to deprive the accused, in whole or in part, of the illegally obtained gains\textsuperscript{281} acquired by means of, or derived from, the criminal offence;\textsuperscript{282} 

e. full or partial compensation for damage caused by the criminal offence;\textsuperscript{283} 

f. (community) service to a maximum of 120 hours.\textsuperscript{284}

The prosecutor determines the time and place for compliance with the conditions imposed\textsuperscript{285} but he may not be unreasonable in his determination. The time frame for compliance may also be extended. If the accused does not comply with the conditions within the set time frame, or only complies partially, then there is no valid transaction. If it only entails the payment of a fine, then it is easy to determine if the accused complied with the condition, but with some of the other conditions, it may not be so easy to determine if the accused indeed complied. For example with the condition of (community) service, the accused may argue that he has complied, and the prosecutor may hold a different view. In addition to the conditions that may be set by the prosecutor, there are a number of requirements with which the process must comply:\textsuperscript{286} 

a. The prosecutor may not offer a transaction when successful prosecution is not a reasonable prospect. Thus a requirement for transaction is that the prosecutor is convinced that the court will be able to find the accused guilty.

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\textsuperscript{280} This will apply to articles that can be forfeited, but which were not seized from the control of the accused.

\textsuperscript{281} The value obtained through illegal means is estimated by the prosecutor. If the accused does not agree with the estimation, he can decline the transaction offer, and at trial argue that it involves less. Although Osinga argues that the prosecutor is not entitled to enter into negotiation with the accused as to the amount of the illegally obtained benefit, one can hardly see how this can be prevented in practice, see P Osinga, Transactie in strafzaken, (dissertaties KUB) Arnhem, 1992, p. 238-9.

\textsuperscript{282} This condition is similar to the depriving of illegally obtained benefit/profit in Art. 36 e Sr. also called the “plukze” legislation.

\textsuperscript{283} Guidelines issued in terms of the Policy on Victims, and the more recent legislative amendment of 2011, determines that the police and prosecutor must determine to what extent persons who were affected by the crime wish to be kept abreast of developments in the case, and also wish to be compensated for damage caused as result of the crime. The manner in which the extent of the damage is determined is not prescribed, neither the manner of proof thereof. Similar to the determination of the illegally obtained benefit, the prosecutor can estimate the correct damage.

\textsuperscript{284} The (community) service order [taakstraf] is divided into a work order [werkstraf] whereby the offender must participate in some work project etc. and a learning order [leerstraf] which entails the offender to undergo courses, treatment or training. C Bijleveld, Sex Offenders and Sex Offending in M Tonry and C Bijleveld (eds), Crime and Justice in the Netherlands, University of Chicago Press, 2007, p. 325. The learning order can no longer be applied to adult offenders (Aanwijzing Taakstraffen (2011A027) and the prosecutor can also not offer a community service order for serious violence or sexual offences or to a repeat offender who has already completed an earlier community service order.

\textsuperscript{285} art 578 lid 1 Sv.

\textsuperscript{286} CPM Cleiren & MJM Verpalen (eds), Tekst & Commentaar Strafrecht 9e ed, 2011, p. 534.
b. The amount to be paid and the encumbering conditions may not be more than would reasonably be expected from the judge, should the matter go to trial.

c. The accused should agree to the transaction voluntarily. This can prove to be difficult to determine, and is also one of the points of criticism against the transaction as alternative to court trial.

The requirement of the voluntary participation of the accused and the sufficiency of evidence to prove his guilt, however, does not entail that the accused acknowledges guilt when he enters into a transaction.

**Legal character and consequence of a transaction**

Where initially the transaction was meant as a substitute for a fine that would presumably have been imposed by the judge, we can see that by the extension of the conditions, the mere substituting of a court fine is no longer the only effect of the transaction and it is considered to be a substantial sanction in itself.\(^{287}\) What exactly is the legal character of a transaction? Remmelink\(^ {288}\) mentions that the Minister of Justice in the explanatory memorandum to the Act when the transaction was introduced, referred to it as a *sui generis* public law instrument, very similar to “*dading*”.\(^ {289}\) The transaction consists of two one-sided legal acts: an offer by the authorities (prosecutor or police) and an acceptance by the accused. Personal contact between prosecutor and accused is not required, but O.M. statistics show that where the transaction is the result of a personal contact session between the prosecutor and the accused, as opposed to simply sending him an offer through the post, the effectiveness of the transaction to influence the conduct of the accused and the willingness to accept it is greatly increased.\(^ {290}\) In complex financial or environmental cases some measure of negotiation does indeed take place.\(^ {291}\)

The consequence of complying with the conditions is prescribed by legislation. Art 74 lid 1 indicates that by complying with the conditions, the right to prosecute expires. Corstens argues that this should also be the case where the accused entered into a transaction in cases that are not allowed by law, or on conditions that are not allowed.\(^ {292}\) Similarly, where a prosecutor does not offer a transaction to an accused in circumstances where policy directives prescribe a transaction, it would result in the expiry of the right to prosecute if the prosecutor cannot explain his oversight.\(^ {293}\) The effect of the expiry of the right to prosecute is that the

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\(^{289}\) See later the discussion on “*dading*” - negotiation instead of criminal law.

\(^{290}\) Memorie van Toelichting Wet O.M.-afdoening, p. 13.

\(^{291}\) Memorie van Toelichting Wet O.M.-afdoening, p. 13.

\(^{292}\) GJM Corstens, Het Nederlandse Strafverordening 7e, 2011, p. 204.

\(^{293}\) MJA Duker, Sanctionering van het verzuim een transactieaanbod te doen alvorens te dagvaarden, Strafblad feb 2012, p.65.
case is concluded and the accused may not be prosecuted for the same facts again.\textsuperscript{294} Obviously this only applies where the accused complies with the conditions. If the accused does not comply with the conditions, no transaction came into existence and prosecution will thus be possible. Whether future prosecution does follow or not remains the decision of the prosecutor, although policy may dictate that transaction offers that are declined by the accused, or “uncompleted” transactions should as a rule result in prosecution by way of the issuing of a summons. The right to prosecute may, however, revive even if the conditions have been met in the case of an art 12 complaint by a person with an interest in the outcome of the case. Obviously the fact that no trial takes place can be relevant to 3rd parties. Therefore a procedure exists whereby they can challenge the decision to dispose of the matter by way of the intended transaction.\textsuperscript{295} Unlike the \textit{sepot}, new circumstances do not revive the right to prosecution after a “completed” transaction.

**Directing transaction through guidelines\textsuperscript{296}**

The O.M. orchestrates the use of transactions by way of guidelines.\textsuperscript{297} The O.M. indicates in advance, when policy is determined, how a particular matter or type of offence will be dealt with - and if by way of transaction, what the conditions will/should be and the amount paid etc. Different guidelines exist for misdemeanours in lower courts and for felonies, the first being much more detailed with little room for deviation from the prescribed guideline. With more serious offences, the guideline is more general and inherently contains more possibility for deviation. In the latter case the conditions that may be set are also not prescribed, but upper and lower limits are given within which the prosecutor dealing with the case may use discretion.\textsuperscript{298} By way of the principle of legitimate expectation, the accused can rely upon the presumption that the prosecutor will act in accordance with the guideline. Transaction guidelines have a control function. Prosecution uniformity can be achieved. For that reason a number of guidelines deal specifically with transactions for specific offences.\textsuperscript{299} To encourage the swift conclusion of criminal cases, the guideline determines that the transaction offer is for an amount of approx. 20\% less than the amount that will be requested as fine if the case

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\textsuperscript{294} For a more complete discussion of the principle \textit{ne bis in idem} resulting from a completed transaction, see P Oosinga, Transactie in strafzaken, (dissertatie KUB) Arnhem, 1992.p. 200-206.

\textsuperscript{295} The Complaint procedure is further discussed in 3.8 of this chapter.

\textsuperscript{296} Since the introduction of the strafbeschikking the latter procedure is directed in the same way by guidelines and other policy documents.

\textsuperscript{297} The Transactiebesluit 1994 and the Polarisrichtlijnen are of particular importance, thought specific guidelines for specific crimes are also developed. See also the discussion of Kader voor Strafvordering in chapter 2 and Besluit O.M.-afdoening van 4 juli 2007, Stb.255 (applicable since 1 February 2008).

\textsuperscript{298} See P Oisinga, Transactie in strafzaken, (dissertatie KUB) Arnhem, 1992, p 102.

\textsuperscript{299} Aanwijzing kader voor strafvordering 2011A030 and various other published guidelines.
An accused that decides to accept the transaction offer gets a “discount” for his willingness to speed up justice dispensation. The guidelines also support the idea that the financial position of the accused can be taken into consideration in determining the transaction amount.

Transactions by the police

Since 1959 the police have also been authorised to offer the accused a transaction. The reason why this was introduced was the tremendous increase in traffic offences to shorten the “reaction-time” in cases where the prosecutor would in any event have offered a transaction to the accused. Initially police transactions only applied to relatively simple and minor misdemeanours. The current police transaction provision is contained in art. 74c Sr. The capability of the Police to dispose of cases through the use of a transaction was again extended in 1993. Police transactions can now also be concluded for elementary felonies [misdaden van eenvoudige aard]. This applies to lesser driving under influence cases and simple shoplifting where the value of the item stolen is under a certain amount. These felonies were chosen since it occurs very regularly, requires no intense investigation, is easily proved and can easily be co-ordinated and orchestrated by policy guidelines. A police transaction may only involve the payment of a fine without any additional conditions. The amount of the fine is determined on the basis of specific guidelines and is prescribed for each offence for which the police may offer a transaction. The police are bound by the guidelines with very little individual room for departure from the prescribed way of action. The guidelines also indicate in which circumstances the police may not offer a transaction. Similar to the transaction by the prosecutor, the police may only consider a transaction offer in circumstances where the guilt of the accused is clear. It is practice that police transaction offers are for a slightly lesser amount than that of the O.M. – the reason being to induce the quick (and relatively effortless) disposal of simple cases without involving the O.M. If the accused decides not to accept the transaction offer, and he can do this by simply not doing anything at all, the matter will in due course be forwarded to the

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300 Aanwijzing kader voor strafvoordering 2011A030. The same principle applies with regard to a (community) service order: if not completed, the prosecutor will ask for a 20% increase in hours when the matter is dealt with at trial.
301 With the introduction of art 74bis WvS. Wet van 9 januari 1958, Stb 7. In operation since 1 May 1959.
302 Wet van 16 September 1993, Stb. 516.
303 Ar. 8 WVW.
304 Ar. 310 + 321 Sr.
306 Art. 7 Besluit Politietransactie. Also Aanwijzing politietransactie inzake eenvoudige diefstal en verduistering 2009A015.
308 At present this is the case where injury resulted from the offence, when items were seized, for repeat offenders, where there is a dispute of fact with the accused or when the victim or accused is closely related to the police official in question.
prosecutor who may again offer a transaction, or deal with the matter within his discretion. The legal consequence of a police transaction is the same as that of the O.M. transaction: when the accused complies with the condition (in this case - pays the fine) the right to prosecution falls away. Of the more than 700,000 transactions which are annually dealt with by the CJIB roughly half are so-called police-transactions, the other half originates from the O.M.

Transaction in other legislation

For the sake of completeness one can just mention, without going into detail, that transaction arrangements similar to the Art. 74 Sr. transactie also exist in other legislation, for example in the economic criminal law [economische strafrecht] and tax law [fiscaal recht]. In these Acts the competence to offer a transgressor the possibility of a transaction to avoid a criminal or administrative trial before a judge rests with prescribed functionaries – which may include the O.M. The conditions that may apply may also differ from those prescribed by Art 74. The administrative transaction, in terms of sec 37 WED has already been referred to in chapter 2.

3.4 The ad informandum practice

Another method available to the prosecutor to dispose of criminal offences is to add it to the trial of similar offences but for sentencing purposes only. The “added” offences do not appear on the charge sheet or form part of the adjudication during trial, but are only relevant for sentencing. The offences added for sentencing may not be of a significantly more serious nature than the offence(s) contained in the summons. This method relies on consensus, since the accused must admit these (added) cases thereby agreeing that it can be taken into account for sentencing purposes. The admission must be without reservation and it must be clear that no further prosecution on those

309 For more, see GJ M van den Biggelaar, De buitengerechtelijke afdoening van strafbare feiten door het openbaar ministerie (dissertatie RUL), Arnhem, 1994.
310 Eg. the Netherlands Bank NV in the case of the economic criminal law.
311 For a more comprehensive discussion of this phenomenon see AA Franken, Voeging ad informandum in strafzaken, diss, Tilburg, Gouda Quint:Arnhem, 1993. Also more recently AL Melai & MS Groenhuijsen ea, Wetboek van Strafvordering, Art 167, loose-leaf updated until 01-07-2011.
312 Before the Hoge Raad decisions in 1979 HR 13 februari 1979, NJ 1979- 243; HR 13 maart 1979, NJ 1979, p. 269m.nt ThWvV the ad informandum practice was only seen as a method to determine sentence – it is since then regarded as an independent method of finalising offences.
313 Cleiren argues that it would be necessary that the O.M. indicate in the summons (dagvaarding) the particulars of all cases it intends to add ad informandum (including the case numbers and a short indication of the facts it relates to). Text & Commentaar Strafvordering. Voeging van zaken door OvJ bij Wetboek van Strafvordering Artikel 259 CPM Cleiren bijgewerkt tot 01-07-2011.
facts will continue. If the accused refuses to admit the added offences, it cannot be added and a separate summons or other method of dealing with it must be used. The same applies where an accused exercises his right to remain silent. Then there can be no admission of ad informandum cases and they should be dealt with separately\(^\text{316}\) although cases can be dealt with ad informandum if the accused does not attend the trial (so-called verstekzaak), though it must clear that he agrees with it.\(^\text{317}\) Denied facts must be proven.\(^\text{318}\) The offences added in this manner are only described briefly, namely the nature of the offence and the date thereof, and must be of the same nature as the offences contained in the summons. At the trial the ‘added’ charges must be brought to the attention of the judge by reading them out.\(^\text{319}\) This is because it is deemed to give the judge “information” regarding the character and circumstances of the accused when considering sentence. Offences that were added in this manner, and that were taken into consideration for sentencing purposes, cannot be brought to trial again.\(^\text{320}\) This, however, only applies where the accused was indeed convicted and sentenced on the charges that did appear in the summons. If it was added for information, but the judge did not explicitly take it into consideration in his sentence, it is questionable if further prosecution can follow.

This long-standing practice\(^\text{321}\) has been recognised by the *Hoge Raad*.\(^\text{322}\) One may ask why such a mechanism should be used at all? Since it can only apply when the accused admits to the offence it appears similar to the plea of guilty in adversarial justice systems. Especially where a great many similar charges are involved, and the accused admits them, why should each and every one be proved with evidence? The ad informandum method is used to “prove” some charges and then “adding” others (which the accused has admitted) for sentencing purposes. The biggest advantage of voeging ad informandum is that it makes it possible to include multiple charges (of the same nature) which the accused admits, and to reduce court-time by only having to prove those charges contained in the summons.\(^\text{323}\) For the accused it has the benefit of a (probable) lesser combined sentence than the individual sentences on each charge would

\(^\text{316}\) HR 29 maart 2011, NJ 2011, 229.
\(^\text{317}\) The Hoge Raad (decision 15 november 2011, Rechtspraak vd week 2011, 1446 and NJB 2011, 2213) confirmed the following requirements for a verstekzaak: 1) the accused must be informed prior to the trial that the cases would be ‘added’, 2) there must be some admission from the accused that he has committed the ‘added’ offences, 3) there must be an indication from the prosecution that they will not separately prosecute the ‘added’ charges.
\(^\text{318}\) P Frielink, Voorwaarden ter voeging ad informandum, AA, 1984-33- 5, p. 247.
\(^\text{319}\) AL Melai& MS Groenhuijsen e.a. Wetboek van Strafvordering, 23.2 Voorwaarden bij: Wetboek van Strafvordering, Art 167, loose-leaf, updated till 01-03-2010.
\(^\text{320}\) Based on the application of the “vertrouwensbeginsel” – the principle of legitimate expectation.
\(^\text{321}\) Franken indicates that voeging ad informandum has been around for at least the last 70 years: AA Franken, Voeging ad informandum (diss. Tilburg), Arnhem:Gouda Quint, 1993, p. 2.
\(^\text{323}\) SAM Stolwijk, Voeging ad informandum, DD1984-14- 6, p. 519.
carry and the possibility of longer (expensive) or multiple trials can also be avoided – especially since he admits his guilt. One drawback of this is that the added offences must be of the same nature as the ones included in the summons. The same requirement that applies for a transaction or conditional waiver, namely that sufficient evidence must exist to prove the guilt of the accused on the charge, also apply to the ad informandum charge.

The victim of crime can have an interest as to whether the offence which the accused has allegedly committed is included in the summons, or dealt with ad informandum. A victim who is unhappy with the decision of the prosecutor to add the matter ad informandum instead of including it in the summons can approach the Court of Appeal. See the discussion later where it is concluded that it would be better if the prosecutor refrain from adding offences ad informandum where damage has resulted and the victim has entered a claim for such damage. To overcome this, the adding of the offence may be made conditional to the accused having compensated the damage. However, since the latest legislative amendment, a victim of a crime which is added ad informandum can indeed also be considered for a compensation order.

3.5 Negotiation and Mediation within the Criminal Law dimension

Dutch legal practice has seen a number of (formal and informal) initiatives to get the offender and victim of crime, in some instances, to talk to each other in an attempt to settle their differences. The question is: to what extent should formal procedures to facilitate this, be encouraged? Whereas the transaction, conditional waiver and ad informandum method discussed earlier can be seen as extra-judicial methods of disposing of criminal cases, but still within the realm of the criminal law, negotiation and mediation to settle disputes originating from unlawful (criminal) conduct, usually take place completely outside the ambit of the criminal law. The point of departure of proponents of negotiation and mediation is that in some instances there may not be the need to introduce the criminal law and criminal sanctions. This is where the conflict that was caused by the crime or the breach of the legal order can be resolved by the offender and injured

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324 The so-called “bewijsbaarheidsvoorwaarde”.
325 P Frielink, De positie van het slachtoffer in ad informandum gevoegde zaken, NJB 1985, p. 778.
326 Wijziging van het Wetboek van Strafvordering ter versterking van de positie van het slachtoffer in het strafproces Stb. 2010, 1. This is possible since 1 January 2011. See also Aanwijzing slachtofferzorg 2010A029.
327 These notions are often also introduced as manifestations of Restorative Justice (which Groenhijsen translates as “Herstelrecht” and which he identifies as a current trend [hedendaagse stroming] in Dutch law. MS Groenhijsen, Strafrechtelijk stromenland in 2008, DD 2008, 77 (3). See also M Lochs, Bemiddeling in het Nederlandse strafproces: De mogelijkheden van slachtoffer-daderbemiddeling in het Nederlandse strafproces, Boom, 2010.
328 I Weijers, Het slachtoffer-dader gesprek als volwaardige mediation, NJB, 2012-1518.
party by agreement. Most often it involves damage suffered by the victim, but is restricted to the personal sphere of the two parties.

**Negotiation**[^329] [**Dading**]

Many years ago the O.M. supported an experiment[^330] in creative resolution of criminal cases which encouraged offenders and victims to find mutually agreeable solutions for the conflict between them. The aim of the experiment was to determine in which types of cases a negotiated settlement between the accused and victim could be an alternative to a criminal trial.[^331] The experiment dealt with cases that were ready for trial but if the parties could come to an acceptable solution, no further criminal prosecution would follow. Legal representation was provided to both parties and the lawyers conducted the negotiations on behalf of the parties.[^332] No limitations were set to what the parties could agree upon and once an agreement was reached and a civil settlement was signed by both parties, the criminal case would be withdrawn by the prosecutor.[^333] Where no settlement could be reached within a specific time frame, the matter was returned to the prosecutor’s office and re-entered the criminal system. In about half of the cases chosen for the experiment both the parties[^334] were interested to attempt negotiations, and a written agreement was reached in two thirds of them[^335] (about one third of all the cases). The cases chosen for this experiment were relatively minor cases[^336] and included first-time offenders as well as repeat-offenders. The types of settlements reached varied from financial compensation for material and/or immaterial loss, agreements to change behaviour, voluntary work/service as “punishment” and apologising to the victim. Although the experiment itself was deemed successful, negotiation [**dading**] seems to have been replaced by mediation [**bemiddeling**]. Informal arrangements aside, negotiation as conflict resolution method is no longer officially applied in criminal cases in

[^329]: The term “dading” refers to an agreement between parties with the aim to avoid a (civil) trial. In this context it is used to describe the process of reaching an agreement to avoid a criminal trial.

[^330]: The so-called “Amsterdam Experiment (1991)”. Further (similar) negotiation experiments were held in six other judicial districts between 1998 and 1999.


[^332]: The lawyers represented the interest of their respective clients and did not act as mediator, although arbitration services were also provided in cases where arbitration was made part of the agreement.

[^333]: This will be a conditional waiver in terms of Art. 167 lid 2 Sv. and the normal consequences follow. This brings the case to a final conclusion – the criminal case cannot be reopened later if the accused does not comply with the terms of the agreement. In that case the victim must rely on the normal civil procedure to enforce the agreement.

[^334]: Rather surprising was the high number of victims (82%) who indicated their willingness to participate with negotiations to replace the criminal proceedings.


[^336]: This would exclude cases where there was “serious” breach of the legal order or where there were specific O.M. guidelines against the withdrawal of such cases. In this instance it involved cases where the maximum penalty would be a 6 months jail sentence.
the Netherlands. The main conclusion that was reached with these experiments is that negotiation overlap significantly with the claim-and dispute settlement procedures prescribed by the Victim Care Directive that prosecutors must take heed of in their choice of the method to deal with a criminal case.

**Mediation [Bemiddeling]**

Mediation, or alternative dispute resolution [ADR], is a fairly new trend in Dutch law and has also made inroads in the area of the traditional criminal law and criminal procedure where it has been the subject of a number of experiments and projects. Mediation in penal matters is defined as a process whereby the victim and the offender can be enabled, voluntarily, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party or mediator. In the Netherlands, mediation in one form or the other, can take place before, during or after the criminal proceedings. Organisations, like de Stichting Slachtoffer in Beeld and de Eigen Kracht have been involved in offender-victim dialogues for years, facilitating a process separate from the criminal justice process to mediate between offenders and victims. Claim settlement procedures have become standard practice with prosecutors and police who must assist victims with their claims for material damage. They often try to settle this before the start of the trial. Mediation can be aimed at compensating/repairing the damage caused by the offence, or at addressing/correcting the conflict between the parties or at “healing” the pain/harm of the victim. However, there is no clear overview of all the types of mediation, the objectives and the methods used in the Netherlands.

The Council of Europe recommendations maintain that mediation should be available throughout the criminal process, and that fundamental procedural safeguards be incorporated in legislation. One of these

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340 Recommendations the Council of Europe – Mediation in Penal Matters, No R(99) 19 adopted by the Committee of Ministers on 15 September 1999, also Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings.
342 I Weijers, Het slachtoffer-dader gesprek als volwaardige mediation, NJB 2012/1518.
343 This is aimed at helping the victim to deal with pain and feelings of revenge and bitterness, and the offender with feelings of guilt.
safeguards includes legal assistance. The minimum requirements according to the Council of Europe are that the parties:

- agree on the factual basis of the matter,
- participate voluntarily,
- having been informed about the consequences of their participation, and
- consent to the confidentiality of all disclosures made in the process.

Conclusion

Mediation in criminal matters also seems to be gaining ground on regional and international scale and has now officially been included in the Criminal Procedure Code, although further detail of its practical application is still awaited. It is envisaged that the art 51h mediation will take place under the supervision of the O.M. or police. Mediation may, however, never be set as only alternative because the ECHR guarantees access to the court.

There are both advantages and disadvantages to negotiations and mediation between the offender and victim in order to avoid a criminal trial. It is, however, clear that these processes cannot (always) replace the workings of the criminal law, although it may influence its application. There is more than one possible application of mediation or negotiation in the realm of criminal law:

- Negotiation/Mediation is seen as a complete alternative to criminal procedure. Once the parties have reached an agreement, no criminal prosecution follows;

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346 MS Groenhuijsen, Mediation in het strafrecht. Bemiddeling en conflict-oplossing in vele gedaanten, DD 2000-30, p 446, on the other hand, argues that legal representation does not normally fit in well with mediation. He suggests that legal representation should in principle be available before and after the mediation process to guarantee the fairness of the process and the interests of the parties involved.


352 More clarity is needed as to what matters may, and may not, be negotiated, and precisely what the consequence of a negotiated (criminal) case will be.
• Negotiation/Mediation is seen as part of the criminal procedure – the result of mediation plays an important part in the decision to waive prosecution, or it influences the sentence of the court;
• Negotiation/Mediation is seen as complimentary to the criminal procedure – the idea behind restorative justice programmes namely to seek reconciliation between offender and victim, even if a criminal trial took place, and even where a custodial sentence was imposed.

Negotiation and mediation are useful tools to try to reduce crime or the escalation of problems, whilst also reducing the consequences thereof for the victim. It almost always also has some measure of reconciliation as result. Negotiation or mediation can possibly fit in with the following scenarios:
• The conduct is of such minor nature that unconditional waiver should apply,
• The conduct is more serious, but conditions (such as victim compensation or community service) can indicate a transaction or conditional waiver

It is, however, important to emphasise that the negotiation or mediation that does take place in (or alongside) Dutch criminal justice, is negotiation or mediation between victim and offender – it is not between the offender and prosecuting authority as is the case in “plea-bargaining”. The prosecutor is never bound by the outcome of the negotiations or mediation, but can take it into consideration when making his prosecution decisions.

3.6 Decriminalisation of certain (minor) traffic offences - WAHV

Background and principles of the Act

The era of modernisation has led to a tremendous increase in motor-vehicle traffic in the Netherlands with a corresponding increase in traffic offences committed resulting in serious capacity problems within the criminal justice chain. The Mulder Commission was instructed to investigate alternative and uncomplicated ways of dealing with minor and traffic offences. The commission’s 1985 report was largely incorporated in a new statutory method of dispensing of certain types of offences. The new act, the WAHV created an administrative law method of adjudicating what

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353 For a more recent take on the WAHV see W.S. Sikkema, De Wet Mulder: terug in het strafrecht?, Trema October 2005- 8, p348.
354 Before the WAHV as many as 96% of all reported misdemeanor cases originated from traffic regulations – Strafrecht met Beleid – Beleidsplan O.M. 1990 – 1995 p 30. In 2010 almost 11 Million traffic offences were committed. (Jaarbericht 2010 O.M.)
355 Wet Administratiefrechtelijke Handhaving Verkeersvoorschriften – The Administration of Road-Traffic Offences Act – is also known as the “wet Mulder” after its originator. This act was introduced on the 3rd of July 1989, Stb. 1989, 300 and initially only applied to certain experimental areas. Since 1 July 1992 the Act applies nationally. In the last ten years the act has undergone various changes.
was previously regarded as criminal conduct.\(^{356}\) Guidelines of the O.M. about this have also been formulated and published.\(^{357}\) A large body of traffic offences were decriminalised and brought under the ambit of the WAHV although criminal law functionaries (police, O.M. judge) continue to play a (albeit different) role in the implementation of the act. One of the criteria for removing certain conduct from the realm of the criminal law is the lack of moral condemnation of the conduct. The transgressor\(^{358}\) is not seen as an accused who has committed a crime, but a person concerned \([\text{betrokkene}]\) who acted in conflict with traffic regulations \([\text{verkeersvoorschriften}]\) which are listed in an addendum to the Act and are updated and amended from time to time. This entails a variety of traffic related offences where the “guilt” of the person is evident or easily determined. The act does not apply to cases where complex sets of facts are common or where an argument between the police agent and transgressor can result. Exceeding the speed limit, for example, can qualify for administrative adjudication if the speed is not in excess of 30 km/h above the legal limit.\(^{359}\) If the speed exceeds the legal limit by more than 30 km/h the WAHV does not apply and normal criminal proceedings will follow. The WAHV will also not apply to offences where an injury to a person or damage to property resulted from a person’s driving.\(^{360}\) Not only natural person’s conduct can fall under the ambit of the WAHV, but also legal persons or public law entities may receive fines under this act.\(^{361}\)

The police are authorised to impose administrative fines for the contravention of the regulations.\(^{362}\) This is done by what is known as a decision \([\text{beschikking}]\). The decision is contained in a prescribed document that indicates the alleged transgression, the amount of the fine payable\(^{363}\) and also that fact that the person can lodge a protest against either the merits of the case or the amount of the fine. The decision is given to the person, but may also be attached to the vehicle in the case of a parking, or similar, violation.

**Protest and appeal against the decision**

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\(^{356}\) This was the beginning of the development of a separate system of administrative adjudication which is, once again, in line with the international trend towards alternative disposal. The WAHV procedure also served as prototype for the strafbeschikking which followed years later.


\(^{358}\) Although technically it is not correct, I will refer to the “person concerned” as the transgressor for the purpose of this discussion.


\(^{360}\) Art. 2 lid 2 WAHV.


\(^{362}\) The O.M. is tasked with supervising the decision-making of the police, Art. 3 lid 3, and has, for this reason, designed guidelines aimed at promoting legal certainty and equal treatment. The guideline also prescribes the amount of the fine.

\(^{363}\) The amount is prescribed and the officer is not authorised to deviate from that amount.
The protest against the decision is a written, signed document lodged with the prosecutor responsible for the district where the conduct took place. This must be done within certain time limits (the transgressor must protest within 6 weeks of receiving the document) and if the person fails to do so, the original decision becomes final and executable. When instituting the protest the person must also supply his personal- and bank- particulars and must also indicate the grounds upon which he protests. Once the protest is lodged with the O.M., it is dealt with by a central body instituted to process all Wet Mulder protest matters. They re-examine the case. Before coming to a decision, the prosecutor must allow the protestor the opportunity to be heard in public. Witnesses and experts may also be called, but the protestor carries the cost of this. The prosecutor must make his finding within sixteen weeks of receipt of the notice of protest. He can confirm or revoke the decision of the police officer and can also lower the amount of the fine. If the prosecutor reaffirms the decision and the person is still not satisfied, he has another 6 weeks to appeal to the (administrative) judge. The appeal is lodged with the prosecutor on the prescribed form and must set out the reason for appeal and the transgressor must give security to the value of the fine before it may proceed. The purpose of this requirement is to discourage vexatious appeals to the judge. A public hearing takes place before the judge where both the appellant as well as the prosecutor can be heard. The judge, on appeal, only assesses the correctness of the decision and must give a motivated public judgement. A further appeal (in certain circumstances) is possible to the Court of Appeal in Leeuwarden. Figures for 2004 indicate that more than 10 million WAHV decisions were issued of which only 3% protested to the O.M. and less than 10% of these protested cases proceeded to trial showing it to be a very effective disposal method of lesser (traffic) offences.

**Execution of WAHV fines**

A central judicial collection agency has been established to administer decisions in terms of the Act, and to take the necessary steps to collect the fines issued. The notice of the decision that is given to the transgressor (by the police) is followed up by a

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364 Art 6 and 6:5 Algemene wet bestuursrecht.
365 CVOM – Centrale Verwerking OM (Central processing unit – OM). They use a digital registration and administration system (called AMBer).
366 This may be disregarded if the prosecutor is of the opinion that it is not necessary either because he will revoke the decision, or if the protest is evidently unjustified. The prosecutor must motivate his decision not to give the protestor the opportunity to be heard.
367 This can be because of the financial position of the accused, but the circumstances in which the conduct took place may also be taken into consideration – HR 29 september 1992, VR 1992, 144.
368 The security must be paid to the CJIB who pays it back if the appeal is successful.
369 Originally an appeal to the Hoge Raad was possible, but since 1 January 2000 that has come to an end and the final appeal is to the Court of Appeal Leeuwarden. Art 14WAHV.
370 The CJIB is not a section of the O.M. but a separate branch of the Department of Justice and Safety. See their website at www.cjib.nl
document by mail from the collection agency. The agency also administers the security that must be paid in case of appeals. If the fine is left unpaid for longer than fourteen days after it has become final, then it is automatically increased with 25%. Another reminder is sent to the person, and if it is still left unpaid after another term, then another increase, of 50% this time, follows. If the fine still remains unpaid, certain methods of execution can be applied, namely attachment of property or bank balance, garnishee orders etc, which methods also include coercive measures like temporary detention or the temporary suspension of a driver’s license.

3.7 Punishment Order [Strafbeschikking]

Introduction

The new disposal method which has recently been introduced amounts to a departure from the basic (traditional) principle that only a criminal court/judge may impose criminal penalties. This can now be done by the prosecuting authority, whereas judicial adjudication only occur when it is necessary, considering the serious nature of the offence or when the accused objects against the punishment order. The new provision is an adaptation of previously suggested alternatives. Already in 1996 the Commission Korthals Altes recommended that a transaction should be able to be “executed” unless the suspect objects timely. A more recent and extensive research project regarding the criminal procedure, the Onderzoeksproject Strafvordering 2001, recommended that the O.M. should obtain the authority to impose criminal penalties (the so-called O.M.-fine) which are not dependant on the courts or on the co-operation of the accused. These earlier proposals, together with developments in administrative penalties, have led to the introduction of a new heading into the Criminal Procedure Code (Sv): “Prosecution through a

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371 The court recently held that the cost of this notice cannot be claimed from the transgressor and should be for the account of the State. www.rechtspraak LJN nummer BV6243.

372 Art. 23 lid 2, art. 24 and art. 25 lid 1.

373 For a more complete discussion on methods of execution and resistance to it by the transgressor, see M Barels, Hoofdlijnen van de wet Mulder, Studiepockets strafrecht (24), 4ed, WEJ Tjeenk Willink, 2010.

374 Art. 30 WAHV.

375 The strafbeschikking provisions introduces a new concept – the person whose conduct is subject to the strafbeschikking is indeed not referred to as accused, or suspect, but is called “bestrafde” – literally “penalised person”. However, as I will indicate later, whenever the strafbeschikking is opposed, and results in a trial before a judge, the “bestrafde” becomes suspect/accused again. For purposes of clarity I will therefore use the term “accused” throughout.


377 For a critical discussion of the suggested O.M.-fine, see JH Crijns, De strafrechter buiten spel, Buitengerechtelijke afdoening van strafbare feiten in heden en toekomst, AA 2002 – 51, p. 35.
The opening sentence by the Minister of Justice in introducing the *strafbeschikking* as new method of prosecutorial disposal, indicates that one of the central ambitions of (his) cabinet is to improve (public) safety. In order to achieve this, capacity in the justice-chain needs to be adjusted to allow for the rising demand for norm-enforcement. Improving or enlarging the possibility and efficiency of out-of-court disposal of criminal cases is of great importance in this regard. The O.M. is given a separate/independent power to impose penalties which are not reliant on either the judge, or the co-operation of the accused.

A *strafbeschikking* is a procedure whereby the prosecutor determines/establishes the guilt of an accused and pronounces an appropriate sentence/penalty. It is a written document which must contain the name and address of the accused, the charge against him as well as the facts upon which it is based, a short description of the (prohibited) conduct as well as the time and place of its commissioning. This is so far similar to the information that is contained in a transaction. In addition the document must indicate the penalty imposed, the date of issue (of the *strafbeschikking*) as well as the manner in which opposition to it may be lodged. Lastly the document also contains information on how the *strafbeschikking* will be executed. The important difference with the *strafbeschikking* is that it becomes an irrevocable order (similar to an order of court) unless the accused lodges a protest timely in which case the matter may be brought before a judge. A prosecutor will be able to impose a *strafbeschikking* for the same offences where he was in the past allowed to offer a transaction, namely for crimes with a maximum sentence of not more than six years imprisonment. A *strafbeschikking* is, however, specifically excluded when “contra-indications” are present, for example where a person is a repeat offender, or in public-or media-sensitive cases.

The new method has the effect of altering the legal basis of the out-of-court disposal of criminal cases. The result of a transaction (or conditional *sepot*) is not prosecution – quite to the contrary - as long as the accused complies with the conditions, prosecution is avoided. With the *strafbeschikking* it is different. Prosecution is not averted, since the new process is regarded as an act of prosecution of a criminal charge in terms of the Criminal Procedure Act. Which leads to the question: what is meant by “an act of prosecution”? Although the Act does not contain a definition, it has

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378 Wet van 7 juli 2006 tot wijziging van het Wetboek van Strafrecht, het Wetboek van Strafvordering en enige ander wette in verband met de buitengerechtelijke afdoening van strafbare feiten (kortom: de Wet OM-afdoening – Disposal of Cases (Public Prosecution Service) Act). Stb 2006, 330. Also relevant in this regard are a number of “aanwijzingen” – directives. Originally the Aanwijzing O.M.-afdoening 2007A007 Stcrt 2008 nr 19, with the latest being the Aanwijzing O.M.-afdoening (2012A010).

379 Kamerstukken II 2004/05 29849, nr 3, p.1.

380 Aanwijzing O.M.-afdoening (2012A010).

381 See M.J. Borgers, Het vervolgingsbegrip 2013, DD 2013, p. 20.
always been understood that prosecution entails bringing a criminal charge (together with evidence in support thereof) before a judge in a criminal court. If there is no trial before a judge, there is also no “prosecution”. But in the new section of the Act a *strafbeschikking* is specifically indicated as being an “act of prosecution”. The punishment is based on the prosecutor establishing the guilt of the person. Whereas conditional *sepot* and transaction can be seen as agreements between prosecution and accused (in as much as the accused “agreeing” not to contest the transaction/conditional *sepot*), and therefore as consensual procedures, the *strafbeschikking* is an one-sided act by the prosecutor which becomes final unless the accused takes legal steps to oppose it. The only consensus required from the accused relates to his willingness (or not) to perform certain penalties. The legal character of the *strafbeschikking* is similar to, or equated to, a conviction (and sentence) by the court. This means that sanctions [*straffen*] and measures [*maatregelen*] are imposed and executed without the co-operation of the accused. Being a “criminal charge”\(^{382}\), the *strafbeschikking* will, therefore, also have to comply with Art 6 of the European Convention on Human Rights. The exclusive right to punish criminal offenders that the judge used to have is now also being shared with the prosecuting authority.

A number of reasons are forwarded for this new process. Firstly the aim is to conserve the (already) overburdened judicial capacity for serious cases that really warrant adjudication in an open court and/or the imposition of jail sentences. The second reason is to align developments in the administrative law\(^ {383}\) with the criminal law. Thirdly, the fact that the co-operation of the suspect is not required will speed up the execution of fines. A fourth reason offered is the fact that the prosecutor is already authorised to make “penalty” decisions (outside the realm of the criminal law) in terms of the WAHV. The new *strafbeschikking* is therefore an extension of these possibilities. Lastly, by replacing the current transaction process which is regulated in the Criminal Code with that of a *strafbeschikking* which is regulated in the Criminal Procedure Code, the out-of-court disposal process is brought to its correct legislative “home”. Although the ultimate intention is that the *strafbeschikking* will eventually replace transactions as a whole, it will initially continue to exist side by side with existing transaction provisions.

**Penalties imposed by the *strafbeschikking***

Sanctions and Measures\(^ {384}\) [*Straffen en Maatregelen*]

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382 A criminal charge is “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence” ECHR 10 December 1982 A56, *NJ* 1987, 828 m.n.t. P van Dijk, Zaak Foti.

383 In administrative law it has become practice that officials may make far-reaching decisions amongst which are the so-called administrative fines. See also previous chapter.

384 JH Crijns, *Het wetsvoorstel OM-afdoening: een wolf in schaapskledij*, *Sancties*, 2004 - 4, p. 227 argues that the still existing distinction between straffen and maatregelen is further eroded by
The following are sanctions and measures that may be contained in a strafbeschikking:

a. A (community) service order to a maximum of 180 hours; 385
b. A fine – payment of an amount of money to the state; 386
c. Confiscation of certain items;
d. Compensation – payment of an amount of money to the state, but which will be for the benefit of the victim(s) of the offence;
e. Suspension of a driver’s license for a maximum of six months.

Instructions [Aanwijzingen]

In addition to the sanctions and measures listed above, the strafbeschikking may also contain a number of instructions, directives or orders which the accused must comply with:

a. Relinquishing/Renunciation of title to objects that have been seized and that are subject to forfeiture or confiscation;
b. Surrendering (or payment of the estimated value) to the state of objects that are subject to forfeiture or confiscation;
c. Payment of a sum of money (or transfer of seized objects) to the state with the aim to deprive the accused, in whole or in part, of the illegally obtained gains acquired by means of, or derived from, the criminal offence; 387
d. Payment of a sum of money into the criminal injuries compensation fund or for the benefit of an organisation for the interests of crime victims; 388
e. Other instructions concerning the conduct of the accused for a probationary period not exceeding one year.

The penalties may be imposed individually or cumulatively. By not only restricting the penalties of the strafbeschikking to fines, but also including the possibility a various other sanctions, measures and instructions, the ambit of this method of disposal is quite comprehensive. All the possible penalty variations available in a transaction have been retained in the

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mentioning it in the same sentence in the wet O.M-afdoening. In Dutch criminal justice a distinction is made between sanctions (straffen) and measures (maatregelen). Both can be imposed for an offence (on its own or together). A sanction is intended to be punishment and should be in proportion to the seriousness of the offence. A measure, on the other hand, does not have the specific function to punish but serve other purposes eg treatment to reduce recidivism. In principle a measure therefore need not be in proportion to the offence. C Bijleveld, Sex Offenders and Sex Offending, in M Tonry and C Bijleveld (eds), Crime and Justice in the Netherlands, Univ. of Chicago Press, 2007, p. 325.

385 This is notably less than the maximum of 480 hours that a court may impose but also significantly more than the 120 hour maximum that was available in a transactie.

386 There is no maximum amount prescribed, but most offences have a maximum fine amount indicated.

387 The art 36e Sr procedure which applies during a trial is followed.

388 Which amount may in any event not exceed the maximum fine applicable for the applicable offence.
“strafbeschikking” although in a slightly different way. Penalties which, until now, could only be contained in “conditions” can now be imposed as substantial sanctions which can be executed. The “instructions” relate closely to transaction conditions and conditions imposed in conditional sentences (by court) in terms of art 14c Sr. It can include aspects like participation in a (drug) rehabilitation program or a prohibition to have contact with certain persons. The forfeiture of property and relinquishing of illegal gains cannot be included as sanction or measure in a “strafbeschikking” because these are both matters that often involve complicated value determinations. It may, however, be included as instructions but cannot be executed without the compliance of the accused. Sanctions that are for the first time introduced in the ambit of disposal without trial is the payment of compensation on behalf of/in favour of the crime victim and the suspension of a driver’s licence for a maximum period of 6 months. These aspects have, up to now, often featured as conditions of a conditional sepot but they are now authorised by legislation. The instructions concerning the conduct of the accused may not infringe on religious or conscience rights of the accused or limit his constitutional freedoms or rights.

Hearing the view of the suspect

Whenever the penalty to be imposed is more strenuous or invasive, more care should go into the preparation of the case. In some instances the accused has a right to be heard, and in some instances to be heard in the presence of his/her lawyer. It is existing practice to hear/consult with the accused in cases where a (community) service-order is the subject of a transaction or conditional sepot to find out if the person is able and willing to comply with the service-order. This “right to be heard” is now a compulsory part of the process and the accused must indicate his willingness to comply with the service order or the instruction regarding conduct. A suspect must also be consulted when the suspension of a driver’s license or instructions concerning the conduct of the suspect is considered. The existing practice whenever high transaction amounts are considered, is to discuss it with the accused, together with his lawyer. The reason for this is that a high transaction amount is an indication that it relates to a more serious offence. The idea behind the involvement of defence council is that it compensates for the guarantees usually associated with a judicial adjudication of the matter. The new “strafbeschikking” provision, therefore, also prescribes that where a fine and/or compensation award is in excess of € 2 000 the accused must be

389 Art 257a tweede lid d.
390 Art 257a tweede lid e.
391 The so-called “officierszitting”.
392 Kamerstukken II 2004/05 29849, nr 10.
heard in the presence of his lawyer. In case of economic crime this amount is € 10 000.

The purpose behind the right to be heard is firstly that it adds to the diligence with which the guilt of the accused is determined. The accused is given a chance to give “his side of the story”. Secondly, the accused gets a chance to indicate what the effect of the proposed sanction may be on him e.g. his need to retain his driver’s license or that he cannot afford the fine – which may lead to a different sanction or a lower fine being decided upon. Thirdly, the accused may indicate that he will not accept the strafbeschikking, in which case the prosecutor can therefore skip this step and continue straight to the issuing of a summons for trial. If the accused is unwilling to comply with the proposed sanction, the matter should preferably be directed to trial. The Act does not prescribe the manner in which the consultation must take place, but the guideline indicates that it must be by way of an “OM-zitting” where the accused is afforded the opportunity to give certain inputs. There may also be the need to have a legal representative and/or translator present. Before the conversation begins the accused must be informed of his right to silence and that he does not have to answer any question. The prosecutor must make a written report of the conversation. If the strafbeschikking deviates from the express viewpoints of the accused, the O.M. must indicate why he decided on those sanctions in the strafbeschikking in any event.

Issuing, service or sending of strafbeschikking

In some instances the accused may be given a notification that a strafbeschikking will be issued. This will be the case where a police official takes down the particulars of an offender, or where such notice is attached to the offending vehicle by an investigating official. The notice has no legal consequence, except to inform the person of the likelihood that a strafbeschikking may follow. Once the strafbeschikking is issued it must be brought to the attention of the accused. The Act does not prescribe the manner in which it must be delivered to or served upon the accused. Preference is given to personal service but if that is not possible, the

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393 Art 257c lid 2. If the person is not represented the matter should rather proceed to court. M Kessler and BF Keulen, De Strafbeschikking Studiepocket Strafrecht, deel 37 1e druk, Deventer: Kluwer:Deventer, 2008, p. 32.
394 Art. 36, lid 2, WED. No distinction is made between natural or legal persons and the requirement of legal representation is also absent.
395 Art 257c lid 3.
396 This is the so-called motiveringsplicht. The prosecutor must motivate why he includes the aspects in the strafbeschikking even though it is contra to what the accused indicated.
397 Art 257c lid 4 Sv.
398 In terms of art 126 RO the prosecutor can mandate other persons working for the prosecuting authority to issue the strafbeschikking on behalf of the prosecutor. Also Aanwijzing O.M.-afdoening (2012A010).
document is sent by regular mail\(^{399}\) to the accused’s registered address\(^{400}\), his work-or residential-address or the address given/provided by him. In the case of high fines or compensation orders the letter must be sent by registered mail.

**Opposing a strafbeschikking [verzet] and consequences of not opposing**

An accused who does not agree with a strafbeschikking has the right to oppose it and to insist on a trial before a judge. This is an important new element in that the onus shifts to the accused to take steps. Opposing a strafbeschikking is done in person (or by a legal representative) or in writing within fourteen days of receiving it or of becoming aware of it.\(^{401}\) Opposition is done at the O.M. office mentioned in the strafbeschikking, indicating the name of the accused, the strafbeschikking that is being opposed and an address in the Netherlands for further notices. Process documents mailed to this address are deemed to have been served in person. Unlike the WAHV protest, the grounds for opposition to a strafbeschikking need not be given. No payment of security for costs is required but, similar to the transaction measure, a higher amount may be asked for by the prosecutor if the case proceeds to court and the accused does not indicate a reasonable reason for the opposition.\(^{402}\)

No opposing may be done if the person has voluntarily complied with the strafbeschikking. An accused who is legally represented may also in writing waive the right to oppose a strafbeschikking. Once a strafbeschikking is opposed, the prosecutor may withdraw\(^{403}\) or amend\(^{404}\) it, giving the accused a copy of the notice of withdrawal or the amended strafbeschikking.\(^{405}\) The amended strafbeschikking must still be based on

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\(^{399}\) Research has shown that the Dutch postal service delivers 99.8% of mail items within 48 hours of it being posted.

\(^{400}\) Basisadministratie persoonsgegevens adres.

\(^{401}\) There is an exception to the fourteen days rule – in the case of a fine not exceeding € 340 for a misdemeanour which took place within 4 months of issue of the strafbeschikking, the strafbeschikking becomes irrevocable (meaning no more opposition can be done) 6 weeks after the date of issue. Art 257e lid 1 Sv. This is the so-called “GBV-fictie” see also Aanwijzing O.M.-aftoening 2007A07.

\(^{402}\) This will be the case where the accused opposes the matter simply to gain time. Aanwijzing O.M.-aftoening 2007A007. The increase that the prosecutor may ask in these circumstances may be to a maximum of 20%. The strafbeschikking must clearly indicate this risk of “unwarranted” opposition.

\(^{403}\) An obvious reason for withdrawal will be if the prosecutor concludes that the objection is valid for example by proof of innocence of the accused. It is not quite clear whether a prosecutor may withdraw a strafbeschikking where no protest is lodged. See T Kooimans and S Meijer, De positite van het openbaar ministerie in de executie-fase na inwerkingtreding van de Wet O.M.-aftoening, DD 2007, p. 459. From the Memorie van Toelichting (Kamerstukken II 2004, 05.29849 p 73) it seems to be possible.

\(^{404}\) After receiving the opposition the prosecutor may conclude that the strafbeschikking could be improved – in essence creating a new strafbeschikking which may again be subject to opposition.

\(^{405}\) It can well be argued that this opportunity of the O.M. to “reassess” the matter after receiving the opposition is in effect an informal re-evaluation of the case. The Aanwijzing indicates that the reassessment must be done by a different prosecutor than the one who issued it in the first place.
the same (prohibited) conduct, but the prosecutor may decide to charge for a lesser offence or penalise differently. The accused may withdraw his opposition against the amended strafbeschikking, or may comply therewith, bringing the opposition effectively to an end. It is, however, not necessary for the accused to lodge a new opposition to the amended strafbeschikking – the initial opposition remains valid unless the accused withdraws it or complies therewith. If the strafbeschikking or the opposition thereto is not withdrawn, the matter will result in a trial before a judge.

**Trial before a judge**

The prosecutor must notify the accused at least 10 days before the day of the trial. The call-up notice [oproeping] contains the charges that the court will adjudicate. The call-up notice may be issued there and then when the accused visits the O.M. office to oppose the case. When the opposed matter is heard in court, the (criminal) trial court continues with a complete trial on the merits and it is not only a testing/adjudication of the strafbeschikking as is the case with WAHV protest before the (administrative) judge. The trial continues even if the accused is not present that day, if the call-up was properly done. The judge may rule that the opposition is not valid if it was done outside time or does not comply with the requirements. A trial before a judge will also result in cases where the penalties contained in the strafbeschikking cannot be (fully) executed or where the Court of Appeal has ordered prosecution in terms of section 12 Sv after a complaint. (See later for further discussion). Whenever the court adjudicates the matter it can make any order allowed for by law, but it will “destroy” the strafbeschikking in the process.

**Execution/enforcement of a strafbeschikking.**

If no opposition is lodged the execution of a strafbeschikking can commence fourteen days after it has been served in person or has been sent by mail, unless the accused waived his right to protest, in which case execution can commence immediately. The CJIB - central judicial collection agency - assists in this regard. Execution is temporarily suspended by an opposition which is still pending unless the O.M. is of the opinion that the opposition was done clearly out of time. Execution follows the normal process as if the strafbeschikking was a judgment/sentence by court. In the case of a fine the usual increase of the amount with each further notice is applicable similar to WAHV fines, unless it is not clear that the accused indeed

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406 The accused may agree to a shorter time-period. Art 265, tweede lid, Sv.
407 Tenlastelegging. In essence the same charges originally contained in the strafbeschikking but possibly in more detail.
408 Art 24b Sr prescribes a warning-notice following sentence/strafbeschikking. Thereafter a further notice in terms of Art 573 Sv must follow to inform the person that the money will now be deducted from his bank account or other measures of recovery [verhaal].
received the relevant documents/notices. In principle the *strafbeschikking* is deemed to be executable without the co-operation of the accused. Where there’s money in a bank account, or a garnishee order against salary is possible, this is indeed the case. But when the penalty entails the completion of community service or some other action by the accused, the principle does not really hold. If a fine is not paid, or not paid in full, a procedure is available to the prosecutor to bring the matter before a judge in the district where the accused’s address is, with the sole purpose of obtaining an order for the temporary detention of the accused pending the payment in full. This procedure is known as “gijzeling”. This procedure is unique\textsuperscript{409} to out-of-court disposal since a sentence by the court already includes alternative imprisonment [*vervangende hechtenis*] in the case of non-payment of fines. The duration of temporary detention is one day for each € 25 outstanding, with a minimum of one day and a maximum of one week per charge contained in the *strafbeschikking*. The court does not consider the validity of the *strafbeschikking* or adjudicate the charges itself, but only deals with the matter of non-payment. The accused receives a call-up notice to appear before the court and has a right to state his reason for not paying. If it is clear that the accused is unable to pay, *gijzeling* will not be ordered. The purpose of *gijzeling* is to force those who can, but are unwilling to pay to do so. The detention is terminated upon payment of the outstanding amount. The *gijzeling*, however, does not cancel the fine. If *gijzeling* is also not successful, the prosecutor may set the matter for trial where it is possible that the trial judge may impose regular imprisonment as sentence in place of the fine.

A *strafbeschikking* is only fully complied with when all sanctions, measures and instructions contained therein are completed. What method is used if other penalties (service order, victim compensation etc.) are not complied with? In this situation the O.M. can reassess the situation to determine whether it wants to continue with the matter to trial before a judge – if further prosecution is indeed expedient.\textsuperscript{410} The O.M. will also have to determine what sanctions will be requested, since the sanctions originally contained in the *strafbeschikking* are not effective. If the O.M. decides to continue with the matter before a judge, he will have to summon the accused and a call-up notice will not suffice. If a matter lands before a judge as result of an unsuccessful execution, the judge will take the sanctions which have indeed been successfully executed as well as any temporary detention which may have taken place into consideration when determining an appropriate sentence. The O.M will in such event request a more severe penalty than the penalty that was initially included in the *strafbeschikking*.\textsuperscript{411}

\textsuperscript{409} Gijzeling is also used against uncooperative witnesses.

\textsuperscript{410} See Aanwijzing gebruik sepotgronden 2009A016. At this stage it is still possible to waive (further) prosecution.

\textsuperscript{411} Aanwijzing OM-afdoening (2012A010).
Consequence of a strafbeschikking

If a strafbeschikking has been fully executed or withdrawn by the prosecutor, no further prosecution with regard to the same facts are possible, unless ordered by the Court in terms of Art 12 or new facts/evidence emerge. A strafbeschikking contains a determination of guilt and is equated to a judicial conviction. Therefore it follows that a strafbeschikking may be of public interest. General administrative measures may prescribe that strafbeschikkingen relating to certain categories of felonies be publicised. This will not be the case with regard to misdemeanors. These regulations will probably be similar to the publicity given to “high” and “exceptional” transactions. A procedure is also available to 3rd parties (who doesn't have a direct interest in the matter) to request copies of a strafbeschikking. The O.M. must decide whether it is necessary to supply this information, or whether an anonymous notice will suffice. A person unhappy with the decision of the O.M. may complain to the court where a judge (in chambers) will then decide if the information must indeed be supplied or not. The Act also provides that persons with a direct interest in the alleged offence or who have suffered harm must be supplied with a copy of any strafbeschikking issued as result of the offence.

Unlike the transaction, which is in essence an (indirect) agreement, the strafbeschikking is an independent determination of guilt, and thus more in line with a conviction by court. But similar to a transaction, all strafbeschikkingen except those relating to misdemeanors or involving a fine of less than € 100, are registered as “judicial information” and may only be supplied to persons/institutions executing a public function.

Staged/phased introduction of strafbeschikking

Different parts of the act have been introduced in stages over a period of time. This has the implication that the transaction will still be used until such time as it has completely been replaced by the strafbeschikking. For a time it may even be possible that either a strafbeschikking or a transaction...
may be considered as reaction to delinquent conduct. In principle it is also possible to bring the offences currently being dealt with under the WAHV into the scope of a strafbeschikking, but this is, for now, not immediately applicable. The introduction of the strafbeschikking commenced for misdemeanors and “simple” felonies which are standardised by the BOS/Polaris guidelines. From the 1st February 2008 a strafbeschikking could be imposed in the districts of Amsterdam and Den Bosch in case of contravention of section 8 WVW (driving under the influence). In practice this is done by the CJIB on behalf of the O.M. For a start only a fine [kale boete] could be imposed, but this is now extended to include a confiscation order and the suspension of the person’s driver’s license. A second phase has authorized police and other officials to also issue strafbeschikkingen (see 3.7.10). During a third phase the strafbeschikking will be extended to the full scope of misdemeanors and felonies with a maximum penalty of 6 years incarceration. According to the directive, a prosecutor is compelled to apply a strafbeschikking if the case falls within the scope indicated in the directive. During the period of transition some measure of unfairness may occur. This is inevitable, given the staged introduction of the new measure. The directive contains a number of contra-indications. When these are present, a strafbeschikking may not be employed. In the initial phase this relates to aspects such as whether the offence occurred in connection with other offences, whether the accused is a recidivist, underage etc. The Aanwijzing O.M-afdoening indicates that an evaluation of the implementation of the new measure will be done 5 years after its introduction. Only then, after a positive evaluation, will the transaction-measure finally be scrapped.

Strafbeschikking by investigating officials (police) or administrative bodies

The authority to issue a strafbeschikking was in the beginning not extended to other persons or institutions except the O.M. but in the second phase this may now take place. Police officials and other administrative bodies executing public functions may also now issue a strafbeschikking for certain (limited) categories of offences (so-called “code offences”). The new Section 257b Sv which authorises police strafbeschikking is very similar to Sec 74c Sr. which authorises police transactions and is also in line with the practice and procedures of the WAHV. A strafbeschikking issued by the police is restricted to certain (limited) offences and to a fine of a maximum of € 350. Administrative bodies (and local authorities) are authorised to issue strafbeschikkingen in terms of Section 257ba Sv and

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418 Although the strafbeschikking is not yet fully implemented, there has already been a total of more than 80 800 strafbeschikkingen issued in 2011 – 25 300 for felonies, and 55 000 for misdemeanors. Source: Jaarbericht O.M. 2011.
are at present limited to a number of offences regarding nuisance (\textit{overlast}-littering, noise etc.).\footnote{Aanwijzing bestuurlijke strafbeschikking overlastfeiten, 2008A027 and Richtlijn voor strafvordering bestuurlijke strafbeschikking overlastfeiten, 20008R007 – applicable since 1 January 2009. AR Hartmann, \textit{De bestuurlijke strafbeschikking: panacee voor de gemeentelijke handhaving?} \textit{PROCES} 2010 - 89 - 2, p.64.} The local authority decides to impose a \textit{strafbeschikking}. It then compiles a \textit{process-verbaal} which is forwarded to the CJIB who indeed issues (and administers the execution of) the \textit{strafbeschikking}. Opposition thereto is, however, lodged with the relevant O.M. Since 1 July 2011 it is also possible for the Receiver of Revenue to issue a \textit{fiscale strafbeschikking}.\footnote{Besluit van 23 december 2009, Stb. 2010, 10 and Besluit van 20 juni 2011, Stb 2011, 308. See also AR Hartmann, \textit{De strafbeschikking: naar nieuwe grenzen van buitengerechtelijke afdoening binnen het strafrecht}, \textit{Tijdschrift voor sanctierecht & compliance}, 2 mei 2012, p. 58 as well as various sources cited by him on p. 65. P Fortuin, \textit{De Strafbeschikking}, \textit{Nederlands Tijdschrift voor Fiscaal Recht}, 2011-44.} The \textit{fiscale strafbeschikking} cannot impose a penalty of (community) service. However, any \textit{strafbeschikking} is still issued under the (indirect) supervision and according to the guidelines of the Board of Attorneys-General. The O.M. is still responsible as from the moment an opposition is lodged, regardless of whether the \textit{strafbeschikking} was originally issued by the O.M. or any other body. A \textit{strafbeschikking} issued by other bodies may be withdrawn or changed/amended by the O.M.\footnote{Art 257e, achtste lid Sv.} The result is hence that administrative bodies are allowed to conclude an act of prosecution, thereby bringing the O.M.’s prosecution monopoly to an end.\footnote{T de Lange, \textit{Over de vlag en de lading. Een bespreking van de Wet O.M.-afdoening}, \textit{Strafblad} 2007, p.69. Also AR Hartmann, \textit{Strafbeschikking en bestuurlijke boete: wildgroei in de handhaving?}, \textit{Justitiële verkenningen}, 2005 – 31 – 6, p. 85 - 96.} De Lange therefore argues that the O.M. will in future have to work closely together with other agencies to create synergy of resources like investigative capacity, information and knowledge etc.\footnote{A de Lange, \textit{De strategische terugtocht van een monopolist – in het belang van een beheerste en evenwichtige toepassing van het strafrecht}, \textit{Strafblad} 2010 – 3, p. 176.}  

### 3.8 Complaints against non-prosecution or method of prosecution\footnote{For a discussion of the history of the beklag procedure, see CPM Cleiren, \textit{De procedure van het beklag tegen niet-vervolgen op de schop}, \textit{Strafblad} 2008, p. 534. During 2011 the Court dealt with 2 400 section 12 complaints, of which about 11% were found to be valid. Source: Jaarbericht O.M. 2011.}  

Dutch law does not recognise the right of unhappy victims of crime to institute private prosecution.\footnote{Unlike other legal systems, like South Africa’s, that allow for private prosecution by persons dissatisfied by the decision of the prosecutor not to prosecute a specific offender.} Criminal prosecution is either done by the O.M. or a specific officially authorised public institution. The O.M. is, however, in a very powerful position: Expediency allows that cases where conviction is possible be waived, or otherwise disposed of, whist the victim of the offence cannot institute prosecution him/herself. For this reason the Code of Criminal Procedure provides that anyone who has a direct
interest in the prosecution of an offender can complain against the decision of the O.M. not to proceed with the case to trial. The purpose of the complaint procedure is to allow the court to test the exercising of discretion by the O.M. However, as De Lange indicates, this procedure is not only important to protect the individual's right to complain, but also has a general corrective and controlling function.

The examination by court following a complaint deals both with the legitimacy of the decision as well as the policy according to which it was taken itself.

The person against whom prosecution is sought also has an interest in the outcome and is therefore also a party to the dispute.

This complaint procedure is regulated by art. 12 Sv. and it applies in a number of circumstances:

1. Where criminal conduct is prosecuted, but for a "lesser" offence when a more serious offence can be proved;
2. Where criminal conduct is not prosecuted or prosecution is not continued (conditionally or unconditionally);
3. Where a case is joined ad informandum;
4. Where a transaction is offered to the accused;
5. Where a strafbeschikking is issued.

There is a duty on the prosecutor to inform persons with a direct objective interest in the prosecution of the specific criminal conduct. The interests can be both material as well as immaterial. The most obvious category of interested parties are victims, but the right can also extend to relatives. HR 25 June 1984, NJ 1984, 714 m.n. SCH; VR 1996, 203. It is uncertain whether the prosecutor may continue with the prosecution pending the art. 12 hearing, but it will in any event be unwise: A Minkenhof, De Nederlandse strafvordering, 9e druk, bewerkt door J.M. Reijntjes, Kluwer: Deventer, 2002, p. 92. Where an O.M. zitting (interview/consultation with accused) is held, the victim also has the right to attend. M Duker & M Malsch, Behartiging van slachtofferbelangen bij de buitgerechtelijke afdoening van strafzaken, Trema 6 June 2011, p. 217.

In cases of waiver - written notice to interested party, art. 51f lid 3 Sv. The Aanwijzing slachtofferzorg prescribes that, in the event of a sepot, the interests of the victim must be taken into account. The notification must also contain the reasons why the notification of the prosecution in the case of his prosecution decision. This is not only in cases of where there is someone with a direct interest in the prosecution or not of criminal conduct. The notification is limited to persons with a personal, objective interest in the prosecution of the specific criminal conduct. The interests can be both material as well as immaterial. The most obvious category of interested parties are victims, but the right can also extend to relatives. HR 28 Feb 1984, NJ 1984, 490; Id's Gravenhage 27 mei 1997, NJ 1997, 601. The notification of the prosecutor to inform persons with a direct interest in the case of his prosecution decision. This is not only in cases of where there is someone with a direct interest in the prosecution or not of criminal conduct.
must also indicate the fact that the interested party can complain against the decision.436

Requirements of the complaint

A person with a direct interest in the alleged offence can lodge a complaint. It can be a complaint against the police not proceeding with investigation or offering a transaction. The prosecutor must then review the decision and if he decides to leave it as it is, it becomes a decision by the prosecutor and the complainant must follow the next step. If it was the prosecutor who made the contested decision, the aggrieved party may lodge a written complaint [klaagschrift] with the Court of Appeal. The complaint must contain concrete facts upon which the complaint is based and must identify the prosecution decision that is complained against. The complaint procedure applies both where a decision not to prosecute has already been made, and made known, as well as to instances where the O.M. postpones the making of such decision indefinitely. In these circumstances the court may conclude that, by not making a decision, the O.M. has in fact decided not to prosecute the case.437 This will not always be the case since the O.M. may have legitimate reasons why it is postponing the taking of a decision.

Review by the Court

Once the complaint is received by the clerk of the Court, the prosecutor at the Court of Appeal [advocaat-generaal] is requested to prepare a report. The prosecutor who made the decision will have to supply the necessary information for the completion of this report. In this hierarchical position, this may lead to the prosecutor being instructed to change his decision. After the report has been received, the Court may call upon the complainant to state his case. The court will also call upon the person whose prosecution is sought438 to present his case if the court is considering an order that the prosecution must continue.439 The complaint-hearing takes place in chambers, (behind closed doors), and both the complainant and the person whose prosecution is sought are entitled to assistance.440 The person whose prosecution is sought is allowed the same rights of an accused in a criminal trial, namely he cannot be compelled to answer questions. The O.M., through the advocaat-generaal, will also be afforded an opportunity to defend its decision not to prosecute.

436 Notice by attorneys-general, Stcr. 17 February 1986, nr. 33. Also Aanwijzing slachtofferzorg 2010A029.
437 GJM Corstens,Het Nederlandse strafprocesrecht, 7e druk, bewerkt door MJ Borgers, Arnhem: Gouda Quint,2011.
438 The legislation avoids the term “accused” in this context and constantly uses the term: the person whose prosecution is sought.
439 The court may only order this after the person whose prosecution is sought was heard or at least properly called-up to present his case - art. 12e lid 2.
440 Art. 12f lid 1. This representation need not necessarily be legal representation.
The Court then reviews the decision of the prosecutor and can confirm it, or can instruct the prosecutor to continue with prosecution against the offender. The court cannot order a conditional waiver or transaction. When the court reviews the decision of the prosecutor, not only must it determine the probable success\textsuperscript{441} of a prosecution, but it must also consider the expediency of the specific prosecution.\textsuperscript{442} If this had not been the case, a prosecution decision based on expediency could always be successfully complained about. Although a substantial\textsuperscript{443} evaluation of the value and wisdom of prosecution is allowed, and the Court is entitled to make a new prosecution decision, in practice it seems as if the courts are only marginally testing the expediency component.\textsuperscript{444} If the court confirms the decision not to prosecute, this ends the specific procedure against the person whose prosecution was sought. Even though the court has turned down a complainant’s request for prosecution, the O.M. may still decide to prosecute the matter after all, unless they are restricted from doing so due to the vertrouwensbeginsel. The court must motivate its decision and copies must be given to the O.M., the complainant and the person whose prosecution was sought. The normal right of an accused to protest a charge against him [bezwaarschrift] is not available to the accused in a case where the court has ordered prosecution in terms of art. 12 unless new facts or circumstances come to light.\textsuperscript{445} The decision of the court in terms of art. 12i lid 1 is final and no further appeal or review is possible.\textsuperscript{446}

The effect of a successful complaint is that prosecution against the offender must continue. In the case where the offender has already complied in full with the transaction conditions, and a trial is now ordered, legislation prescribes that any payments that were done by the accused in compliance with the conditions of the transaction, must be returned to him.\textsuperscript{447} No similar legislative provision exists with regard to other methods of diversion (conditional waiver or strafbeschikking for example), but is would

\textsuperscript{441} In this regard there must at the very least be a reasonable presumption of guilt on the side of the person whose prosecution is sought – AL Melai, Het O.M., de vervolging en de rechter, DD 1973, p. 457.

\textsuperscript{442} Art. 12i lid 2 -Het gerechtshof kan het geven van zodanig bevel ook weigeren op gronden aan het algemeen belang ontleend. The more detailed and complete the expediency motivation of the prosecutor, the less the chance will be that the court will overturn it.

\textsuperscript{443} See CPM Cleiren, De procedure van het beklag tegen niet-vervolgen op de schop, Strafblad 2008, p. 534 who argues that, unlike in earlier days when prosecution decisions were made ad hoc, it is nowadays mostly the result of extensive and public policy which are also subject to democratic (political) testing. A decision deviating from this policy already has to be motivated within the hierarchical system. Additional (substantial) testing of the policy by a judge on top of this seems rather odd. Cleiren argues, quite correctly I may add, that the testing by the court should be restricted to whether the prosecutor’s decision deviates from the policy or is in conflict with the principles of a proper process.

\textsuperscript{444} GJM Corstens, Het Nederlandse strafprocesrecht, 7e druk, bewerkt door MJ Borgers, Arnhem: Gouda Quint,2011. See also MJA Duker, De toetsingsruimte van het hof in beklagzaken ex artikel 12 Sv. DD 2009, p. 428.

\textsuperscript{445} Should the court find the new facts relevant and the objection valid, the final say still rests with the Court of Appeal who still reviews the finding of the court.

\textsuperscript{446} HR 18 October 1994, NJ 1995, 118 m.n ThWvV.

\textsuperscript{447} Art. 12b lid 2 Sv.
be unfair and could lead to injustice if payments made conditional to a waiver are not paid back if the waiver is reversed by the court.

**Limits to the Court’s review power**

The complaint procedure does not apply where the O.M. has already issued a notice of non-prosecution and a complaint was not done within 3 months from when the interested party received notice of this.\(^{448}\) If the complaint is made outside the 3 months, only new information\(^ {449}\) would allow for the reopening of the case. Even the court cannot order prosecution in the absence of such new information. In the case of a notice of conditional waiver or of an informal waiver, where no such notice was issued, the court may hold that the creation of an expectation that no prosecution will continue [‘vertrouensbeginsel’] is sufficient to exclude such further prosecution. In these cases, however, the judge has room to come to the conclusion that prosecution should take place, even though the expectation has been raised that it would not.\(^ {450}\)

In the case of a complaint against a transaction, art. 12k prescribes that the complainant must lodge the complaint within 3 months from the date on which the offender complied with the transaction conditions.\(^ {451}\) A complaint against a transaction for a misdemeanour is not possible\(^ {452}\) and some commentators argue that the chance of successfully complaining against a transaction decision is very slim.\(^ {453}\) A complaint against a *strafbeschikking* must be done within 3 months of the complainant becoming aware of it\(^ {454}\) but it is also possible outside this timeframe if the *strafbeschikking* is not complied with in full. A complaint against a decision of the prosecutor to add a charge *ad informandum* is also possible. The court may order that the charge be prosecuted independently after weighing the interests of the interested party and that of the alleged offender. The question is though, whether a complaint in terms of art. 12 suspends the *ad informandum* case until the Court of Appeal has ruled on it?\(^ {455}\)

### 3.9 Objection by the accused against the summons\(^ {456}\)

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\(^{449}\) Art. 255 lid 1 Sv – nieuw bezwaar.

\(^{450}\) If “serious interests” - zwaarwichtigte belangen - of the complainant necessitates it.

\(^{451}\) The prosecutor has the duty to relay this information to the victim.

\(^{452}\) Art 12 l Sv.

\(^{453}\) MS Groenhuijsen, Schadevergoeding voor slachtoffers van delicten in het strafrecht, (diss Leiden) 1985.

\(^{454}\) Art 12k lid 1 Sv.

\(^{455}\) If the charge has already been considered for judgement purposes, A Minkenhof, De Nederlandse strafvordering, 9e druk, bewerkt door J.M. Reijntjes, Kluwer, Deventer, 2002, p. 95 argues that the ne bis in idem rule should prevail.

Just as the victim/person with a direct interest has a right to complain against the prosecution decision by the prosecutor, the accused who is summoned has the right to apply to court to have the decision of the prosecutor to charge him with an offence, set aside. This takes place before the commencement of the public trial. The purpose is to allow the accused to object to needless prosecution in public. Unlike art. 12 complaints, which are lodged with the Court of Appeal, the accused must raise his objection to the summons or the notice of further prosecution with the court that will eventually hear the case if the objection is not allowed. The summons, or notice of further prosecution, must indicate the right of the accused in this regard. Within eight days of receipt of the notice of further prosecution or the summons, the accused must deliver his notice of objection [bezwaarschrift] to court. This must in any event be before the case is called for trial. The notice of objection must contain the grounds upon which the objection is based. The accused is not bound to only these grounds when the hearing takes place, and the grounds may relate to factual defences as well as legal defences. The objection is heard in chambers and both the accused and prosecutor are given an opportunity to present their case. The effect is that the protest in chambers precedes the public trial. The judge must determine whether there is sufficient evidence for a probable conviction on the charge contained in the summons and the expediency of the charge is not examined. The purpose of the objection procedure is not to reach any factual conclusion and it retains a provisional and summary character. The criterion before the judge will dismiss the prosecution is whether a conviction against the accused is “highly unlikely”. If the objection is upheld, the accused can be placed beyond prosecution [buitenvervolging] and only new facts or circumstances can lead to a new charge. If the objection is rejected, the public trial takes place before the very same court. No appeal is available for the accused if his bezwaarschrift is unsuccessful. Experience has shown that the accused is very seldom successful with an objection against the summons and in practice it is seldom used. Corstens nevertheless argues that the existence of such a mechanism is important if only to keep the O.M. on its

457 Bijl. Hand. TK nr 22 584, 3 p. 11-12.
458 Kennisgeving van verdere vervolging – this is a notice issued by the prosecutor to inform the accused that a decision has been taken to prosecute him, but that the summons is not ready to be served yet. The accused must lodge his objection against this notice and cannot wait for the summons – art. 250.
459 Art. 248 and 260 lid 3.
460 Behind closed doors, since the question to be decided is indeed whether a public trial should take place.
461 Hoogst onaannemelijk - HR 29 september 1951, NJ 1952, p. 58 m.n WP.
462 The O.M. can appeal against this decision. Art. 252 lid 1.
463 And it may even be before the very same judge(s) – although GJM Corstens, Het Nederlandse strafprocesrecht, 7e druk, bewerkt door MJ Borgers, Arnhem: Gouda Quint,2011. p 500 argues that this would not be ideal.
Since the court would only uphold the objection when it is obvious that the conviction of the accused on the charge is “highly unlikely”, the testing is rather marginal. The prosecutor remains *dominus litis* until the case is called for trial, so the prosecution can still be withdrawn the summons.

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