

The Dutch Punishment Order: Controversy, Comparison and Compromise

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SUMMARY

The introduction of the punishment order in 2008 reflects a fundamental change of the Dutch criminal justice system. For the first time an authority other than the judge may decide on guilt and punishment in the Netherlands. Many authors have debated the punishment order's constitutional compatibility, disputed the standard of legal protection and questioned the need of the punishment order. This study does not only discusses the punishment order and its controversies, but also aims to find solutions that could mitigate the controversies surrounding the Dutch punishment order. This is done by conducting a legal comparison including equivalent punishment orders from Germany, Switzerland, France and Sweden. The study shows that some fundamental differences exist between the Dutch punishment order and these equivalent punishment orders. Consequently, some of these differences, such as the involvement of a judge or the approval of the accused, could prove useful to mitigate the Dutch controversies. The study concludes with recommending much needed empirical research to confirm current findings.

INTRODUCTION

The Dutch criminal justice system is often characterized as either ‘moderately adversarial’ or ‘moderately inquisitorial’ (Hirsch Ballin, 2012). Either way you look at it, strong inquisitorial elements are present within the Dutch system, such as the active involvement of the judge and the goal of, theoretically, finding the truth. The prosecutor also has this goal of truth finding instead of merely accusing the defendant and trying to convince the judge of his¹ guilt, as is the case in pure adversarial systems. However, the Dutch criminal justice system has undergone some fundamental changes in the recent years (Van de Bunt & Van Gelder, 2012). Particularly noteworthy is the changed role of the prosecutor, as evidenced by the punishment order (*strafbeschikking*) entered into force in 2008 (Wet OM-afdoeing van 7 juli 2006, Stb. 330). The Dutch punishment order is an efficiency measure and is the subject of this study. For the first time an authority other than the judge may decide on guilt and punishment. As a consequence the prosecutor has become a true ‘judge before the judge’: he makes a formal decision on guilt and imposes punishment. This reflects a fundamental breach with the traditional dogmatic relationship of the prosecutor vis-à-vis the judge, and their respective roles within the criminal justice system. It appears Dutch criminal justice policy is dominated by a desire for efficient law enforcement and, according to some, by penal populism (Downes & Van Swaaningen, 2007; Pratt, 2007; Roberts, Stalans, Indermaur & Hough, 2003; Tonry, 2007).

Background

Developments of penal populism and the increasing strive for efficient law enforcement are not unique to the Netherlands. In the Western world, both in Europe and in the United States this is a common trend. Signs of penal populism have first presented themselves in the United States in the mid-1980’s, and spread over to the United Kingdom and the rest of Europe (such as France, Italy, Luxembourg Spain and Portugal) since the 1990’s. The same applies to the Netherlands where safety and security has increasingly become the focus of criminal policy (Daems, 2007; Roberts, Stalans, Indermaur & Hough, 2003; Tonry, 2007). Additionally, the emphasis on efficient law enforcement and the goal of reducing the workload of criminal judges have always been common themes for any

¹ For simplicity reasons every time the text refers to ‘he’, also ‘she’ is implied.

prosecution service in the (Western) world, and are now strengthened due penal populism developments (Jehle & Wade, 2006; Peters, 2012; Gilliéron, 2014). The prosecution service is regarded as part of the criminal justice system, a system which is constantly under pressure to deal with a high number of cases. In this coherent criminal justice system the prosecution service is increasingly becoming the decisive stage reducing the courts' but also its own workload by means of simplified methods and proceedings (Jehle & Wade, 2006).

This urge for efficiency is not surprising because if one looks at the numbers of offences and suspects recorded, one can observe that for decades a rise in registered crime has taken place in Europe, even if in some countries the crime rate has stabilized or is declining, such as in the Netherlands (Aebi, 2004; Aebi & Linde, 2011; Jehle & Wade, 2006; Kalidien & De Heer-de Lange, 2013; Peters, 2012).² Especially the incidence of the most frequent and ordinary crimes, such as traffic offences, thefts and other minor wrongdoings, has risen strongly (Jehle & Wade, 2006). When maximum capacity has been reached, criminal justice systems cannot cope with this increased load unless more staff is hired or working mechanisms change. Additionally, the economic crisis has put emphasis on budget cuts and efficiency in the Netherlands (Peters, 2012). Therefore, in principle three possibilities remain to maintain an efficient criminal justice system that can deal with the increased caseload. First of all, if the system would want to operate in its traditional manner in which (all) cases are prosecuted by the prosecution service and brought to charge in a full and open criminal trial, this would mean a considerable increase in the amount of trained staff, both prosecutors and judges. This option would also add considerably to the financial costs, which is not an ideal scenario for any criminal justice system (Gilliéron, 2014). Another option is the decriminalization of material law. Usually the threat of a criminal reaction is removed for less serious law violations. Traffic offences and minor wrongdoings are transferred to the 'administrative' category, and the criminal reaction is replaced by administrative proceedings and fines. In Europe, especially the Netherlands and Germany have made considerable use of this option (Jehle & Wade, 2006). The third option seems the most used option in (Western) Europe and concerns discretion used by police or prosecution in combination with simplified criminal procedure. Evidence of this can be found in the fact

² For a clear European overview see the two studies conducted by Aebi (2004) and Aebi & Linde (2011). In these studies police recorded crime rates over the period 1990-2000 in 16 Western European countries and conviction statistics over the period of 1990-2006 in 26 European countries are analyzed respectively.

that today in most legal systems not only can cases be dropped because the accused's guilt is of a minor nature or when there is no public interest in a prosecution, but criminal proceedings also contain procedural short cuts and simplifications (Jehle & Wade 2006; Gilliéron, 2014). Examples of these proceedings are the conditional disposal, the settlement offer, the Dutch punishment order, as well as equivalents of this measure in Germany, Switzerland, France and Sweden. In these procedures, the prosecutor plays a central role and becomes the 'judge before the judge'. Prosecutors thus gain increasing importance and play a vital role in the criminal justice system as they are given the responsibility to decide how to deal with incoming cases and suspects (Jehle & Wade, 2006).

The Netherlands

The vital role of the prosecutor especially applies to the Netherlands, where the Public Prosecution Service (*Openbaar Ministerie* or OM) has a central and monopolistic role in criminal proceedings. The prosecutor controls the investigation and originally his task is to prosecute cases before court on the basis of expediency, otherwise known as the opportunity principle (Van Daele, 2003). This principle enables the prosecutor to drop a case if it is not in the 'public interest' to prosecute, resulting in broad discretionary powers to use diversionary measures (Van de Bunt & Van Gelder, 2012). For example, a decision not to prosecute can be conditional and is frequently used (e.g. according to official prosecution statistics at least 20,4% of regular court cases was (conditionally) dropped by the prosecution service in 2012; Blom & Smit, 2006).³ An important measure to compare with the punishment order is the 'transaction' (*transactie*, henceforth transaction), basically a settlement offer. Since 1921 the prosecutor is authorized to resolve infractions (*overtredingen*) by offering these 'transactions', and due to efficiency reasons, since 1983 this includes crimes (*misdrijven*) with a statutory maximum of six years imprisonment as well (Van Daele, 2003; Van de Bunt & Van Gelder, 2012). By accepting one or more specified conditions, usually paying a sum of money, the accused could, on the basis of consent, avert prosecution. The goals of this measure are clear: lowering the workload of the courts and a swifter criminal justice response towards certain (minor) wrongdoings. The punishment order has been introduced to replace the 'transaction' as part of new government policy

³ See also <http://www.jaarberichtom.nl/>

plans to make the Netherlands safer by tough and even more efficient law enforcement (see *Veiligheidsnota 'Naar een veiliger samenleving'*; Parliamentary Papers II 2002/03, 28 684, 1).

Origins of the punishment order

The extrajudicial disposal of offences has undergone a constant development in the Netherlands and the Traffic Regulations Administrative Enforcement Act (WAHV) is another example, as it moved a number of traffic violations from criminal law to administrative law. The very first origins of the punishment order can be found in the preliminary advice of the author Knigge⁴ in 1994 to the Dutch Lawyers Association (*Nederlandse Juristenvereniging*) and the proposal of the Commission Korthals Altes (named after its chairman; 1995)⁵ a year later. Knigge proposed a further distinction by categorizing criminal proceedings into three different tracks. The Commission Korthals Altes suggested to make transactions executable after a certain period of time. In this latter proposal the notion of consensus remained, and the accused still had to agree with the conditions of the transaction. The only difference was that the prosecutor could eventually, after the agreement was made, force the accused to meet the conditions. Later, a research project, called *Onderzoeksproject Strafvordering 2001*,⁶ contained the proposal to give the prosecution service the power to deal with cases in an extra-judicial fashion. The goal of the project was to make Dutch criminal procedure more efficient and adapted to contemporary society (Van den Wyngaert, 2006). The research group came with a so called 3-tracks model (*Driesporen model*), a model similar to that of Knigge, in which criminal offences should be dealt with (Hartmann, 2001; Hartmann, 2002; Knigge, 2002). The third track was reserved for relatively frequent and minor offences, in which imprisonment was seen as an unnecessary response. For this third track category of offences extra-judicial settlement was deemed adequate. Alongside the research project a bill was being prepared within the legal department, in which the present law *Wet OM-afdoening* directly originates from. In full, this bill and subsequent law is called '*Wet tot wijziging van het Wetboek van Strafrecht, het Wetboek van Strafvordering en enige andere*

⁴ G. Knigge is a former professor of Criminal Law at the University of Groningen and is currently an Advocate-General at the Supreme Court of the Netherlands.

⁵ The Commission was installed by former Minister of Justice Winnifred Sorgdrager to research a) alternatives for criminal enforcement of the law and b) alternatives for prison sentences with regard to punishment. See also Groenhuijsen (1995).

⁶ An extensive research project funded by the Ministry of Justice, conducted by the criminal law departments of the University of Groningen and the University of Tilburg. The project aimed to rethink the Code of Criminal Procedure and to adapt it to the changing views and needs.

wetten in verband met de buitengerechtelijke afdoening van strafbare feiten’ (Stb. 2007, 155 and Stb. 2007, 160; henceforth Wet OM-afdoening). The Wet OM-afdoening was part of the government’s aforementioned security policy plans (*Veiligheidsnota ‘Naar een veiliger samenleving’*). Implementing the punishment order meant a new title (Title IVA) had to be added to the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*, henceforth CCP). As a consequence, several Sections in the Criminal Code (CC) and Code of Criminal Procedure (CCP) were added or adapted.



Figure 1: Timeline development of the Dutch punishment order

The punishment order as replacement of the transaction

The difference between the transaction and the punishment order does not seem significant at first glance, but formally there is a large discrepancy: the prosecutor now may decide on his own authority whether the accused is guilty of a crime, and what kind of punishment to impose, ranging from a fine to community sentence or a restraining order. No judge is involved, and if the accused does not ‘appeal’ within fourteen days, the punishment order becomes executable and the accused receives a criminal record equal to a criminal conviction by a judge in a criminal trial. Only the most far reaching punishment of imprisonment is still reserved for the judge. With a transaction, the accused can refuse to pay the required sum. This requires the prosecutor to bring the case to court in order to get a conviction, or the case will be dropped. With a punishment order, the prosecutor does not have to bring the case to court when the accused refuses to pay. In order to be acquitted, the accused has to take the initiative himself and oppose to the punishment order in a written document. This is a crucial difference between the transaction and the punishment order. The focus has thus formally shifted from punishment on the basis of consent to imposed punishment (Crijns, 2002).

Therefore, the punishment order is not merely an additional diversionary measure or cosmetic change in order to improve efficiency, but touches upon the fundamentals of the

criminal justice system and the role of the prosecutor (and to a lesser extent, the judge; Crijns, 2004). By diminishing the judicial monopoly on decisions on guilt and punishment and increasing prosecutorial discretion, the legislator seems to have diminished the accused's legal protection and transparency in decision making for the purpose of efficiency (*Parliamentary Papers II 2004/05*, 29 849, 3). This efficiency goal seems to concur with recent developments concerning the role of the prosecutor. According to Van de Bunt and Van Gelder (2012), the prosecutor's role seems to have shifted from the 'magistrate's role' to the 'worker's role' in terms of decision making. Currently, many decisions are not dealt with by the prosecutor acting as a magistrate, but for a large extent mandated to other agencies such as the police or to the prosecutor's own staff, such as the *parketsecretaris*, who makes initial decisions on almost all frequent and ordinary cases using a computerized system called BOS-POLARIS, best to be characterized as presumptive numerical guidelines (Tonry & Frase, 2001). These decisions, which amount to about 80 percent of the total caseload, are entirely standardized (Van de Bunt & Van Gelder, 2012). The numeric guidelines determine not only the type of sanction and its severity, but also whether to settle for a case or to bring it to court. Additionally, the standardization of the decision-making process also increases the role of the prosecutor as a 'civil servant' who merely executes policy instead of carefully weighing the interests involved (Van de Bunt & Van Gelder, 2012). However, the role of the prosecutor as a magistrate has not diminished because his role has also become more judicial due to the introduction of the punishment order. As a result of this new efficiency measure, the prosecutor gained adjudicatory powers normally reserved for the judge.

Research aim and scope

In the literature, the punishment order has been discussed and criticized before and after its implementation. Many authors have debated its constitutional compatibility, disputed the standard of legal protection and questioned the need of the punishment order (e.g. Crijns, 2002; 2004; 2010; De Graaf, 2003; Groenhuijsen and Simmelink, 2005; 2007; Hartmann, 2010; Kooijmans, 2007a; 2007b; 2012; Mevis, 2004; Van den Brûle, 2014; Weigend, 2012; Went, 2007; Wijkerslooth, 2007). However, the topic has not been discussed as much as it deserves, considering the fundamental formal changes it has brought to the

role of the prosecutor (and to a lesser extent, the judge). More importantly, critics have refrained themselves from posing ideas and solutions for above mentioned controversies. This thesis will fill the gap in the literature by not only extensively discussing controversies of the punishment order, but also by discussing possible solutions to strengthen the legal protection of the accused and improve the safeguards in order to meet the criticisms. This will be done by looking at equivalents of the punishment order in Germany, Switzerland, France and Sweden. These countries already had such a measure in place before the Dutch punishment order and it could be valuable to analyze how such measures are arranged and developed there, in order to draw possible lessons for the Dutch case. By placing the controversial issues of the punishment order in relation to the workings of equivalent punishment orders abroad, legal recommendations can be made for the Dutch punishment order. This discussion is also important considering the increasing influence of the European Union (EU) on criminal law, through judicial cooperation and harmonization. When diversionary measures in one country need to be accepted on the basis of the principle of mutual recognition, as is partially the case with the Dutch punishment order, it is important to understand the origins and workings of such measures for other countries, especially when considering the principle of mutual trust and the legitimacy of such measures. Lastly, this thesis will also fill a lingual gap as the literature about the punishment order has mainly, if not almost all, been written in Dutch so far.⁷ This seems obvious as the punishment order is mainly a national legal issue, but it limits international scholars to enter the debate on this fundamental change in the Dutch criminal justice system. By discussing the punishment order in English, the debate on extra-judicial measures can be broadened and, consequently, new insights from international scholars can be given. Therefore, in general, this thesis will have the following research aim:

To what extent can the controversies with regard to the Dutch punishment order be (legally) mitigated by looking at equivalents abroad?

⁷ Two English studies have been found in a book about the reform of the Dutch code of criminal procedure, edited by Groenhuijsen and Kooijmans (2012).

To accomplish the research aim, this thesis will deal with a set of four research questions that have been touched upon above and are now systematically presented below.

A) WHAT IS THE NATURE OF THE PUNISHMENT ORDER IN THE NETHERLANDS?

Before discussing its controversies and relating them to efficiency measures abroad, it is paramount to establish a good understanding of the nature of the punishment order in the Netherlands. The first question has the purpose of outlining the legal and policy frameworks of the punishment order.

B) WHAT ARE THE MAIN CONTROVERSIES OF THE PUNISHMENT ORDER AS DESCRIBED IN THE LITERATURE AND PARLIAMENTARY DEBATES?

The second research question involves discussing the main controversies of the Dutch punishment order. As stated, the punishment order means a fundamental change of the role of the Dutch prosecutor in the criminal justice system and this has attracted criticism from both parliament and legal scholars. These controversies are searched in and distilled from the (Dutch) literature, the Preparatory Memoranda, the Explanatory Memoranda and parliamentary debates, and consequently discussed.

C) WHAT IS THE NATURE OF THE EQUIVALENTS OF THE PUNISHMENT ORDER IN GERMANY, SWITZERLAND, FRANCE, AND SWEDEN?

Other countries have already developed similar efficiency measures like the Dutch punishment order. Therefore, it could be valuable to compare the nature of the Dutch punishment order with the nature of some of these efficiency measures. Differences between them can help to draw lessons for the Dutch case. The answer to the third question contributes to this purpose. The goal is not to provide an extensive legal comparison but to focus on the differences between the equivalent punishment orders. This in turn could lead to possible recommendations for the Dutch punishment order as will be explained in the

next research question. The rationale of selecting these countries is explained in the next chapter.

D) TO WHAT EXTENT CAN LEGAL RECOMMENDATIONS BE MADE WHEN RELATING THE CONTROVERSIES OF THE DUTCH PUNISHMENT ORDER TO THE DIFFERENCES BETWEEN THE DUTCH PUNISHMENT ORDER AND THE EQUIVALENTS OF THE PUNISHMENT ORDER IN GERMANY, SWITZERLAND, FRANCE AND SWEDEN?

The final question will try to respond to the criticism and controversies of the Dutch punishment order by offering legal recommendations for the Dutch punishment order. These recommendations are made by relating the controversies of the punishment order to the differences between the Dutch punishment order and its equivalents abroad. The final question will contribute to the research aim of finding solutions that could mitigate the controversies surrounding the Dutch punishment order. The recommendations are not limited to cosmetic changes, and might also include more fundamental changes that would lead to a total different procedure, if that is the result of relating the Dutch controversies with the workings of equivalent punishment orders abroad. For example, a recommendation could include going back to the practice of the transaction, if that practice is similar to an equivalent punishment order abroad, that could provide a solution to the controversies of the Dutch punishment order. The recommendations are thus limited by the boundaries of the legal comparison, and not limited by the fundamental characteristics of the Dutch punishment order.

METHODOLOGY

In order to provide answers to the four research questions a methodology of literature study is employed. This is no systematic literature review, but a method of convenience sampling. First, a short note on the language of the sources is given. Second, the selection of the countries for the comparative study will be clarified. Third, the various types of sources and subsequent selection process, as well as the analysis are discussed.

Language of sources

With regard to the sources, a distinction should be made between Dutch language sources and English language sources. Dutch sources were used to tackle the first two research questions, while English language sources were used to address the third research question of this study. Consequently, for the fourth and final research question, both Dutch and English language sources were used. It should be noted that only using English sources for the information on the equivalent punishment orders has implications for the subsequent findings: it could exclude valuable information on these equivalent punishment orders abroad. Using foreign texts could also lead to misinterpretation. However, two English studies written on the Dutch punishment order were found to be representative of the Dutch sources discussing the Dutch punishment order.⁸ Based on this result, the method was extrapolated to the equivalent punishment orders abroad, so that only Dutch and English sources are used for this study. The goal of this study is not to give an all-encompassing (legal) comparison of efficiency measures but to pin-point some interesting characteristics of other efficiency measures abroad in order to contribute to the debate on the Dutch punishment order and to find solutions to its controversies. This means that it is sufficient to work with a sample of punishment orders, and a sample of sources on those punishment orders.

Selection of countries

This study applies a so-called ‘similar design’, taking similar countries for comparison, and selected equivalent punishment orders from Germany, Switzerland, France and Sweden

⁸ See the English written studies by the German author Weigend (2012) and by Kooijmans (2012).

for this purpose (Hague, Harrop & Breslin, 1998; Pakes 2010). The rationale behind the selection of these specific countries is the following. First of all, a distinction should be made between civil law (inquisitorial) and common law (accusatorial) systems. The United States and the United Kingdom, for instance, are part of the common law family and the roles of the different actors are formally different than of the actors in civil law systems. This makes common law systems unsuitable for comparison. Another and even more straightforward criterion is of course availability. Not all countries have the same kind of efficiency measures, especially when taking the punishment order as subject for comparison. The selected countries all have so called punishment orders, while still (fundamental) differences remain with the Dutch punishment order. Third, an undeniably restricting factor is the availability of English texts on these punishment orders.⁹ Fourth, the punishment orders selected for comparison come from countries that can serve as archetypical or representative cases so that it is not necessary to include all countries with equivalent punishment orders.

For example, France is the archetypical case of the inquisitorial criminal justice system and all other European inquisitorial systems are more or less derived from it (Pakes, 2010). France is also exemplary for Romanic legal cultures with their feature of having an examining judge next to a prosecution service. Sweden represents the Scandinavian legal culture, which differs from the rest of Europe, especially concerning the relationship between the prosecution and the police. For example, in Sweden, the police has considerable judicial powers and prosecutors do not have formal powers to give direct orders to the police as how to run a particular investigation (Zila, 2006). Germany, though part of the inquisitorial legal system, represents an important sub-category. Prosecution in Germany is based on the principle of legality, whereas prosecution in the Netherlands is based on the opportunity or expediency principle. Switzerland is also worthwhile to compare because, just like the Netherlands, it has recently reformed its code of criminal procedure but already had a punishment order present in its system. Before the reform, the 26 Swiss federated states, called cantons, each had their own code of criminal procedure. Lastly, prosecution in Switzerland is also based on the principle of legality (Jehle & Wade, 2006; Gilliéron, 2012).

⁹ But this is no limitation as explained earlier.

Table 1: Characteristics of the selected countries for comparison

Country	Civil or common law	Inquisitorial or accusatory	Prosecution principle	Representative for	Punishment order
Netherlands	Civil	Inquisitorial	Opportunity	-	Since 2008
Germany	Civil	Inquisitorial	Legality	Legality principle	Since 1877
Switzerland	Civil	Inquisitorial	Legality	-	Since 2011 (nationwide)
France	Civil	Inquisitorial	Opportunity	Inquisitorial system & opportunity principle	Since 1972
Sweden	Civil	Accusatory	Legality	Scandinavian legal culture	Since 1995

Selection of Dutch sources

Books and articles about the Dutch punishment order were searched in the online catalogue of the library of Leiden University Law School and Kluwer Navigator. As the punishment order was first proposed in 2001, this study incorporates the literature from that year until 2014. The following two search terms were used for these databases: 'strafbeschikking' (punishment order) and '*Wet OM-afdoening*' (*Law on extra-judicial settlement*). For the two databases combined, this initially led to over 2.500 results. Therefore, a selection had to be made among the search results. For the Leiden University catalogue, this was done by reading the titles, abstracts and first few pages. Only sources which contained references to the '*strafbeschikking*' or '*Wet OM-afdoening*' were selected, resulting in six sources. A method of snowballing yielded an additional 12 results.

Kluwer Navigator allows you to select results on the basis of the type of source. Therefore, the category of 'legal journals' was selected. After all, the purpose was to find Dutch literature discussing controversies on the punishment order. Within this category, the journal '*Delikt en Delinkwent*' was selected because this journal is a leading criminal law journal in the Netherlands and also provided the most results within the journals category. Consequently, the amount of sources was narrowed down to ten, by using the criteria presented in table one below. Additionally, some of these sources cited valuable other sources on the punishment order. This method of 'snowballing' yielded an additional twenty results.

Table 2: Dutch sources selection process (1)

Database	Leiden Catalogue	Kluwer Navigator
<u>Search terms</u>	'strafbeschikking', 'Wet OM-aftoening',	'strafbeschikking, 'Wet OM-aftoening'
<u>Results</u>	10	2500+
<u>First selection</u>	Excluding sources not discussing punishment order	Selecting category 'Journals', and journal 'Delikt en Delinkwent' because other journals are non-criminal law journals.
<u>Results</u>	6	73
<u>Second selection</u>	Additional results via snowball method	Excluding documents not discussing punishment order by reading titles and first two pages of the articles.
<u>Results</u>	18	10
<u>3rd selection criteria</u>	-	Additional results via snowball method
Total results	18	30

Aside from literature research, use was made of Preparatory Memoranda and Explanatory Memoranda of the law that implemented the punishment order. All 59 official documents published by the Dutch national government on the law governing the punishment order (*Wet OM-aftoening*) were searched and downloaded from the website that publishes all official government publications (www.officielebekendmakingen.nl). The government dossier of the punishment order is coded by the number 29 849 so initially all official publications with number 29 849 were included. Subsequently, these documents were scanned and only those documents that contained substantive issues about the punishment order were used. Documents with less than four pages and that only presented changes to the law without any comments were excluded so that about twenty documents remained (see table 2).

Finally, the Commentaries on the relevant Sections of the Code of Criminal Procedure, as published in *Tekst en Commentaar* were used. This was accessed through Kluwer Navigator by using the search term '257a Sv',¹⁰ and selecting the source '*Tekst en Commentaar Strafvordering*' (Commentaries on the Code of Criminal Procedure) resulting in 25 hits (see table 2). Subsequently, eight sources were selected, because the other results did not discuss the relevant sections of the code of criminal procedure (namely, 257a-257h Sv). The commentaries proved useful for both acquiring descriptive information about the

¹⁰ This is the relevant section of the Dutch Code of Criminal Procedure.

punishment order and information about the controversies. Additionally, the commentaries referred to six sources that discussed the (controversies) of the punishment order, so that through the snowball method these could also be analyzed.

Table 3: Dutch sources selection process (2)

Database	Government Publications	Commentaries in Kluwer Navigator
<u>Search terms</u>	Dossier number 29 849	'257a Sv'
<u>Results</u>	59	35
<u>First selection</u>	Excluding documents with less than 4 pages and documents not discussing controversies or amendments	Excluding commentaries not discussing relevant sections of punishment order
<u>Results</u>	20	8
<u>Second selection</u>	-	Additional results via snowball method
Total results	20	14

Selection of English sources

Comparative study books were used to gather information about, and analyze equivalents of the punishment order from abroad. There have been some large comparative studies on criminal justice systems in Europe, including on the nature and workings of the prosecution service, as well as on prosecutorial discretion. In general, the studies conducted by Jehle and Wade (2006), Gilliéron (2014), Van Daele (2000), Fijnaut, Van Daele and Parmentier (2000), and Delmas-Marty and Spencer (2002) proved useful. These studies were found by means of convenience sampling. When Dutch sources of the punishment order were found in the Leiden Law school library, some of them cited these studies. Other studies were found by searching for comparative studies on prosecution services in Europe. Search terms such as 'prosecution in Europe', 'prosecution services in Europe', 'European prosecution services', 'criminal justice systems in comparison', 'comparative criminal justice' were used. This resulted into more than 200 hits. After scanning the titles of these sources and the tables of content, about fifteen sources were found to discuss criminal justice systems of the selected countries, and prosecution in particular. Subsequently, from this selection the above named studies were chosen based on the availability of information about diversionary measures, including the punishment order. Additionally, English translations of the Penal Code and Code of Criminal procedure of the selected countries

were searched through Google (for example, ‘German Code of Criminal Procedure’ etc.) to find the legal framework of the equivalent punishment orders.

Table 4: English sources selection process

Database	Leiden University catalogue
<u>Search terms</u>	‘prosecution in Europe’, ‘prosecution services in Europe’, ‘European prosecution services’, ‘criminal justice systems in comparison’, ‘comparative criminal justice’
<i>Results</i>	200+
<u>First selection</u>	Scanning title and table of contents. Excluding sources that not mention criminal justice systems of the selected countries
<i>Results</i>	15
<u>Second selection</u>	Reading diagonally and excluding sources not discussing prosecutorial diversionary measures
Total results	5

Analysis

After selection, first all Dutch sources were carefully read. By doing so, the rationale as well as the workings of the punishment order were discovered. Additionally, these sources were used to look for controversial issues. For example, when a motion or amendment was proposed in the official government documents this could potentially be considered as a controversial issue of the punishment order. The same applies for questions asked by Members of Parliament. The controversies were interpreted as either constitutional issues, legal protection and procedural safeguard issues, or issues with regard to effectiveness of the measure. In the literature a similar method was employed: which elements of the punishment order proved to be a topic of discussion between the legislature and legal scholars and between legal scholars themselves? The focus was especially geared towards issues that were mentioned by multiple authors.

With regard to the English sources, articles and chapters (of books) on the equivalent punishment orders in Germany, Switzerland, France and Sweden were carefully read. The relevant sections in the respective codes of criminal procedure were also read to understand the legal framework of these punishment orders. Additionally, the focus of the analysis was to distinguish possible differences with the Dutch punishment order, with an emphasis on procedural safeguards and legal protection. The findings of these analyzes are found in the next chapter.

RESULTS

THE NATURE OF THE PUNISHMENT ORDER IN THE NETHERLANDS

This chapter addresses the first question: what is the nature of the Dutch punishment order? The chapter serves as a basis for the next chapter that will discuss the main controversies of the punishment order. First, the legal framework of the punishment order, including the relevant Sections of the Dutch Code of Criminal Procedure, will be presented and discussed. Second, policy (guidelines) with regard to the punishment order will be discussed. Third, other relevant information of the punishment order, such as its applicability abroad in context of the EU and some empirical data will be presented.

LEGAL FRAMEWORK

Punishment order is a statement of guilt

Sections 257a-h Dutch Code of Criminal Procedure (CCP) regulate the punishment order and enable the prosecutor to impose a punishment order for infractions (*overtredingen*) and criminal offences (*misdrifven*) with a statutory maximum of six years imprisonment. Issuing a punishment order is, equal to a court summoning, considered to be an act of prosecution. The main concerns are found in Section 257a, and according to paragraph one it is the prosecutor who decides if someone committed a crime and guilt has been established. This might give the impression the prosecutor only has to find a punishable offence has been committed but not whether the accused can also be held criminally liable. However, that impression is invalid as an amendment (Parliamentary Papers II 2004/05, 29 849, 9) has made it explicit that the establishment of guilt should also include the deliberation of whether an accused can be held criminal liable for the punishable offence. This means the prosecutor should, in theory, consider whether a statutory defense (*strafuitsluitingsgrond*) is present (Kooijmans, 2012). Despite the fact that the law does not explicitly mention what evidentiary rules prosecutors should follow, prosecutors are bound to the same rules on evidence prescribed for criminal judges (as laid down in Section 339

CCP and further; Kooijmans, 2012). The punishment order is given unilaterally and in principle no consent is required between the prosecutor and the accused. As stated before, this means a departure from the principle only criminal courts may impose criminal sanctions (Kessler & Keulen, 2008). As the punishment order is an act of prosecution, issuing one interrupts the statute of limitations. This is a crucial difference compared to the transaction, because the transaction is no act of prosecution and therefore it does not interrupt the statute of limitations. This seems to be an inherent consequence when considering the goal of the transaction is to, contrary to the punishment order, prevent prosecution. The difference is especially important for *overtredingen*, a category of minor offences which have a prosecution limitation period of (only) three years (Section 70, paragraph 1 Dutch Criminal Code).

Sanctions and measures

After establishing guilt, the prosecutor can choose what kind of sanctions or measures to impose. Many of the measures are based on the measures available for the transaction, as laid down in Section 74 of the Dutch Criminal Code. According to paragraph 2 of Section 257a CCP the following sanctions and measures can be imposed:

- a) community sentence for a period with a maximum of 180 hours (it is worth noting this exceeds the amount possible with the transaction, namely 120 hours), for juvenile offenders the maximum is 60 hours according to Section 77f Criminal Code;
- b) a fine;
- c) confiscation of goods;
- d) the obligation to pay the State a yet to be determined sum of money as compensation for the victim;
- e) revocation of driver license for motorized vehicles up to a maximum of 6 months.

Additionally the prosecutor can give instructions and conditions the accused should comply with (Section 257a CCP, paragraph 3). These include:

- a) to relinquish objects that have been seized and are susceptible to forfeiture or confiscation;

- b) to transmit, or to pay the State, the estimated value of goods susceptible to forfeiture;
- c) payment of an amount of money to the State or the transfer of seized property in order to deprive the accused, either fully or in part, of the unlawfully obtained gains subject to deprivation pursuant to Section 36e of the Criminal Code;
- d) payment of a yet to be determined amount of money for the benefit of the Criminal Injuries Fund for victims of violent crimes or for the benefit of an institution whose goal is to represent the interests of victims of criminal offences (the maximum amount may not exceed the maximum fine applicable to the criminal offence);
- e) other instructions, concerning the conduct of the accused, the accused needs to comply with for a given probationary period, up to a maximum of one year.

The two most notable material differences compared to the transaction are the increase of the maximum hours of community sentence and the revocation of a driver license (Wijkerslooth, 2007). Examples of 'other instructions, concerning the conduct of the accused' are a restraining order and a ban from designated public areas. Sanctions entailing the deprivation of liberty cannot be imposed by a punishment order and are reserved for the courts. Groenhuijsen and Simmelink (2005), as well as Wijkerslooth (2007) have argued to include the possibility of a conditional sanction or instruction. After all, a conditional fine could serve as extra motivation to follow certain instructions. The argument is that if unconditional sanctions are possible, it would be irrational if less severe forms cannot be imposed (Wijkerslooth, 2007). However, conditional sanctions are not provided by the law. Kessler and Keulen (2008) rightly point out that including it would lead to inconsistency as Section 14g Criminal Code prescribes the execution of conditional sentences is done by judges. It would be irrational when a prosecutor can impose unconditional sanctions but needs the judge to execute the lesser form of conditional sanctions.

Serving the punishment order¹¹

After guilt has been established and sanctions are chosen, the punishment order is served to the accused in written form and must contain certain information pursuant to

¹¹ A simplified process model of the punishment order is found in figure 2 on page 28.

paragraph 6 of Section 257a CCP. The punishment order needs to mention the name and address of the accused, description of the behavior as well as the criminal offence the accused is punished for, the sanctions and/or instructions imposed, the day the punishment order was issued, information on how to object, and finally, the methods of the execution of the punishment order. The criteria are less strict than when summoning the accused to court pursuant to Section 261 CCP (Wijkerslooth, 2007). The punishment order is, whenever possible, served in person. When not served in person, a copy is forwarded to the address of the accused as registered in the municipal records database (Section 257d, paragraph 1 and 2, CCP).

Hearing the accused

In principle, the prosecutor is not required to hear the accused and no legal counsel is provided to him. Section 257c, paragraph 1 CCP does state, however, that the prosecutor should hear the accused before issuing a punishment order involving community sentence, revocation of the driver license or other instructions concerning the conduct of the accused as sanctions. For fines and damages above €2000,- both hearing the suspect and legal counsel are required. No strict criteria are prescribed so that the accused does not have to say much and the hearing can also take place, for example, through a telephone call (Explanatory Memorandum, Parliamentary Papers II, 2004-2005, 29 849, 3). Additionally, the legislature has specifically stated if the accused, despite the obligation to be heard, is not heard, this does not influence the outcome of the criminal case. According to the legislature the purpose of the obligation is not to increase the chances for the accused to make a successful objection, but to establish punishment orders to which it is unlikely the accused will object to. After hearing the accused, a written report has to be made. This does not have to be a full formal report (*proces verbaal*): a small written report suffices. One of the reasons is that hearing the suspect can then also be mandated to secretaries of the prosecutor (*parketsecretarissen*) who do not have investigative powers (Parliamentary Papers I 2005-2006, 29 849, C). If the punishment order deviates from the accused's expressly formed arguments, the prosecutor is required to motivate its judgment. However, this requirement is no hard requirement as potential errors of the prosecution service should not be an independent ground for acquittal or penalty reduction according to the Explanatory Memorandum (Parliamentary Papers II, 2004-2005, 29 849 3; Wijkerslooth, 2007). No

hearing or legal counsel is required for fines and damages under €10.000,- imposed on legal persons for economic crimes (Section 36, par. 2 Act on Economic Crimes). For both natural persons and legal persons legal counsel is required when issuing punishment orders for fiscal crimes and customs offences (Section 76, par. 3 General Tax Act, and Section 10:15 General Customs Act; Kessler & Keulen, 2008).

Issuing a punishment order after using coercive measures

Issuing a punishment order is also possible when coercive measures (such as telephone tap) have been used or when the accused has been in remand custody. The prosecutor can formally issue a punishment until the first court hearing. This is in line with the fact that a court summoning cannot be revoked when court proceedings have begun. If detained unlawfully, a suspect may request for compensation on the basis of Section 89 CCP. As punishment orders do not involve prison sentence, the suspect can request for compensation, but this can only be done when the accused objects to the punishment order. In contrast, issuing a transaction is not possible after remand custody because a transaction serves the goal of preventing prosecution, while a punishment order can be considered to be the 'next step of prosecution', as detaining the suspect is already a form of prosecution (Kessler & Keulen, 2008).

Objection by the accused

The punishment order becomes a final, and thus, irrevocable decision when no objection is lodged (timely) by the accused, or stated more correctly, by the 'penalized person' (*bestrafte*). In the official guidelines directed at the prosecution service (*Aanwijzing OM-afdoening*, Staatscourant. 2008, 19) the term 'penalized entity' is consequently used, but in the Explanatory Memoranda and the law the term 'accused' is used (Parliamentary Papers II 2004/05, 29 848, 3). The legislature did not want to go as far, though legal consequences of the punishment order are equal to a criminal conviction, to use the term 'offender' or 'convicted offender' for the person receiving a punishment order. To avoid confusion this thesis will consistently use the word 'accused' for any offender, as penalized offenders are formally accused again as soon as they lodge an objection or appeal. Lodging an objection is regulated in Section 257e CCP and prescribes that the accused must lodge an

objection at the prosecution service office within fourteen days after receiving the punishment order or when it is known to him. This is a strict deadline and failing to object in time results into a criminal conviction and thus criminal record. A longer term of six weeks is prescribed for those punishment orders imposing a fine of no more than 340,- euros for an offence committed no more than four months prior receiving the punishment order (Section 257e, paragraph 2 CCP). After the accused lodges an objection, the prosecutor has three options: withdraw the order, change the order, or take the case to court. Withdrawal may occur without explicitly stating the reasons why. When a prosecutor does so, the right to prosecute lapses (Section 255a, paragraph 2 CCP). When the prosecutor decides to change the punishment order, the accused may lodge another objection. This change may not constitute accusation of a difference offence though, in the meaning of Section 68 Criminal Code (Section 257a, paragraph 8 CCP).

When the prosecutor does not withdraw (or change) the punishment order, the case is brought to court. Calling the accused before court would in principle require a formal court summoning pursuant to Section 261 CCP but the legislature has been flexible, and found it satisfactory for the prosecutor to call the accused without a full formal court summoning: the description used in the punishment order suffices. By adapting Section 314a CCP, the prosecutor can formulate its full and formal accusation at the start of the court hearing (Wijkerslooth, 2007). The criminal court will, contrary to administrative law, fully adjudicate the matter *ex nunc* and thereby making all decisions itself (Section 257f, paragraph 3 CCP). This is also the reason why the legislature has chosen to call a protest against a punishment order an 'objection' (*verzet*) and not an appeal, as to make clear what is expected from the judge (Parliamentary Papers II, 2004/05, 29 849, 3; Wijkerslooth, 2007). Irrespectively of the judge's final decision, it is standard procedure to set the punishment order aside, so that criminal courts do not have to consider and establish shortcomings in the content or procedural conclusion of the punishment order (Section 257f, paragraph 4 CCP). This also means, in principle, the judge does not compensate for prior shortcomings originating from the punishment order in his final judgment. Despite the punishment order requires the accused to take the initiative when disagreeing with the punishment order, the legislature seems to have tried to make it relatively uncomplicated, because the accused who lodges an objection does not have to explicitly state his reasons why. However, lodging an objection should not be done carelessly as the public prosecutor may, according to the

Explanatory Memorandum (Parliamentary Papers II, 2004/05, 29 849, 3), ask the court to impose a higher sanction than was imposed with the punishment order when the accused fails to appear before court or does not satisfactory explain why he disagrees with the punishment order (Kessler & Keulen, 2008). Despite the discrepancy between the formal goals and legal consequences of the transaction and the punishment order, aforementioned possibility does not deviate from existing prosecutorial guidelines, as requesting a higher sanction in court was already common practice for the transaction.

Enforcement

As the legal consequences of a punishment order are equal to that of a criminal conviction by a judge, the punishment order is also considered to be a form of criminal conviction. This makes it possible to execute the punishment order and to invoke measures (such as a warrant) that guarantee compliance of the accused to the (instructions given by the) punishment order, something which is already possible after a regular criminal conviction by a judge. The accused cannot be prosecuted for the same offence when the punishment order has been executed, be that partially or in full, or when the prosecutor has revoked the punishment order (Section 255a CCP). This is similar as to what is current practice with the transaction (Dullaart & Dubbeldam, 2007). With regard to enforcement, an important distinction must be made between sanctions that can, and cannot be enforced without cooperation of the accused. A fine or sum of money for the benefit of the victim can, for example, be enforced quite well without the cooperation of the accused. When the payment of the fine is not met within the set time, the prosecutor may seize or impound money in the accused's bank account(s) or objects belonging to him (Section 572-576 CCP). The new Section 578b CCP has also made it possible for prosecutors to ask the cantonal judge (*kantonrechter*) to detain the accused (*gijzeling*) up to one week in order to force the accused to pay his fine.

Enforcing the punishment order proves to be much more difficult when sanctions involve community sentence or driving disqualification. If the accused does not fulfill the instruction (or meet other sanctions that needs active cooperation) given by the punishment order, the legal consequence becomes taking the accused to court for a 'full-dress' hearing. In this case, the accused can be prosecuted for the same offence, but the reason on which this summoning is based on is that the punishment order was not fully enforced (Section

255a, paragraph 1 CCP). This is referred to as ‘prosecution in stages’ (Parliamentary Papers II 2004/05, 29849, 3). When the accused is summoned to court for a criminal offence stated in a punishment order, the punishment order is not enforceable anymore, or when already started, suspended or stayed (Section 255a, par. 3 CCP). When sanctions, for example a community sentence, are partially met, the judge will take this into consideration when imposing sanctions himself (Section 354a, par. 2 CCP).

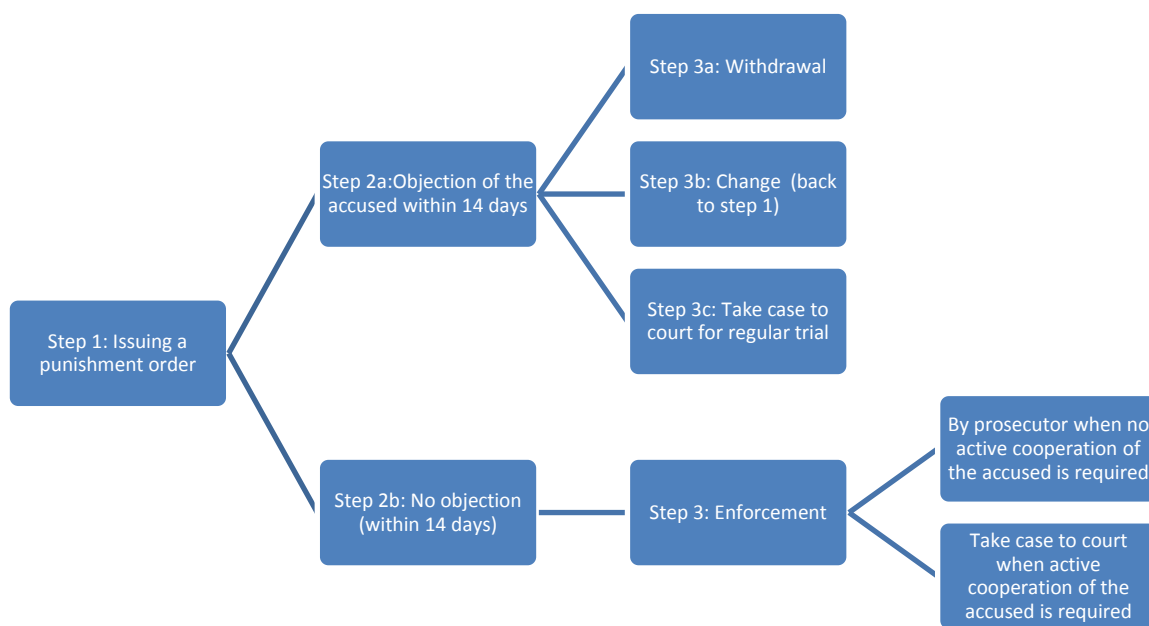


Figure 2: Simplified process model of the punishment order

Attribution or delegation of powers

One of the important features of the Dutch prosecution service is that it delegates its decisions to prosecute. In theory the decision lies with the prosecutor, but in practice the decision to prosecute can be made without active involvement of a prosecutor (Blom & Smit, 2006). The legislature is of the opinion the workings of the punishment order fit in the recent and current developments in administrative law, in which it has become accepted that administrative bodies can impose punitive fines for violations of the law. Aside from the prosecutor, the power to issue punishment orders therefore can be attributed to investigating officers and bodies or persons charged with public duties as well (Sections 257b and 257ba CCP). The punishment order can be attributed to administrative bodies by Governmental Decree (*Algemene Maatregel van Bestuur*, or *AMvB*). This has made it

possible for municipalities to assist in law enforcement for a wider category of small misdemeanors and traffic offences. In a majority of these cases sanctions are determined on the basis of guidelines produced and published by the Attorneys-General (Van der Horst & Plaisier, 2007). Police officers can issue fines up to a maximum of 350,- euros on the basis of Section 257b CCP and an issued Governmental Decree. Collection of fines (for mainly traffic violations) is usually done by the Central Judicial Collection Agency (*Centraal Justitieel Incassobureau*, or CJIB), to whom decisions are mandated by the prosecutions service (Staatscourant 2011/10937). The attribution of power goes even further for the Dutch Tax and Customs Administration (*Belastingdienst*), as Section 76 General Dutch Tax Law (*Awr*) gives this Administration the exclusive power to issue punishment orders for violations of the Dutch Tax Law. In other words, the prosecutor does not have control or oversight of these imposed sanctions (Wijkerslooth, 2007). Prosecutors may also mandate the power to issue punishment orders to their secretaries, on the basis of Section 126 Judicial Organization Act (*Wet RO*). Handling and deciding on objections may also be performed by secretaries, under the auspice of a prosecutor (Kessler & Keulen, 2008).

POLICY FRAMEWORK

Aside from the legal framework as laid down in the code of criminal procedure, policy also has the ability to restrict and regulate the workings of the punishment order. An important and first policy measure was the exclusion of sex- and violent offences. The prevailing public opinion was that sex offenders and offenders who commit serious violent crimes should not be punished lightly. As the punishment order does not provide the possibility to impose prison sentences, it was considered insufficient to deal with these types of crimes. Therefore, the Minister of Justice decided to exclude serious sex- and violent crimes to be eligible for a punishment order (Parliamentary Papers II, 2004/05, 29 849, 16; Wijkerslooth, 2007). Additionally, the law *Wet OM-afdoening* has not been implemented all in once but will be gradually over time. In 2005 a project group called '*Onderzoek, ontwikkeling en implementatie van de Wet OM-afdoening*' started to prepare and create policy in order to implement the punishment order within the organization of the prosecution service. The instruction or guideline, called '*De Aanwijzing OM-afdoening*' includes the most important legal terms, but also includes legal and policy criteria for when

issuing a punishment order is (temporarily) excluded. Since 2008 several of these Instructions have been issued and adapted. The purpose is that eventually all crimes with a statutory maximum of six years can be dealt with by means of a punishment order, and the transaction will be abolished. In the meantime the eligibility of crimes and misdemeanors, as well as the range of sanctions that can be imposed, will be implemented in several phases. In this paragraph the latest instruction will briefly be discussed. To avoid repetition, only close attention is paid to Appendix 1A of the latest instruction, entered into force on November 1st, 2013 (Staatscourant 27 November 2013, no. 33003). In this Instruction, some guidelines pertaining the methods of issuing a punishment order, hearing the accused, and the requested punishment before court after objection or when a punishment order could not fully be enforced, are given. Additionally, as the punishment order is implemented gradually over time, some so called 'contra-indications' are given. These are criteria, that exclude the possibility of a punishment order for certain misdemeanors and crimes, despite being in the legal range of crimes with a statutory maximum of 6 years imprisonment. Also, certain types of sanctions are excluded for certain crimes. These 'exclusion criteria' are presented below.

Exclusion criteria

First, a punishment order cannot be issued against a minor when violating Section 8 Road Traffic Act (WVW). Additionally, for all crimes, no other sanctions can be imposed on persons of age except for a fine, driving disqualification, confiscation of goods, or the instruction to relinquish objects that have been seized and are susceptible to forfeiture or confiscation. However, due to a national pilot it is now also possible to impose community sentences. For all minors and legal entities the same exceptions apply. The difference is that minors (and obviously legal entities) cannot receive community sentences and fines against minors may not exceed 115,- euros. For a certain category of crimes and misdemeanors, called 'non-coded offences' still no punishment order can be issued at all. However, due to the ongoing national pilot these type of offences can, if the prosecutor desires, be dealt with by a punishment order when the sanction involve a fine, a community sentence, driving disqualification, confiscation of goods or the instruction to relinquish objects that have been seized and are susceptible to forfeiture or confiscation. Also, in principle, punishment orders cannot be issued for political or publicity sensitive cases. Lastly, exceptions are made for crimes committed by the following three categories of persons. First, for illegal aliens it is

common policy to summon them to court, and no punishment orders are thus given. However, when summoning becomes impossible, illegal aliens can be given a transaction or punishment order containing a fine, and subsequently expelled from the country immediately after payment. Second, asylum seekers can only be given a punishment order when they can properly show identification and have an address registered in the municipal records database. It is also possible to issue a punishment order when it is handed out in person in the context of a 'ZSM' procedure, in which immediate payment follows. Third, persons who do not have permanent residence can only be given punishment orders when they have an address to which the punishment order can be sent to. It is also possible to issue a punishment order when it is handed out in person in the context of a 'ZSM' procedure, in which immediate payment follows (Staatscourant 27 November 2013, no. 33003).

ZSM procedure

In the previous paragraph the procedure called *ZSM* is mentioned a few times. This procedure requires additional elaboration. The abbreviation *ZSM* is the Dutch version of the English abbreviation 'ASAP' (As Soon As Possible), and also stands for the procedure that deals with criminal cases in a quick and efficient way by means of usually issuing a punishment order within three days (maximum of remand custody by the police) after the crime has been committed. The procedure usually takes place at the police station where a prosecutor resides for this purpose. *ZSM* is mostly used when offenders are caught in the act and allow a quick and efficient way of dealing with various small crimes. Within *ZSM*, various parties work together to deal with the case: police, prosecutor, Victim Support Netherlands (*Slachtofferhulp Nederland*), and Probation Service (*Reclassering*). *ZSM* is a working process and thus not the same as the punishment order. However, since the start of *ZSM*, many punishment orders are issued in this context.

Execution within the European Union

Within the European Union (EU) punishment orders are, under certain conditions, executable in other EU countries. Likewise, equivalents of the punishment order abroad can be executed in the Netherlands. This practice originates from a Framework Decision of the

European Council (2005/214/JBZ, PbEG L 76) prescribing monetary sanctions imposed in one Member State should be executable in another Member State. In the Netherlands, the law '*Wet wederzijdse erkenning en tenuitvoering van strafrechtelijke sancties*' (Staatsblad. 2007, 354) has implemented this Framework Decision and Section 15 states that fines and damages are eligible to be executed in another Member State, including those imposed in context of a punishment order. Other sanctions, including instructions of monetary nature cannot be executed in a different Member State. The reason is those instructions or sanctions cannot be executed without cooperation of the accused, so that they are excluded from the Framework Decision on which the Dutch law is partially based (Parliamentary Papers II 2005/06, 30 699, 3). Equal to the transaction, a punishment order prevents prosecution for the same offence in a different Member State (Kessler & Keulen, 2008).

Empirical data

It appears much data on the punishment order is yet to be made available to the public. However in the Prosecution Service Annual report of 2013 information is presented about the amount of punishment orders issued between 2009 and 2013 (see table 5). The Central Bureau for Statistics (*Centraal Bureau voor Statistiek*, or CBS) and the Dutch Research and Documentation Centre (*Wetenschappelijk Onderzoek- en Documentatiecentrum*, or WODC) show different numbers. The reason could be that all delegated decision-making is excluded in the CBS and WODC statistics.¹² Despite the lack of uniformity, the CBS and WODC numbers show that punishment orders are not only issued for just (minor) traffic offences but also (small) crimes such as burglary, theft and assault (15,3 % of all issued punishment orders fall under this category). The same applies for (minor) violent crimes and sexual indecencies, with a share of 8,4% in 2012. In this category, most punishment orders are issued for minor assaults and sexual indecencies (e.g. on the basis of Section 239 CC; while sex offences are excluded it appears this does not prevent prosecutors from issuing punishment orders for this particular offence). Punishment orders are also imposed for drugs and (fire) weapon violations; 3,5% and 3,7% of total issued punishment orders in 2012 are imposed for these offences respectively. The absolute (and relative) numbers of these offences will possibly increase when the punishment order is fully

¹² The numbers vary from 2.098 issued Punishment Orders in 2009 to 20.351 in 2012. See Kalidien & De Heer-de Lange (2013).

implemented and more offences become eligible. The punishment order proves to be efficient: in 2012, the average time period for a case to be disposed by means of a punishment order after registration was 5 weeks on average. In comparison, the overall average of all extra-judicial settlements was 15 weeks (Kalidien & De Heer-de Lange, 2013).

Table 5: Number of Punishment Orders issued in the Netherlands 2009-2013

	2009	2010	2011	2012	2013
Sub-district cases (<i>kantonzaken</i>)	0	100	48.000	39.000	20.500
First instance court cases (<i>rechtbankzaken</i>)	3.900	10.700	22.500	36.300	34.300
Total	3.900	10.800	70.500	75.300	54.800

Note: Data from the Public Prosecution Service Annual Report (2013). Retrieved from <http://www.hetccv.nl/>

CONTROVERSIES OF THE PUNISHMENT ORDER

As can be derived from the previous chapter, it would be unjust to depict the Dutch punishment order as merely another diversionary measure. The goal is to fully replace the transaction and to issue punishment orders for the vast majority of cases. The scope and nature of the punishment is (potentially) very broad and it is safe to assume that almost every citizen who commits a small infraction or a crime will first have to deal with a sole prosecutorial decision in his case, potentially final. As stated before, much controversy has been raised about the punishment order in the Dutch literature. Extensive discussions can also be found in the Preparatory Memoranda of the law itself. The amount of motions and amendments, as well as the length of such debates also show that the legislature had difficulties with the original proposal and that the punishment order should not be perceived as something lightly. Even today new controversies arise, especially regarding the so-called *ZSM* procedure. Van Nispen, a Member of Parliament has inquired about the punishment order as recently as on the third of July, 2014. In his inquiry he wondered whether the *ZSM* procedure was compatible with the right to a fair trial (*Aanhangsel van de Handelingen, Tweede Kamer 2013/14, Aanhangselnummer 2591*). This chapter deals with the second question: What are the main controversies of the punishment order as described in the literature and parliamentary debates? In addition to the most important and heavily discussed points, some other so far unmentioned controversies will be presented.

Constitutionality

The first important controversial issue concerns the question whether the punishment order is compatible with the Dutch constitution, and it is telling that the Council of State as well as the Prosecution Service (who has given a more prominent role due to the punishment order) have raised doubts with regard to this issue (*Parliamentary Papers II 2004/05, 29 849, 6; Groenhuijsen & Simmelink, 2005*). In the Netherlands, the Public Prosecution Service is part of the judiciary and therefore regulated in the Judicial Organization Act (*Wet op de Rechterlijke Organisatie*). Even though prosecutors are part of the judiciary, the constitutional position of the prosecution service is still controversial.

Several authors argue that the prosecution is part of the judiciary, while others state that they are part of the executive branch (Van Daele, 2003). The majority however takes the view that the prosecution service is an institution *sui generis*, standing between the executive and judicial branch. The constitutional position of the prosecutor is essential for the debate on whether the punishment order can be deemed constitutional compatible because Section 113 of the Dutch Constitution (*Grondwet*, henceforth *Gw*) states only criminal judges have the power to decide on criminal offenses. More specifically, it states that 'judicial adjudication' (in Dutch *berechting*) is reserved for judges only. In the literature, the debate is about whether deciding on guilt and punishment within the contours of the punishment order can be seen as a form of 'judicial adjudication'. As the main view is that the prosecution service is an institution *sui generis* this means that the punishment order should not be a form of '*berechting*' in order it to be constitutional compatible. After all, only judges are entitled to perform judicial adjudication according to Section 113 *Gw*. In this debate it is important to distinguish between the formal and material approach. In the formal approach, judicial adjudication is considered to be a decision on the basis of an accusation presented in a court hearing. The legislature has chosen to take this approach and therefore deemed the punishment order not to be a 'judicial adjudication', and thus compatible with Section 113 *Gw*. When taking the material approach, *berechting* means 'to take note and to decide' (*kennisneming* and *beslissing*). According to Crijns (2004) and De Graaf (2003) this would be the correct approach, as the prosecutor takes note of the alleged offense and also makes a (possible) final decision in the case, meaning prosecutors would perform judicial adjudication incompatible with the constitution. Groenhuijsen and Simmelink (2005) also take the material approach but come to a different conclusion. According to them the punishment order is very well compatible with the Constitution, not despite but precisely because of the material approach. They base their result on the fact that the accused can unilaterally evade himself from the punishment order by lodging an appeal, something which does not suit the picture of 'judicial adjudication' or the administration of justice in court. From their perspective, the punishment order merely contributes to a system of 'sharing powers' in which safeguards are available for when subjects feel like they need them (e.g. by lodging an objection to have the case tried before court). They also consider the punishment order is not surrounded by the same safeguards and legal protection as a full criminal trial has (which is interesting to remember when

discussing subsequent controversies about the legal protection and quality of decision-making), which makes them conclude the punishment order is no judicial adjudication but a preliminary procedure. According to Went (2007) this argument is tautological, because the question should first be whether such a procedure, in which guilt is established and sanctions are imposed, should entail these safeguards. It is not difficult to see the answer to that question should be affirmative because the undisputed legal consequence of the punishment order are equal to that of a regular criminal conviction, imposed by a court who does provide those aforementioned safeguards. However, it should be noted that applying this to a wide range of small offences would considerably harm the efficiency of the system.

Article 6 ECHR and the separation of powers doctrine

Another issue revolves around Article 6 of the European Convention on Human Rights (ECHR), which contains the right to a fair trial and to have your case heard by an impartial tribunal. Because the prosecutor becomes both prosecutor and judge in the same case, the punishment order seems to be at odds with Article 6 ECHR, as well as the separation of powers doctrine. For example, Den Uijl (2010) states that the punishment order harms the balance of powers doctrine because too much power, both executive and judicial, is concentrated in one institution. De Graaf (2003) argues only the judge can be perceived as truly impartial and independent, capable of imposing fair sanctions. However, by enabling the accused to bring his case before an impartial judge when lodging an objection to the punishment order, the Dutch Minister deemed the punishment order procedure in accordance with Article 6 ECHR: "It can be concluded from ECHR case-law that an extrajudicial 'preliminary procedure' would not encounter objections, provided an appeal to the court is possible which meets the requirements of the Convention (Parliamentary Papers II 2004/05, 29 849, 3)." Hartmann (2010) and Witteveen (Member of Parliament; *Handelingen I* 2005/06, 36, p. 1696) also deemed the relatively easy possibility to object to a punishment order a valid argument for waiving away the critic that the punishment order would be at odds with the separation of powers doctrine. Moreover, Hartmann (2010) states it is already common practice for the prosecution service to have an accumulation of tasks. In theory, the right to a fair trial appears to be guaranteed, and this is common practice with administrative fines also. Additionally, the right to a fair trial under Article 6 ECHR is tested

autonomously, and not by each separate right provided by this Article. This means that violation of one of the rights provided for in Article 6 ECHR does not necessarily mean the right to a fair trial has been violated. According to Kooijmans (2012) it is, however, open to doubt whether the possibility to object to the punishment order is experienced as a positive right by the accused in practice, especially when considering the common practice of requesting heavier sanctions in court after a transaction has been issued, seems to have been copied to the practices of the punishment order. The Minister has even explicitly said this practice can be continued fully under the regime of the punishment order (Parliamentary Papers II 2004/05, 29 849, 3; Parliamentary Papers II 2004/05, 29 849, 17). Additionally, the Minister has said the fact that the accused *de facto* risks a heavier penalty by using a legal remedy when he does not have any well-founded, substantive objections is not incompatible with Article 6 ECHR according to various case law (ECHR 29 February 1980, *Deweere v Belgium*; ECHR 2 March 1987, *Monnell & Morris v United Kingdom*; ECHR 21 September 1994, *Fayed v United Kingdom*). Moreover, in light of 'special prevention' goals it would be desirable and justified in principle to impose a heavier sanction when the accused does not appear before court or has no substantive objections. According to Kooijmans (2012) this reasoning is not convincing because it is based on a complete disregard of the distinction "in legal character between the settlement penalty [transaction] on the one hand and the punishment order on the other." Kooijmans is correct in noting that the transaction is characterized by its, in principle, voluntary nature for the accused while the punishment order must be considered as "unilateral and, in principle, binding application of a sanction by the government (Kooijmans, 2012)." This fundamental difference should lead to the conclusion that punishment given by means of a punishment order ought to give justice to the actual circumstances of the case and thus cannot be seen as a form of buyoff, as is the case with the transaction. According to Kooijmans (2012), the punishment order must therefore be in accordance with the customary manner of sentencing and despite Article 6 ECHR allows certain restrictions on the right of the access to court, it does not alter this perception. Groenhuijsen and Simmelink (2005) also state that this should be the standard point of departure for imposing a punishment order.

Disparity in the severity of punishment

Originally, the prosecutor's task is to bring charges before court and request punishment according to prosecutorial guidelines. Judges, on the other hand, impose punishment according to their own guidelines, called 'Orientation Points' that may differ from prosecutorial guidelines. The question is whether prosecutors follow their original guidelines or the judge-made guidelines when imposing sanctions, because previous research has indicated sanctions imposed by judges are conform the prosecutor's request in little over half of the cases only (Slotboom, Koppe, Passchier, de Jonge & Meijer, 1992). Some expect prosecutors to exceed even their own guidelines when imposing a punishment order (Van den Brûle, 2014). In theory, prosecutors can request different or higher sanctions than judges in the following two circumstances: either when imposing the punishment order, or when requesting sanctions after the accused has lodged an objection to the issued punishment order. In the literature the possibility for the prosecutor to request a heavier sanction in court after the accused has objected, has been criticized, but no such critics appear to have been raised when issuing the punishment order itself (Kooijmans, 2012). In light of the disparity between prosecutors' and judges' guidelines, this is striking. There is no reason to believe this would not apply *mutatis mutandis* to the punishment order, meaning prosecutors already sanction heavier than a judge would think would do justice to that specific case. In order to have consistency in punishment, comparable factors should be used by judges and prosecutors when making decisions on punishment. Disparity between prosecutors and judges, on the other hand, negatively affects transparency, predictability, perceived rationality and the legitimacy of the sentencing process (Hawkins, 1992; Hutton, 1995). With regard to requesting heavier sanctions in court, the legislature has justified this by stating this confers with the existing system of discouraging suspects for lodging objections unnecessarily and to reduce the burden of the courts so that only those cases that would deserve judicial attention are brought before court (Parliamentary Papers I, 2005/06, 29 849, C). Kessler and Keulen (2008) point out this basically means a prosecutor will request higher sanctions as a matter of course, unless his opinion changes when he hears the accused in court and comes to the conclusion requesting higher sanctions are not appropriate after all. In the Instruction to the PPS of the Attorneys-General it is formally written down differently: it states that prosecutors *can* decide to request up to a twenty percent penalty increase when the accused does not show up or does not give substantive

arguments for his objection (Parliamentary Papers II, 2005/06 29 849, E; Staatscourant 2013, 33003).¹³ As stated above, Kooijmans (2007; 2012) argues this possibility indicates a complete disregard of the distinction between punishment order and transaction. After all, despite it being common practice with the transaction, the punishment order is an act of prosecution, not a settlement offer. According to Groenhuijsen and Simmelink (2005), the practice of the transaction is based on the notion that the court imposes sanctions which would fit the crime, but that a lower sanction in the transaction offer can be seen as some sort of a reward for accepting the transaction proposal. Both parties profit from this: the State saves considerable costs and the accused is rewarded for its willful cooperation. The nature of the punishment order is different and the sanctions provided should therefore fit the crime and the guilt of the offender, precisely because it can be seen as a regular criminal conviction. If a prosecutor requests a higher sanction in court, he essentially requests for a disproportionate punishment for the crime committed (Groenhuijsen & Simmelink, 2005; Kooijmans, 2007; 2012). Kessler and Keulen (2008) deem it appropriate for special and general prevention goals to impose heavier sanctions when no substantive grounds are raised. They compare it to the common appeal practice, in which a higher court can impose heavier sanctions than a lower court has imposed. However, this reasoning still shows signs of a disregard of the formal difference between a regular criminal trial (and subsequent appeal) and a punishment order (and subsequent criminal trial after objection). When a higher court imposes a heavier sanction than a lower court, it can do so because it judges differently on the facts of the case or thinks the lower court has made an error or did not take certain facts into consideration (strongly enough). In any case, such an increase in sanction is not based on the mere fact that the accused has appealed (without substantive grounds). Also, in theory, the accused has all the procedural safeguards available when summoned before court. With regard to the punishment order, the accused does not have the same procedural safeguards and legal protection. When lodging an objection it is the first time his case is fully assessed with a maximum of safeguards. Imposing a heavier sanction than the prosecutor should be possible, but only on the grounds of prosecutorial mistakes or due to disagreement on the facts, not because of the reluctance or mistake of the accused when invoking a legal guarantee.

¹³ Also see the most recent Instruction for the PPS: Aanwijzing OM-strafbeschikking 2013A017.

Despite disagreeing with Kooijmans (2007), as well as Groenhuijsen and Simmelink (2005), Kessler and Keulen (2008) mention an alternative to the current regime. Instead of requesting higher sanctions a form of security deposit should be arranged, so that the accused needs to pay (a part of) the fine before able to object to the punishment order. This is already common practice for crimes committed and punished under the WAHV (Traffic Regulations Act). However, this alternative also has its downsides for both the accused and the efficiency of the system: the accused needs to pay upfront, while at the same time it becomes more appealing to object because it does not cost the accused any (or much) more money. Additionally, such a system would be incompatible with an important criminal law principle laid down in Article 6 ECHR, namely the presumption of innocence.

Controversies with regard to the quality of decision-making

The previous paragraph touched upon possible disparity in the outcome (namely, severity of punishment) between prosecutorial and judicial decision-making. The question of course remains whether this should be perceived as problematic as complete consistency is an utopia, especially considering the fact that each case can be perceived as ‘unique’ (although that might be hard to argue for most traffic offences). If disparity in outcome is not perceived as problematic, focus lies on the quality of the preceding procedure. In that case, the way how a decision is established should meet certain standards. The controversies of the quality of decision-making will therefore be discussed next.

Prosecutorial decision on guilt

By enabling the prosecutor to establish guilt, the legislature has also required the prosecutor to do so when issuing a punishment order. However, deciding on guilt is complex: the issue contains both a normative and an empirical part. Prosecutors are formally bound to use the same legal minimum standards as judges do when deciding on evidence and guilt. This means minimum evidentiary rules should be met (as laid down in Section 339 CCP and further). However, sufficient belief that guilt has been established should also be present and this is a subjective and empirical issue (Section 338 CCP). Even though the PPS does not consider the conviction of the accused as its main objective, the question remains how individual prosecutors deal with the remaining room of discretion the

law and policy guidelines provide them (Van de Bunt 1985; De Doelder 2002; Tak, 2008). Punishment orders take place behind closed doors, and the prosecutor is not accountable to the police, victims, the defendant or judge (unless the accused lodges an objection). Moreover, in many instances he is not required to consult any of these parties and the lack of adversarial element may possibly lead to prosecutorial bias. The punishment order requires the prosecutor to be an independent magistrate while the purpose of the punishment order is efficiency. As Weigend (2012), when discussing the reform of the Dutch criminal procedure from a German perspective, rightly pointed out it is uncertain to what extent the theoretical recognition of the prosecutor's neutrality is in fact honored in practice. In the words of Weigend (2012: p. 159), "(...) prosecutors are interested in exonerating evidence to the extent that they don't wish to make fools of themselves by bringing charges that turn out to be clearly untenable in court; but once the police and the prosecution have made up their minds that a case has been "resolved" and that there is enough evidence to show the suspect's guilt, it would demand very high ethical standards indeed for them to keep searching for evidence that might contradict their conclusion." There seems to be some merit in his point and empirical research could possibly contribute to prove (or reject) his point. In the meantime, it remains unclear how prosecutors exactly come to their decision, especially because the majority of punishment orders decisions are taken by other agencies or secretaries. The accused also does not have the same say as he would have in a criminal trial, in which his side of the story is fully heard and taken in consideration.

Relevant for the quality of decision-making is Went's (2007) argument that the increasing standardization of the prosecutor's work could be at odds with the expediency or opportunity principle. Pakes (2010) notes this has become inherent to prosecutorial work, and the opportunity principle does not mean as much in practice as it does in theory. Following their line of argument it means misdemeanors and small crimes would be prosecuted and sanctioned automatically, while serious criminal offences would be not, resulting into a reversal of the (due to the 'social contract' and the prosecutorial monopoly of the prosecution service) constitutional preferred situation that not small but serious crimes are prosecuted as a matter of course. A prosecutor could, in theory, decide to issue a punishment order, while only getting himself acquainted with the case until the accused lodges an objection. Since the goal of the punishment order is efficiency, this idea seems not

too farfetched. When the prosecutor (re)assesses the case when an objection has been made, and comes to the conclusion the evidence is in fact very weak, he can decide to withdraw the punishment order after all, without explicitly stating the reasons why. Doubts about the quality of decision-making can also be found when looking at the average time it costs for a case to be dealt with by means of a punishment order, as this proves to be done very quickly. For example, in 2012 the average time period for a case to be disposed after registration by the prosecution service was 15 weeks for the total average of all extra-judicial settlements. Punishment orders only took 5 weeks on average, compared to transactions with 9 weeks (Kalidien & De Heer-de Lange, 2013, p. 131). Therefore, instead of placing one's trust in the impartiality of the prosecutor, it would be desirable to strengthen the position of the defense in the pretrial phase (Weigend, 2012).

Delegation of power

The previous chapter explained that the decision to issue punishment orders can be delegated to secretaries, police officers and administrative bodies. Some authors, such as Groenhuijsen and Simmelink (2005) have doubts about the quality of punishment orders when issued by these entities. This can be illustrated by the following. The power to impose conditions in order to avoid prosecution (e.g. conditional dismissal) and issuing a court summoning can be mandated (Section 75 PC and Section 258 CCP). In practice, this means many of these decisions are mandated to the prosecutor's secretary (Groenhuijsen and Simmelink, 2005). The Explanatory Memorandum states this practice can be continued with the punishment order but this shows that the legislature seems to forget the difference between a transaction or a court summoning on the one hand, and a punishment order on the other hand. The (initial) voluntary nature of a transaction and the mere accusatory character of a court summoning are qualitatively different than a punishment order in which guilt is established and the accused is confronted with negative legal consequences in the form of sanctions. Groenhuijsen and Simmelink (2005) therefore argue that the decision to issue punishment orders should not be delegated to secretaries. They refer to a ruling of the Dutch Supreme Court in which it was decided that the decision to revoke a driver's license could not be left over to the *parketsecretaris* (HR 23 september 2003, LJN AG 3621). Additionally, Groenhuijsen and Simmelink (2005) think delegation of the punishment order is not ideal due to the wide range of sanctions possible. They argue only small fines, short

community sentences and short term driver license revocations with regard to easy to prove facts should be eligible for delegation. Mevis (2004) even argues that community sentences should fall under the exclusive competence of the criminal judge so that both prosecutors and other bodies should not be able to make such decisions.

Legal protection

Controversy also revolves around some procedural safeguards, which seem to protect the interests of the accused. When looking closer at the obligation to hear the accused in some circumstances, as well as the requirement for the prosecutor to motivate its judgment when it deviates from the accused's expressly formed arguments, one can see these safeguards are not primarily aimed at legal protection. From a legal protection viewpoint it is worrisome the legislature has proposed these obligations with the rationale of making the procedure as efficient as possible, by explicitly stating the goal of these so called safeguards is to reduce the likelihood an accused will object, instead of increasing the quality of the procedure. This thought is confirmed by the fact that potential errors of the prosecutions service should not be grounds for acquittal or penalty reduction according to the Explanatory Memorandum (Parliamentary Papers II, 2004/05, 29 849, 3; Wijkerslooth, 2007).

Transfer of the initiative

Aside from the fundamental change that no judge is involved and the prosecutor can decide on issues of guilt and punishment, another controversial change involves the role of the accused in the procedure. Normally, as is the case in a regular criminal trial or with transactions, it is the prosecutor who needs to take the initiative to bring a case before court in order to get a criminal conviction. The role of the accused is somewhat passive and if the prosecutor remains passive after a transaction has been rejected, no consequences follow for the accused. In other words, without active involvement of the prosecutor (and subsequently the judge) no formal criminal conviction is possible. However, a punishment order transfers the initiative to the accused. If the accused does not respond within two weeks by lodging an objection (and does not show up in court and prepares substantive grounds for his objection), he risks an irrevocable and enforceable sanction, without having the legal guarantees or remedies which would have been available when his case was dealt

with in a different manner. In light of efficiency goals this approach seems preferable, but from a legal protection (and systematic) viewpoint it is questionable.

Objection procedure

Normally, when errors are made in the investigative phase the judge can attach legal consequences to it pursuant Section 359a CCP. For example, the judge can decide to impose lower sanctions or may exclude evidence. According to the Explanatory Memorandum potential errors made while issuing a punishment order do not belong to the 'circumstances of the case' which are important for 'adequately' deciding on guilt and punishment pursuant to the decision model of Section 348 and 350 CCP (Kessler & Keulen, 2008). The Dutch Bar Association (*Nederlandse Orde van Advocaten*) has criticized the objection procedure and subsequent criminal trial in such a case. The criticism focuses on the fact that criminal courts do not have to consider and establish shortcomings in the content or procedural conclusion of the punishment order when a accused has objected to a punishment order and the case comes before court. The Bar Association finds it undesirable no direct judicial review on the prior actions of the prosecutor is performed. According to Wijkerslooth (2007) the legislature has justified this correctly by stating that a decision model in which the main question is whether the accused has committed the crime (and not whether government has made a mistake in the way it has dealt with the case) confers with the system of criminal procedure and best contributes to the goal of it, namely establishing substantive criminal law (Parliamentary Papers II, 2004/05, 29849, 3; Wijkerslooth, 2007). But even when avoiding picking sides in this debate, legal protection and procedural safeguards remain doubtful. This does not mean no judicial check can be performed at all. Wijkerslooth (2007) foresees a development in which the general principles of a 'proper criminal procedure' (*behoorlijke rechtspleging*) allow not only to consider prior prosecutorial actions but also actions from administrative bodies to which the ability to issue punishment orders is delegated or attributed to. The Explanatory Memorandum also seems to have anticipated on these possible concerns with regard to procedural rights (Parliamentary Papers II, 2004/05, 29 849, 3). After all, Section 257c paragraph 1 CCP prescribes an accused must be heard before a driver license can be suspended or instructions concerning the conduct of the accused can be given. The accused does not have to agree but must state he would fulfill to the given instructions. On the other hand, it is no solid safeguard as no strict criteria underlie

this requirement to hear the accused, and the legislature has been reluctant to attach legal consequences towards violations of these rules by the prosecutor (Parliamentary Papers II, 2004/05 29 849, 3).

Effectiveness

It has been argued that the transition of transaction to punishment order fit reality as most mass transactions are not perceived by citizens as a settlement proposal based on consensus but more like imposed punishment (Wijkerslooth, 2007). This would also be reason to expect a significant increase in objections or appeal is unlikely to happen for most offences eligible for a punishment order. As the goal of the punishment order is more efficiency, the possibility of directly enforcing sanctions seems to be a good result. However, this could be different in the more complex and larger cases, especially in the field of financial and environmental crimes. For companies, one of the advantages of the transaction was the out of court settlement opportunity based on consensus which prevented a 'full-dress' trial in which reputation and good will would be harmed. Most importantly, a transaction would mean no official statement of guilt. This benefit has been lost in the punishment order and could lead to a shift towards more objections or appeals (Wijkerslooth, 2007).

The question to which extent every fact should be legally and convincingly established and proven is already discussed under the paragraph about the quality of decision-making, but is also relevant for effectiveness. From a theoretical and systematic viewpoint the same criteria should be applied to the punishment order as is the case for a regular conviction by a criminal court. According to Wijkerslooth (2007) common practices with regard to the transaction show that a subtle but important difference can be made between cases which in theory could be prosecuted and cases which are fully prepared to be prosecuted. It sometimes happens that the prosecutor and the accused come to an agreement in a complex case, while knowing the case is not fully ready to be prosecuted. This is usually not seen as a problem by neither of the parties because the prosecutor saves time while the accused avoids a long lasting public trial. According to Wijkerslooth (2007), it is doubtful whether this is still possible with the punishment order. The interests for the accused to leave no stone unturned become much greater because the punishment order

means a unavoidable statement of guilt. This is of course the goal of the legislature but it could also severely limit efficient settlement of criminal cases against companies in the areas of environment, fraud and fiscal crimes (Wijkerslooth, 2007). Additionally, the goal of efficiency is also harmed because prosecutors need to have their case fully prepared. If not fully prepared, this means the accused lodges an objection. In both cases, it will take longer before a case has been resolved.

Evaluation study

A first evaluation has been made regarding the '*bestuurlijke strafbeschikking*', the punishment order delegated to the administrative bodies of municipalities. The report, commissioned by the WODC, concluded that at first sight it appears the punishment order did not lead to a new way of thinking (see Flight, Hartmann, Nauta, Hulshof & Terpstra, 2012). Also, it could not be concluded that public nuisance or anti-social behavior went down. According to the researchers, the introduction of the punishment order merely seemed to have provided the municipalities with an "extra tool in their toolbox (Flight et al, 2012)." Taking that into account it can therefore be argued that existing instruments, such as administrative fines and the transaction already were sufficient to deal with the problems municipalities have to face. This conclusion casts doubt on the necessity of implementing the punishment order in terms of effective law enforcement.

Clarity of the system

Lastly, a point of critic which is not directly related to effectiveness but important nonetheless, is that the present obscure set of extrajudicial disposal modalities does not contribute to making the system very clear to citizens. Kooijmans (2012) has a valid point when arguing that the introduction of the punishment order in a system in which disposal of a case on the basis of the WAHV still exists as a separate modality, alongside other administrative fines, conditional disposals and transactions, has not resulted in a more transparent system. Aside from endangering the legal protection of suspects, this is also troublesome for a criminal justice system which constantly needs to deal with legitimacy issues.

PUNISHMENT ORDERS IN GERMANY, SWITZERLAND, FRANCE AND SWEDEN

In the following paragraphs to come equivalent punishment orders in Germany, Switzerland, France and Sweden will be discussed. The chapter addresses the third question of this study. The goal is to shed light on how neighboring countries have made their own choices regarding efficiency measures, with the purpose of possibly using these choices to help improve the Dutch punishment order. Therefore, the findings present here focus on the differences between the Dutch punishment order and equivalents abroad. A summary of the findings can be found in table 6, at the end of this chapter.

GERMANY

Legally three types of offences exist within the German system, namely *Übertretungen* (minor offences), *Vergehen* (less serious crimes) and *Verbrechen* (crimes). According to the German legality principle the prosecutor is obliged to prosecute a case when there is sufficient suspicion the accused committed the crime and no legal grounds are eligible for dismissal (Van Daele, 2000). However, the *Strafbefehlverfahren* procedure is one of the possibilities to render a final decision in a case without formally bringing it before court, and was first implemented in 1877 (Meyer-Goßner & Schmitt, 2012). Crimes which fall under the *Vergehen* category are eligible, but only when the prosecutor and the criminal judge (*Strafrichter*) or president of the laymen's court (*Schöffengericht*) have come to an agreement (Tak & Fiselier, 2002).

Procedure

After a case comes into the prosecution service, the prosecutor can decide to impose a *Strafbefehl* (punishment order): he writes a concept in which the defendant's name, the charge, evidence and the sought punishment is stated, and sends it to the judge. The punishment of the *Strafbefehl* is limited to fines and few additional measures: confiscation

of goods, warning with sentence reserved, publication of decision, driving ban up to two months or suspension of the driver's license up to a maximum of two years (Section 407 German CCP). When a lawyer is present the judge can impose a conditional imprisonment sentence up to one year as well (Section 407 German CCP). It is, contrary to normal German practice, a written procedure: the judge decides on the basis of a written dossier provided by the prosecutor. This is a crucial difference compared to the Dutch punishment order in which the judge does not play a role. In principle, the *Strafbefehlsverfahren* has a non-adversarial nature: the prosecutor, nor the judge is required to hear the accused when issuing a punishment order. Three remarks have to be made though. Before the investigation phase closes, the accused needs to be heard by the police, the prosecutor or the *Ermittlungsrichter*. Secondly, the accused can lodge an appeal against the punishment order, in which his case will be tried in a full trial where he will be heard. Thirdly, when imposing a conditional prison sentence it is, as mentioned, required to provide the accused with legal counsel, in which case the judge would mostly hear the accused's lawyer before issuing a punishment order (Van Daele, 2000). When the judge receives the prosecutor's request for a punishment order, he can decide to drop the case, refer it to court or agree with the *Strafbefehl*. After the judge has signed the request, the decision will be sent to the defendant. He has fourteen days to appeal to this decision, which will result to his case being brought before court. If the defendant does not show up in court or does not appeal at all, the decision becomes final and executable (art. 410 par. 3 CCP).

According to Section 408, paragraph 3 German CCP, it is essential prosecutor and judge come to an agreement on both the judgment of the facts and on the sanction. This safeguard is deemed necessary considering the *Strafbefehl's* short, written and non-adversarial nature (Van Daele, 2000). The prosecution will refrain from issuing a punishment order in two circumstances. First, when a full trial is deemed necessary to recover all essential facts of the case in order to adequately determine the appropriate sanction. Second, considerations of general prevention or special (individual) prevention can play a role. It is important to note that the sole expectation the accused will lodge an appeal is not a reason for the prosecution to refrain from requesting a punishment order (Van Daele, 2000). This sheds different light on the safeguards of the procedure compared to the Dutch punishment order in which they (primary) have an efficiency purpose. When the judge thinks he cannot judge the case on the present dossier, he can request additional investigation by

the prosecutor. When the prosecutor ignores this request, the judge can start additional investigation himself.

The role of the judge

The judge can reject the punishment order when he thinks insufficient suspicion exists against the accused. Refusal can be based on either legal grounds; for example when the statute of limitations has expired, or on factual grounds; for example when the judge thinks there is not enough evidence. Even when the judge thinks sufficient evidence exists, he can still decide to proceed with a regular hearing instead of a punishment order. Reasons for this are when the judge deems it necessary to have a personal impression of the accused or when he thinks the severity of the case requires it so. A difference of opinion on the severity of punishment or the interpretation of the facts can also be a good reason to change the procedure to a full trial. When a judge decides to do so, nor the prosecutor or the accused can appeal to such decision (Pfeiffer, 1987; Van Daele, 2000). When the judge deems the case eligible for a punishment order, acknowledges sufficient evidence and no other procedural limitations are present, he is required to issue a punishment order pursuant to Section 408, paragraph 3 German CCP. Issuing a punishment order assumes agreement between prosecutor and judge and therefore the punishment order is only served to the accused. When serving the punishment order to the accused, certain conditions must be met. Aside from including the personal details of the accused, identity of his legal counsel, facts of the case, applicable laws, evidence and information on the punishment, the punishment order must also contain information and instructions about the possibility of appeal. More importantly, the accused needs to be notified of the legal consequences when he neglects to appeal: the punishment order is equal to a criminal conviction and becomes executable (Van Daele, 2000).

Remarks

The *Strafbefehl* shows similarities with the Dutch punishment order, but is formally a court order because it is signed by a judge (Bleichrodt, Mevis & Volker, 2011). It is mainly used for offences such as minor assault, traffic offences and minor property crimes (Tak & Fiselier, 2002). More than half of the cases that are not dismissed are resolved by a

punishment order; that is about ten to fifteen percent of all cases with a known suspect (Weigend, 2012).¹⁴ While court rejections are rare, they do occur in roughly 1% of the cases (Gilliéron, 2014). Additionally, in about 20% of the cases the accused lodges an objection (Elsner & Peters, 2006).

In the German literature there has been debate about whether the judge must be convinced of the guilt of the accused or whether it suffices *hinreichender Taverdacht* exists. On the one hand it has been argued that due to the short and written procedure a full conviction of guilt cannot be required (Roxin, 1998; Kleinknecht & Meyer-Gossner, 1999). This is an interesting argument when one considers that regular criminal trials in the Netherlands are, for the most part, done on paper as well. On the other hand, it has been argued that a judge may only decide to issue a punishment order when he is fully convinced of the guilt of the accused. This argument is especially strong from a constitutional point of view: it would be undesirable to impose sanctions merely based on suspicion (Radtke, 1994; Van Daele, 2000). Despite this important discussion it has been argued that in practice the judge's involvement merely means rubberstamping the prosecutor's proposal. The judge does not test whether the punishable act was legally and convincingly proven (beyond a reasonable doubt), instead he tests whether enough indications of guilt exist. Especially because a court rejection is very rare, the influence of the prosecution is significant (Elsner & Peters, 2006). The accused does not have to be heard, but often he is, as the prosecutor usually wants to negotiate the *Strafbefehl* in order to avoid an appeal by the accused (Zwiers, 2011; Peters, 2012). The German punishment order can therefore be seen as a form of guilty plea as well (Langbein, 1974). In theory, the Dutch and German punishment order differ substantially, but in practice they seem to have similar effects (Elsner & Peters, 2006; Tak & Fiselier, 2002).

SWITZERLAND

The Swiss prosecutor combines executive and judicial powers, and ordinary proceedings before court are an exception instead of the standard procedure. The country reformed its code of criminal procedure in 2011, that lead to the implementation of a

¹⁴ Numbers vary from 15% in 2007 to 12% in 2013. Also see Statistisches Bundesamt Rechtspflege Staatsanwaltschaften, accessed through: <https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Staatsanwaltschaften.html>

uniform punishment order in all cantons, though some of the cantons already had it prior to 2011 in one way or another (Gilliéron, 2014; Jehle & Wade, 2006). The Swiss punishment order is, equal to the German punishment order called *Strafbefehl*, and is regulated in Section 352 and further of the Swiss CCP. Just like the Netherlands, and contrary to Germany, the judge does not play a role in the proceedings until the accused has formally objected to the punishment order.

Procedure

The Swiss *Strafbefehl* is a written procedure where the prosecutor primarily decides on the police files, and thus usually no hearing takes place. If the accused has accepted responsibility in the preliminary proceedings for the factual circumstances of the case or if the circumstances are otherwise sufficiently resolved the prosecutor issues a punishment order (Section 352 Swiss CCP). Sanctions may include a fine, 'a monetary penalty of no more than 180 daily penalty units', community service with a maximum of 720 hours, or custodial sentence up to six months (Section 352 paragraph 1 Swiss CCP). The sanctions may be combined with additional measures (Section 352 paragraph 2 Swiss CCP). Compared to the Dutch prosecutor, the Swiss prosecutor has considerable more options in terms of sanctions. The punishment order is not a judgment of first instance but an 'offer' to the parties for an out-of-court settlement, also known as a proposed judgment or provisional judgment (Gilliéron, 2014; Schubarth, 2007). In practice an "over-ordination and sub-ordination" exist between prosecution and the accused (Gilliéron, 2014). The prosecutor makes the decision and the accused is usually not represented by a lawyer. Despite called a proposed judgment, no bargaining takes place. Because there is no duty to hear the accused, the accused can either accept or reject the punishment order by lodging a written objection within ten days after the punishment order has been issued (Section 354, paragraph 1 Swiss CCP). This term is shorter compared to the Dutch punishment order. The service takes place by registered post or by some other means that enables acknowledgment of the receipt (e.g. given by the police, Section 85 paragraph 2 Swiss CCP). In case service is not possible (e.g. the place of residence of the accused is unknown), service takes place by way of publication in the official journal of the Federation or the canton. However, according to Section 88 paragraph 4 of the Swiss CCP, punishment orders are deemed to be served even when not published. This means that the time limit for objection starts without notification, severely limiting the right

of the accused to have their conviction reviewed by a court (Gilliéron, 2014). When the accused lodges an objection, he does not have to provide a statement of grounds (Section 354 paragraph 2 Swiss CCP). After objection, the prosecutor gathers additional evidence to assess the objection and to decide whether to withdraw or stand with the punishment order. The objection is deemed to have been withdrawn if the accused fails to attend an examination hearing without an excuse despite being served with a summons (Section 355 paragraph 2 Swiss CCP). If the prosecutor decides to stand by the punishment order, he sends the case files to the judge in which a main hearing just like in ordinary proceedings take place. If the accused fails to attend the main hearing without excuse or being represented, the objection is deemed to have been withdrawn as well (Section 356 paragraph 4 Swiss CCP). This is different compared to the Dutch punishment order in which case the prosecutor may request a 20% increase in punishment if the accused fails to appear in court after objection. Next to the accused, senior prosecutors or the attorney general may be given the competence to object to the decision of a prosecutor's decision. This basically means the prosecution service can engage in a self-checking exercise (Gilliéron, 2014). If no objection is made, the punishment order becomes final and has the same effect as a judgment following regular proceedings (Section 354 paragraph 3 Swiss CCP).

Remarks

The Swiss punishment order is extremely popular and the majority of convictions are based on this procedure. Nationwide statistics are not available but it has been estimated more than 90% of all cases overall are settled out of court (Gilliéron, 2014; Hutzler, 2010, Riklin, 2006; 2007). Some data is available for separate cantons and statistics show that, for example, in the cantons of Zug and Zürich 98.6% and 90.4% of cases were dealt with by means of a punishment order in 2011 respectively (Gilliéron, 2014; also see Supreme Court of the Canton of Zug, 2012).¹⁵ In Zürich the reform of the Swiss CCP has provoked an increase in punishment orders, as in 2008 only 83.5% of cases were dealt with by means of a punishment order. The reform raised the sanction, which can be imposed from three to six months for this canton. In the canton of Zug prosecutors already had the power to impose six months imprisonment prior to the reform in 2011.

¹⁵ These numbers have considerably meaning when considering that the canton of Zürich includes the nation's capital and that both cantons represent over 1.5 million of the country's 8 million inhabitants.

To assess the quality of decision-making attention should also be paid to the data on objections. In the years 2008-2011 objections have been made by the accused in about 5% of issued punishment orders in the canton of Zug. Additionally, senior prosecutors have called back lower prosecutors in about 2% of the cases (Gilliéron, 2014; also see Supreme Court of the Canton of Zug, 2009; 2010; 2011; 2012). Gilliéron (2014) adds that in many cases in which no objection has been lodged, this does not necessarily mean that the accused agrees with the prosecutor, but may be the manifestation of indifference, fear, and ignorance of the law. Similar criticism towards the Dutch punishment order, such as doubts about the impartiality of the prosecutor and the strong inquisitorial nature of the punishment order and the right to a fair trial, has been raised with regard to the Swiss punishment order (Gilliéron, 2014). Wrongful convictions are even mainly attributed to the fact that the accused is not heard. Furthermore, the application of the punishment order, originally designed for petty offenses, has been widely expanded over time (Gilliéron, 2014; Riklin, 2006). This is important to take into account considering the formal wide range of the Dutch punishment order. To conclude, the Swiss punishment order seems to have to deal with the same criticism as the Dutch punishment order. When looking at the range of sanctions and few safeguards surrounding the notification and objection procedure, the accused might even be worse off in Switzerland than in the Netherlands. Gilliéron (2014) considers it to be highly problematic that the prosecutor faces extremely little oversight of his decisions and that the Swiss legislature has set a high value on the purpose of efficiency.

FRANCE

In France, the prosecutor has wide discretion with regard to prosecution. Prosecution is based on the opportunity principle and at any point in the investigation the prosecutor may decide to drop the case on various grounds. Alternatively, he may decide to prosecute the perpetrator. The method of proceedings differs according to the nature of the offence. If the offence is a *contravention* (minor infraction, as opposed to a *délit* or *crime*) the prosecutor refers the case to the *tribunal de police* for ordinary proceedings, but he may also opt for the simplified procedure of what is called an *ordonnance pénale* (Section 524 French CCP). Misdemeanors (*délit*) provided for by the Traffic Code may also be dealt with by an

ordonnance pénale (Section 495 French CCP). The French punishment order is the oldest form of simplified proceedings in French criminal law, and exists since 1972 (Gilliéron, 2014).

Procedure

The *ordonnance pénale* is a written procedure without adversarial hearing, in which the prosecutor sends the dossier of the case and his observations to the judge (Section 525 French CCP; Dervieux, Delmas-Marty, Benillouche & Bachelet, 2002). In effect, the public prosecutor proposes a sanction to the court and gives notice to the accused when the judicial police inquiry has established the matters of the fact and enough information about the income of the accused has been obtained in order to determine the sanction. After having received the case file and the request for an *ordonnance pénale*, the police judge (*juge de police*) may either transfer the file to the public prosecutor (when he thinks a regular trial is needed) or declare by an *ordonnance pénale* an acquittal or a conviction. When not referring it back to the prosecutor, the court deals with the case without further investigating the evidence. A conviction contains a fine and one or more supplementary penalties applicable (Section 525 French CCP). The fine may not exceed 5.000 euros and supplementary measures may include prohibition, forfeiture, incapacity or withdrawal of a right (e.g. suspension driver's license), obligation to seek treatment or duty to act, confiscation, compulsory closure of an establishment or public notification of the decision (Section 131-10 French CCP). There is no trial and judgment is based on the file only. The judge is not bound to give reasons and may modify the sanction. In practice, the judge seems to accept the prosecutor's proposals quite often (Aubusson de Cavarlay, 2006; Gilliéron, 2014).

The prosecutor has ten days to oppose to the judicial decision on the punishment order, before the accused is notified by recorded delivery with an acknowledgment of the receipt (Section 495-3 French CCP). The accused may object to the punishment order within thirty days when it is issued for a petty offence (*contravention*), and within forty-five days when issued for a misdemeanor (*délit*). This is considerably longer than is the case in Germany or the Netherlands. An additional safeguard for the accused is found in Section 527 of the French CCP; objections remains possible when it is not apparent from the receipt notice that the accused received the notification letter. The thirty-day time limit then starts to run from the day when the accused was first apprised of the conviction (e.g. because of

enforcement means) or when informed about the time limit and the possibility to object (Dervieux et al, 2002). This is different than the Swiss punishment order where the time limit starts to run immediately after issuing the punishment order. After objection, the case will be heard by regular adversarial procedure. If no objection is lodged, the order will be carried out. The punishment order has the effect of a regular conviction that has become a final decision, but not in relation to any civil action brought in respect of damages caused by the offence (Section 528-I and 495-5 French CCP).

Remarks

The punishment order seems to be a popular method of simplified proceeding because about 25% of cases brought before the *tribunal correctionnel* and about 55% cases brought before the *tribunal de police* are dealt with by means of a punishment order (measured in 2007-2009; Gilliéron, 2014). The number of offences formally eligible for a punishment order seem to be more restricted than is the case with the Dutch punishment order: only petty offences and misdemeanors in the Traffic code are eligible for a punishment order. Just as is the case in Germany, the French judge remains his formal role as the decision-maker on guilt and punishment when cases are dealt with by means of a punishment order. The prosecutor does all the preparatory work but has to ask permission to the judge in order make the punishment order executable. Because the prosecutor's position remains very strong, Jehle and Wade (2006) evaluate such proceedings as the prosecutor "effectively pre-forming court decisions." Be that as it may, the French punishment order does not seem to only focus on efficiency because the possibility to object to the punishment order is both given to the prosecutor and the accused. Moreover, the accused has considerable time to make his decision whether to object.

SWEDEN

Unlike the typical continental procedure, which is inquisitorial, the Swedish legal system can be characterized as accusatorial, in which the parties play a large role and the judge is less active (Zila, 2006). In theory, prosecution is based on the legality principle but the majority of crimes and offenses, in particular offences such as theft, shoplifting and traffic infringements, are sanctioned by police officers or prosecutors in the form of

simplified proceedings. Both prosecution and police are thus entrusted with considerable judicial powers. The Swedish equivalent of the Dutch punishment order is called *Strafföreläggande*: this procedure enables the Swedish prosecutor to assume a court role and unilaterally sanction certain offences since 1995 (Zila, 2006; Lappi-Seppälä, 2008).

Procedure

In the case of less serious crimes that would normally lead to a fine (or in certain cases up to six months imprisonment), the prosecutor may decide to issue a punishment order instead of prosecuting the case before court (Wong, 2012). This means that the prosecutor, without a trial, decides that the accused should pay a fine. Special provisions apply when an offence is committed by a minor (Section 48:4 Swedish CCP). A precondition for the punishment order is that the accused accepts the punishment order and therefore admits guilt. This is a crucial difference compared to the punishment orders in the Netherlands, Germany, Switzerland and France (Kessler & Keulen, 2008). A punishment order has the same effect as a judgment and is recorded in the Criminal Records Registry (Section 48:3 Swedish CCP). Sanctions may include a fine or a conditional sentence. The conditional sentence is an alternative sanction to imprisonment, and is given when the prosecutor thinks the accused would have received imprisonment when the case is brought before court, but deems it desirable not to take the case to court (Zila, 2006). Additional measures to be imposed include forfeiture of property and a fee under the Act on the Fund for the Victims of Crime (Section 48:2 Swedish CCP). Compared to the Dutch punishment order, the range of sanctions is very limited and basically includes a fine only.

The punishment order can also be delegated to police officers (and customs-officers), but only for offences which can be punished by a pre-fixed fine, determined by the Prosecutor General (Section 48:13-14 and 20 Swedish CCP). They are usually for minor criminal offences that in many other legal systems would be treated as administrative violations (Wong, 2012). This procedure is called *föreläggande av ordningsbot* and the approval of the accused remains required (Section 48:15 Swedish CCP).

After issuing the punishment order, a form is sent to the accused on which he needs to admit to the offence and accepts the punishment within a specific time period (Section 48:7 Swedish CCP; the law does not mention a time limit so the prosecutor needs to state a time limit on the punishment order). Failing to respond within the designated time period

means the prosecutor will take the case to court. Police officers can usually hand out the punishment order in person and ask for approval immediately. If the accused needs more time, he can give his approval later. If the accused accepts the punishment order, he has thirty days to pay the fine (minors aged 15-18 have fifteen days). If the accused rejects the punishment order or does not pay in time after approval, the prosecutor is allowed to bring charges and have the case tried in a regular trial instead. This is similar to the current practice of the Dutch transaction: the prosecutor needs to take the initiative in order to get a criminal conviction when the accused remains passive. An approval given after the prosecutor has issued a summons before court has no effect (Zila, 2006; Lappi-Seppälä, 2008).

Remarks

The fine is an important type of punishment in Sweden and the vast majority of them are given by means of a punishment order. Around 60% of cases handled by the courts result in fines, while 80% of all cases handled by the courts and prosecutors together, result in fines. This means that the courts impose about 40,000 fines annually, while prosecutors issue some 200,000 punishment orders, and the police issue some 100,000 punishment orders (Lappi-Seppälä, 2008).

The decision to give the prosecutor, instead of the judge, the right to impose fines is an equal fundamental change to the criminal justice system as the Netherlands has experienced since 2008. Lappi-Seppälä (2008) argues the change is of lesser importance in practice, because under the old regime fines were prepared by the prosecutor and the courts had the tendency to rubber stamp the prosecutor's proposal. In Sweden, the prosecutorial decisions on guilt and punishment seem to be limited to mainly traffic offences. In addition, fines imposed by the police for minor traffic offences are set at a fixed amount. In the case of non-payment, punishment orders cannot be converted into imprisonment (Lappi-Seppälä, 2008). An important aspect and difference of the Swedish punishment order compared to the Dutch punishment order, is the requirement of the approval of the accused. Jehle and Wade (2006) remain skeptical though and argue that despite the duty to actively seek the accused's agreement, the question remains "as to in how far the person subjected to such proceedings fully understands what s/he is agreeing to, or failing to appeal against, remains to be examined (Jehle & Wade, 2006, p. 75)."

Table 6: Differences and similarities between the equivalent punishment orders

Country	Judge involvement	Consent required	Time limit to object	Type of sanctions ⁽²⁾	Main type offences ⁽³⁾	Delegation possible
Netherlands	No	No	14 days	F, C, I, R	T, A, P	Yes
Germany	Yes	No	14 days	F, C, I, R, (P)	T, A, P	No
Switzerland	No	No	10 days	F, C, I, R, P	T, A, P	Yes ⁽⁴⁾
France	Yes	No	30/45 days	F, C, I, R	T	Yes
Sweden	No	Yes	N/A ⁽¹⁾	F, C, I, R	T, A, P, D	Yes

(1) The punishment order states the time period. Failing this term means the prosecutor needs to take the case to court.

(2) Legend: **F**= fine, **C** = community sentence, **I** = instructions, **R**= revocation driver license, **P** = unconditional prison sentence, **(P)** = conditional prison sentence.

(3) Legend: **T** = traffic offences, **A** = minor assault, **P** = minor property offences, **D** = possession of cannabis

(4) This is restricted as police may only issue fines for traffic offences.

LEGAL RECOMMENDATIONS

This thesis has proposed the question to what extent controversies of the punishment order can be mitigated by looking at equivalents abroad. After analyzing the Dutch punishment order, its controversies and some of its equivalents abroad, we now turn to an analysis of how the Dutch controversies relate to equivalents of the punishment order abroad, and what legal recommendations can be made. In short, the recommendations are organized in three categories. The first category includes the involvement of a judge. The second category consists of the approval of the accused, and means going back to the (or similar) practice of the transaction. The third category consists of less radical changes and includes limited delegation, limited categories of offences, reasonable time to object and mandatory legal counsel. The recommendations are not necessarily cumulative. Large improvement can already be established when adopting one or two recommendations, so that in fact they sometimes can be perceived as alternatives to each other.

Involvement of a judge

If there is one aspect that stands out when comparing the Dutch punishment order with equivalent punishment orders abroad, it is the involvement of the judge. This is also the most important and extensive recommendation to be made when relating the controversies to the equivalent punishment orders abroad. It is strongly recommended to restore the traditional roles of the prosecutor and judge in the criminal justice system, by enabling the prosecutor to bring charges and the independent judge to decide on these allegations. This will tackle a few controversies at the same time. The first large controversy contains the constitutional compatibility of the punishment order. Even though after intensive debate a certain consensus seems to have been reached, a few scholars remain skeptic (Crijns, 2004; De Graaf, 2003; Groenhuijsen & Simmelink, 2005). After all, for the first time an authority other than the judge may now decide on guilt and punishment unilaterally as well. When looking at the German *Strafbefehl* one can easily wonder why the Dutch legislature has not looked at its eastern neighbor. When a judicial check is in place, even when this is just a rubber stamp as has been argued with regard the German *Strafbefehl*, the constitutional compatibility discussion could, at least formally, be resolved.

Additionally, concerns about the quality of the decision-making process and the severity of punishment are also mitigated. The judge is best suited to decide on guilt and punishment because he is truly an independent magistrate. Moreover, the quality of the decision-making can improve when a second party looks over the case. With regard to disparity in punishment; when a judge signs the punishment order, the prosecutor formally does not impose punishment anymore, removing any possible formal disparity in punishment between prosecutors and judges. If prosecutors continue to differ in their opinion on judgment, the involvement of a judge remains useful: judges could modify disproportionate punishments requested by the prosecutor. According to data from the Federal Statistical Office of Germany (Gilliéron, 2014), judges reject 1.4% of requested punishment orders (measured in 2011). Perhaps this seems not much, but if one recalls the large caseload of misdemeanors and small crimes the prosecutor has to deal with, the absolute amount of rejected case are considerable. The German, but also the French system have thus provided a safeguard for any possible overzealous or disproportionate use of the punishment order by the prosecutor. The German data show this safeguard is not pure symbolic and therefore it is recommended that the Dutch legislature also restores the prosecutor and the judge in their traditional roles. This will also bring back the initiative to the prosecutor so that the accused does not have to bring the case to court in order to get his case better looked at. Another advantage is that prosecutors do not have to decide whether to increase sanctions with twenty percent when the accused objects to the punishment order and the case is tried before court. In light of equality, legality and proportionality principles, as well as legitimacy, this is desirable.

Finally, by changing the punishment order into a court order, critic from a systematic viewpoint can also be mitigated. For example, one can think about the following current inconsistency: prosecutors can impose and execute unconditional but no conditional sanctions while issuing a punishment order. Section 14g of the Dutch CC prescribes that only judges can execute conditional sanctions so that a 'full-dress' trial is required. If a punishment order is signed by a judge and conversion procedures become possible, this could lead to a more efficient system in which also conditional sanctions can be imposed and properly be enforced without the prosecutor needing to take the case back to court for a full hearing.

In sum, it is striking that one (but fundamental) change could remove or mitigate a few of the most important controversies in the heavy debate on the punishment order, but that this idea is totally neglected by the legislature in fear of efficiency loss. Even when this change does not mean as much in practice as it does on paper, it would at least have prevented some criticism given by legal scholars. Enabling a senior prosecutor to object to a decision of a prosecutor, as is the case in Switzerland, does not seem to go far enough but is recommended when the judge remains outside the picture. Unfortunately, despite the involvement of a judge, problems remain with regard to the quality of decision-making. As can be seen in the German and French example, a judicial check could merely mean rubberstamping the proposal. If the judge is ought to perform a more thorough check, this would, contradictory to its goal, seriously endanger the efficiency of the punishment order. Moreover, if the judge does not request for additional investigation, the judge can only base its decision on what the prosecutor has given him in the case file so that the prosecutor maintains an important role when requesting for a punishment order.

Approval of the accused

Another recommendation is related to the controversies with regard to legal protection and procedural safeguards. In Sweden, punishment orders can only be issued and enforced when the accused accepts the punishment order and thus admits having committed the crime. The Swedish practice seems to be very similar to the current Dutch practice of the transaction. In both cases, it is the prosecutor who needs to take the initiative when the accused does not agree with the proposed punishment. The only difference is that the Swedish (and Dutch) punishment order equals a regular criminal conviction, while a transaction does not, as it is no official statement of guilt (it will be noted in the criminal registration database though). Going back to the transaction or using the Swedish type of punishment order could be an important safeguard to prevent prosecutors from excessively issuing punishment orders whenever they feel like it. A confession is a first important factor in establishing the guilt of the accused; especially in the Dutch criminal justice system in which its frequency is relatively high. It would be recommendable to introduce such a criterion for issuing a punishment order for the more serious cases, but not for small offences, such as easy to prove traffic offences. Implementing abovementioned

recommendation will limit the prosecutor's discretion and improve the accused's legal protection. Additionally, it is advisable to hear the accused so that possibly some kind of negotiation or plea-bargaining could take place, and consequently an agreement can be made to issue a punishment order. This will not only contribute to better acceptance of the prosecutor's decision but also encourages offenders to accept a swift criminal reaction when their case is clear. In light of the controversies raised about the necessity and effectiveness of the punishment order, it might also be a good idea to go (partly) back to the current practice of the transaction. Despite the criticism, from a systematic viewpoint, that a transaction does not fit the inquisitorial criminal justice system, and that in practice it is often not perceived as an offer based on consent, the transaction has so far functioned relatively well. Additionally, when opting for the Swedish version, thus attaching the legal consequence of a regular criminal conviction, no form of buyoff exists anymore, mitigating the current criticism on the transaction.¹⁶ It would also be advisable to reconsider the proposal of the Commission Korthals Altes that suggested to make transactions executable after a certain period of time so that the notion of consensus remains.

Limited delegation

In analogy with the recommendation to include the judge in the punishment order procedure it could also be recommended that the punishment order should not be mandated to police officers or administrative bodies. As opposed to the first two given recommendations, this would mean a far less radical change to the punishment order. Controversies raised about the quality of decision-making can easily be related to the workings of equivalent punishment orders abroad. For example, in Germany the police does not have sanction authority and decisions on punishment or not left over to the prosecutor, let alone delegated to secretaries or other bodies. However, recommending total exclusion of delegation seems rigorous and contrary to common practice within administrative law in which punitive administrative fines can be imposed. Therefore, it would be advisable to keep the delegation of power limited to this type of sanction only and thus excluding more complex sanctions such as community sentence or instructions concerning the conduct of the accused. The common practice to have the police or administrative body 'announce' a

¹⁶ See for a discussion on the transaction for example Groenhuijsen & Simmelink (2005).

punishment order or transaction for certain offences might also be continued, so that punishment orders become final only when the judge has signed it. This is for instance the case in Switzerland, where the police only issues fines for traffic offences. Such a limitation will contribute to the quality of decision-making: perhaps not because the judge does a judicial check (this check could not be very thorough) but because it forces authorities who announce such punishment orders to hand them out carefully just because they know a judge will need to sign it.

Limited categories of offences

In addition, or instead of limiting delegation, it is worth considering to formally limit the categories of offences. At this moment, all offences with a statutory maximum of 6 years imprisonment are eligible for a punishment order. While it is true that policy restricts the scope even further, it could prove to be a slippery slope as we have seen with regard to the Swiss punishment order. In Switzerland, the punishment order was designed for relatively small traffic offences, but its use has been extended to more serious offenses. In light of the controversies about the quality of decision-making and legal protection, as well as current penal populism developments, it is recommended that primacy should lie with the legislature and not the executive branch. Despite the fact that the primacy of the legislature cannot prevent penal populism developments, the executive branch is usually more susceptible to it, and also has the power to adhere to popular opinion more easily while performing its duties. Therefore, it is advisable that the categories of offences eligible for a punishment order are explicitly defined by law so it will be harder to expand the scope, while at the same time legal certainty increases. It is best to look at the French example, and to specifically list certain (categories of) offences. This is a far more practical solution than, for example, deciding that instead of all offences with a statutory maximum of six years, only offences with a statutory maximum of four years are eligible. Last mentioned alternative would exclude a vast majority of petty crimes, that would actually be a perfect fit for the punishment order. This is best explained by an example. If the bar is reduced from six to four years, this would mean that a simple theft (e.g. stealing a piece of bread) committed with another person would not fall under the scope of the punishment order anymore because it would be qualified as a form of theft with aggravating circumstances, namely committed

with another person. This offence is punished with a statutory maximum of six years imprisonment (Section 311, paragraph 1 under 4 CC). However, the gravity of such offence might not require a ‘full-dress’ hearing in order to serve justice.

Time to object

In light of efficiency goals, the previous recommendation of requiring the approval of the accused may seem irrational. It may be argued that requiring such consent could limit the efficiency of the measure to such an extent that it equals going back to the transaction. Instead of requiring the consent of the accused an alternative could be considered. In this case, in order to provide the accused with sufficient legal protection, the time period to object should be increased. By increasing the time period to, for example, the French standard of 30 or 45 days, the accused can have considerable time to decide on his procedural strategy and get himself acquainted with legal advice or legal counsel if he deems necessary. This would not increase the quality of the decision-making process of the prosecutor, but will help the accused to be able to prepare his defense better when accused (and punished) for a particular offence. Similar to requiring the approval of the accused extending the time limit to object also decreases efficiency, but to a lesser extent. Another advantage is that the prosecutor is still able to execute sanctions after the limit has passed, instead of taking the case to court.

It should be noted that a fundamental critic could be raised with regard to increasing the time limit. One might argue that increasing the time limit to over fourteen days is contrary to the system of criminal law. After all, a regular appeal in court also has to be made within fourteen days after the judge has given judgment. This critic can easily be waived, however, when we look at the nature of the punishment order. When issuing a punishment order, the prosecutor seems to function similar to an administrative body performing executive duties. In administrative law, terms of six weeks are the regular time period to object to certain decisions, such as an administrative fine. Such an appeal is first considered by the entity who made the decision, and on second appeal brought to court. With regard to the punishment order, if the accused objects, the prosecutor can also reconsider the case and decide to withdraw or change the punishment order before going to

court. Therefore, it would not be irrational to deviate from the regular time limit in criminal law and adhere to administrative standards.

Legal counsel

In lieu of previous recommendation it is also recommendable to extent the scope for mandatory legal counsel. This recommendation is not directly derived from the comparative analysis but a result of discussing the controversies. Legal counsel is already provided for sanctions other than fines under 2000 euro, but practice has shown that this might not be sufficient.¹⁷ According to the *Salduz* jurisprudence, legal counsel should be available prior to the first hearing. However, the right of legal counsel after the prosecutor has made a decision with regard to how he continues the case after a hearing, cannot be based on this jurisprudence. This means legal counsel is not always required after the prosecutor decides to issue a punishment order instead of taking the case to court. It is desirable however, to also receive legal advice after a punishment order has been issued, especially when caught in the act and the accused is inclined to accept a punishment order immediately. Without the involvement of a judge, no hearing and no consent of the accused, the position of the accused within the punishment order procedure can be considered to be very weak. In order to compensate for this, the accused needs extra tools to withstand the 'sub-ordination' of the inquisitorial criminal justice system. This can either be done by judicial review, by giving the accused the power to reject the punishment order or to provide them legal counsel. As implementing a true adversary element such as a hearing might unreasonably limit the efficiency of the measure, it is therefore recommendable to also provide legal counsel (for serious offences) after a decision to order a punishment order has been given. Lawyers have explicitly criticized the lack of legal counsel (for small offences) with regard to the ZSM procedure as well (Van den Brûle, 2014). Therefore, it is recommended to also have legal counsel present next to the other parties involved in a ZSM procedure at the police station. This could improve the legal protection of the accused.

¹⁷ For example, last summer, in the Netherlands controversies were raised about how the prosecution service issued punishment orders for drug possession on a music festival. Instead of leaving the festival and wait for legal counsel at the police station, the suspects were inclined to pay immediately, while not being aware of the legal consequences. See: De Vries, J. & Flokstra C. (25-08-2014). 'Een advocaat is nodig bij drugscontroles'. *Het Parool*. Retrieved from <http://www.parool.nl/>

CONCLUSION

The implementation of the punishment order in 2008 has brought a fundamental change to the Dutch criminal justice system. For the first time an authority other than the judge may decide on guilt and punishment in the Netherlands. As a consequence the prosecutor has become a true 'judge before the judge': he now makes a formal decision on guilt and imposes punishment. This reflects a fundamental breach with the traditional dogmatic relationship of the prosecutor vis-à-vis the judge, and their respective roles within the criminal justice system. It is therefore no surprise that the punishment order has attracted a substantial amount of criticism. Many authors have debated its constitutional compatibility, disputed the standard of legal protection and questioned the need of the punishment order (e.g. Crijns, 2002; 2004; 2010; De Graaf, 2003; Groenhuijsen & Simmelink, 2005; Hartmann, 2010; Kooijmans, 2007; 2012; Mevis, 2004; Van den Brûle, 2014; Weigend, 2012; Went, 2007; Wijkerslooth, 2007). This thesis has given an overview of the nature of the punishment order and its controversies. The aim of this study was to find solutions that could mitigate the controversies surrounding the Dutch punishment order. This was done by conducting a legal comparison with equivalent punishment orders in Germany, Switzerland, France and Sweden.

The comparative analysis has rendered the following results. First, in Germany and France the punishment order procedure is safeguarded by the involvement of a judge. This means that without the approval of the judge, the punishment order cannot be issued. Additionally, in Germany the power to issue a punishment order cannot be delegated to the police, while in France the punishment order is mainly used for traffic offences. Also, the time to object is considerably longer in France than in the Netherlands. When comparing the Dutch punishment order to the Swedish punishment order, the most crucial difference is the requirement that the accused has to give consent to the Swedish punishment order. This resembles current practice of the Dutch transaction and provides an important safeguard for the accused. Lastly, the Swiss punishment order seems to be most similar to the Dutch punishment order. Equal to the Netherlands, in Switzerland, the punishment order is given without the involvement of a judge and no consent of the accused is required. When looking at the broad range of sanctions, and the few safeguards surrounding the notification and

objection procedure, it can even be argued that the accused might be worse off in Switzerland than in the Netherlands in terms of procedural safeguards.

When relating these differences to the controversies of the Dutch punishment order some valuable recommendations can be made that could mitigate these controversies. The first recommendation concerns the involvement of the judge. The second recommendation involves going back to a similar form of the current practice of the transaction. Other recommendations include limiting the delegation to police and administrative bodies, limiting the scope of offences eligible under the punishment order, increasing the time period to object, and extending the scope for providing mandatory legal counsel. By implementing (some of) these recommendations, controversies of the Dutch punishment order can be mitigated, while strengthening procedural safeguards and legal protection.

DISCUSSION

Implications

This study has shown that efficiency measures are necessary and unavoidable in any criminal justice system. Criminal justice systems around the world have good reasons to have such measures. The necessity of enforcing the law and the continuous public desire to combat crime in combination with limited resources means national legal systems need to make choices how to organize their criminal justice system. Penal populism developments might be temporarily present, but the urge for efficient law enforcement can be considered to be a constant factor in criminal justice policymaking. All (western) criminal justice systems seek ways to maintain an efficient criminal justice system that can adequately respond to law violations, and considering the various differences between the equivalent punishment orders compared in this study, it appears different choices can be made. For example, in the Netherlands, a high-trust society, much trust is given to government and prosecutorial authority in particular. Despite having a different role than the judge, the prosecutor is seen as a trustworthy authority capable of weighing all interests involved. The fact that the decision-making process is different than that of the judge does not change that view and therefore the Dutch punishment order differs on certain fundamental aspects compared to other punishment orders, mainly the involvement of a judge. In comparison with Switzerland, the Netherlands seems to have followed a moderate version of the Swiss punishment order. In Switzerland, the range of sanctions are significantly broader while procedural safeguards seem limited. Despite criticism, the Swiss punishment order has become embedded in the national legal system since 2011. Together with the fact the punishment order is used in the vast majority of cases, this gives to wonder how the punishment order works out in practice.

Tension between efficiency and legal protection

This thesis has presented a substantial amount of criticism towards the Dutch punishment order, but the strive for efficiency should not be considered to be negative as a matter of principle. Efficiency has its great advantages for the public and the accused alike. For the public it means less resources are wasted and for the accused it means, when talking about the punishment order, avoiding a long lasting public trial. This saves the accused

considerable time and public humiliation. The downsides are, of course, legal protection and procedural safeguards. However, for many law violations a 'full-dress' hearing is not required nor desirable. After all, it would clog the criminal justice system if all law violations would be prosecuted before court. For more serious offences the tension between efficiency on the one hand, and legal protection and procedural safeguards on the other hand, remains. Serious criminal offences, such as assault or burglary, formally fall under the scope of the punishment order and if prosecutorial policy does not limit it, could be issued without restraint. In these instances, the balance between efficiency and legal protection becomes unstable as it shifts towards efficiency.

The function of criminal law

According to Foqué and 't Hart (1990), the function of criminal law is both instrumentality and provider of legal protection. Instrumentality and legal protection cannot be seen separated from each other, neither should preference be given to the one above the other. At this point it seems the Dutch criminal justice system focuses too much on instrumentality. This is perhaps best evidenced by the way in which procedural safeguards have been introduced and defended with regard to the punishment order. These safeguards are not introduced with the rationale to improve the quality of decision-making but to increase the efficiency of the system. They would, as the legislature put it, reduce the likelihood of the accused to lodge an objection. This is different than introducing safeguards because it is exactly the function of criminal law to provide that legal protection. Despite the fact that the implementation of the punishment order is no direct result of the public call of more safety, it does prove the current mindset of policy-making. This mindset is more efficiency focused than ever. It forgets however, that the other side of the coin should not be neglected. The punishment order is exemplary for this because legal protection and procedural safeguards seem to be dependent on the initiative of the accused, while it is the duty of the state to actively provide this protection ('t Hart, 1997). Originally, the Dutch criminal justice system has been built on the idea that for its protection, the individual is primarily dependent on the integrity of a coherent system of procedural rules that both aims for truth-finding and a fair 'trial', and whose fair application depends on the public actors who are involved in criminal law ('t Hart, 1997). It is questionable whether the punishment order fits in this paradigm. Without the involvement of a judge, no hearing, no consent of

the accused, and the significant amount of power concentrated in one institution, the position of accused within the punishment order procedure can be considered to be very weak.

Restoring the balance

In order to compensate for his weak position, the accused needs extra tools to withstand the 'sub-ordination' of the inquisitorial criminal justice system. In countries like Germany and France, the state seems to take its duty more seriously because the independent and impartial judge oversees the procedure. In France, the accused also has more time to object and in Germany the police cannot issue punishment orders. In Sweden, the accused has considerable power because he has to approve before a punishment order becomes executable. In the Netherlands (and Switzerland), (too) much trust is put in the prosecutor who is continuously encouraged to perform his duties as efficient as possible. Recommendations that could provide the desired compensation against the 'sub-ordination' in the Dutch context are the involvement of a judge, the approval of the accused, limiting the categories of offences, limiting delegation, extending time to object, and providing legal counsel.

Limitations and future research

This thesis has given information on the workings of the Dutch punishment order and extensively discussed its controversies. Despite the valuable contribution to the debate on the fundamental change of the Dutch criminal justice system, and providing important recommendations, this thesis also needs to acknowledge its limitations. These can be organized in two different categories. The first category concerns the limitations of language and legal comparative research. The second category concerns the lack of empirical research.

Language and legal comparative research

First of all, while the performed legal comparison was sufficient for the purpose of this study, a more extensive and in-depth study could be performed by including other language sources. This could possibly lead to a better understanding of the equivalent punishment

orders abroad. Comparing legal systems is a challenging endeavor with various pitfalls, and language is just one of them. Another limitation is that this legal comparison has been conducted from a Dutch point of view only. This can lead to bias and misinterpretation of the analyzed topics. Also, law in the books may differ from law in action, and the 'armchair researcher' suffers from this. Lastly, by isolating the punishment order this comparative study neglects to analyze the broader context of the respective legal systems (Pakes, 2010).

Future comparative research

To tackle aforementioned problems, it would be desirable if scholars from the respective countries of the equivalent punishment orders discussed here, would shed light on the workings and practices of these equivalent punishment orders. A more in-depth analysis of the respective legal systems as a whole should also be included. This will lead to a more balanced understanding of the respective punishment orders and the role they play in the respective legal systems.

Lack of empirical research

The second category of limitations includes the lack of empirical research. This study has mainly focused itself on the theoretical aspects of the punishment order. While the study has provided some empirical data to support its arguments, it would be worthwhile to research how these punishment orders work in practice. The valid and valuable recommendations made in this study could then also be based on empirical based arguments instead of only legal and theoretical based arguments. Research in this field is severely lacking and is essential to the discussion of the punishment order. Empirical research has the ability to put aside the critics raised in this thesis, or could back up and strengthen the presented controversies. An important issue remains the quality of decision-making. For example, the question whether a prosecutor can provide the same due diligence as a judge when deciding on guilt and punishment, can only be answered adequately if sound empirical research is conducted.

Future empirical research

The present study has made a good start by extensively discussing plausible presumptions about the punishment order, but it is the task for future research to confirm current findings. Future research should include empirical research conducted in the Netherlands. The focus should be on some of the controversies raised in this study: the quality of prosecutorial decision-making within the contours of the punishment order and the consequences it has for the outcome and legal protection of suspects. Four different studies are proposed for this purpose below.

First, the general scope and nature of the punishment order in practice needs to be researched by analyzing the characteristics of punishment order cases via quantitative analysis. This requires data on punishment orders from the public prosecution service. Second, the prosecutorial decision-making process should be assessed by employing a qualitative methodology of focus-groups with prosecutors as participants. In these group interviews, the role of prosecutors and the way how they reach decisions can be assessed. Third, future research should address whether prosecutors decide differently on guilt and punishment within the contours of the punishment order than judges do in a criminal trial. For example, do prosecutors reach guilty verdicts easier than judges do? For this purpose, a comprehensive experimental design is required in which prosecutors and judges are asked to decide on guilt and punishment in several cases, and to motivate their decisions. Fourth, future research should assess potential differences in severity of punishment between judges and prosecutors, by using a so called quantitative matching design in which punishment order cases are compared with similar criminal cases decided by a regular criminal court.

To conclude

To recapitulate, we do not know whether the criticisms raised in this thesis (in particular the quality of decision-making, the disparity in severity of punishment, and the standard of legal protection) are all valid criticisms. Perhaps the prosecutor is very well capable of making legitimate and fair decisions on guilt and punishment. Perhaps the outcome of cases would not differ as much when compared to the outcome of cases after a regular criminal trial. However, we do know that the punishment order has led to a fundamental change of the Dutch criminal justice system. We also know that some of the

controversies may be mitigated long before future (evaluation) research is completed. The punishment order is being implemented gradually since 2008 but has yet to come to full implementation. The legislature should reconsider the law governing the punishment order. Now it is the time for the legislature to provide the desired compromise.

REFERENCES

- Aebi, M.F. (2004). Crime Trends in Western Europe from 1990 to 2000. *European Journal on Criminal Policy and Research*, 10(2-3), 163–186.
- Aebi, M.F. & Linde, A. (2011). Conviction Statistics as an Indicator of Crime Trends in Europe from 1990 to 2006, *European Journal on Criminal Policy and Research*, 18(1), 103–144.
- Aubusson de Cavarlay, B. (2006). The Prosecution Service Function within the French Criminal Justice System, in Jehle, J-M. & Wade, M. (Eds), *Coping with Overloaded Criminal Justice Systems. The Rise of Prosecutorial Power Across Europe*. Berlin, Germany: Springer, 185-206.
- Berghuis, A.C. (1992). De harde en de zachte hand; een statistische analyse van verschillen in sanctiebeleid, *Trema*, 3, 84-93.
- Bleichrodt, F.W., Mevis, P.A.M. & Volker, B.W.A. (2011). *Vergroting van de slagvaardigheid van het strafrecht. Een rechtsvergelijkend perspectief*. Erasmus University Rotterdam/WODC. Rotterdam: Erasmus University Rotterdam, Faculty of Law.
- Blom, M. & Smit, P. (2006). The Prosecution Service Function within the Dutch Criminal Justice System, in Jehle, J-M. & Wade, M. (Eds), *Coping with Overloaded Criminal Justice Systems. The Rise of Prosecutorial Power Across Europe*. Berlin, Germany: Springer.
- Bushway, S.D. & Piehl, A.M. (2001). Judging judicial discretion: Legal factors and racial discrimination in sentencing, *Law & Society Review*, 35(4), 733-764.
- Crijns, J.H. (2002). De strafrechter buitenspel, *Ars Aequi*, 51(7-8), 513-521.
- Crijns, J.H. (2004). Het wetsvoorstel OM-afdoening: wolf in schaapskledij, *Sancties*, 4, 225-236.
- Crijns, J.H. (2010). Efficiëntie in het kwadraat. Over de lotgevallen van de kleine strafzaak na invoering van de strafbeschikking in het verlofstelsel, *PROCES*, 6, 392-405.
- Commissie Heroverweging Instrumentarium Rechtshandhaving (Commission Korthals Altes) (1995). *Het recht ten uitvoer gelegd. Oude en nieuwe instrumenten van rechtshandhaving*, The Hague, Ministry of Justice.

- Daems, T. (2007). Engaging with penal populism. The case of France, *Punishment and Society*, 9(3), 319–324.
- De Doelder, H. (2002). Richtlijnen en rechtshandhaving. In Boonen, K. (Ed.), *De weging van 't Hart*, Deventer, The Netherlands: Kluwer.
- De Graaf, M. (2003), Doelmatigheid boven rechtmatigheid: Bespreking van het conceptwetsvoorstel Wet OM-afdoening', *Delikt & Delinkwent*, 8, 811-829.
- M. Delmas-Marty & J.R. Spencer (Eds.) (2002), *European Criminal Procedures*. Cambridge: University Press.
- Den Uijl, M. (2012). Straffen: de uitvoerende macht als de nieuwe rechterlijke macht?!, *Staatsrechtstag voor promovendi en jonge juristen 2012*. Accessed on August, 17th, 2014 through: <http://www.publiekrechtenpolitiek.nl/wordpress/wp-content/uploads/2012/06/Den-Uijl-Straffen-de-uitvoerende-macht-als-de-nieuwe-rechterlijke-macht.pdf>
- Dervieux, V., Delmas-Marty, M., Benillouche, M. & Bachelet, O. (2002). The French system, in M. Delmas-Marty & J.R. Spencer (Eds.), *European Criminal Procedures*. Cambridge, UK: University Press.
- De Vries, J. & Flokstra C. (25-08-2014). 'Een advocaat is nodig bij drugscontroles'. *Het Parool*. Retrieved from <http://www.parool.nl/>
- Downes, D. & Van Swaaningen, R. (2007). The Road to Dystopia? Changes in the Penal Climate of the Netherlands, *Crime and Justice: A Review of Research*, 35, 31-72.
- Elsner, B. & Peters, J. (2006). The Prosecution Service Function within the German Criminal Justice System, in Jehle, J-M. & Wade, M. (Eds), *Coping with Overloaded Criminal Justice Systems. The Rise of Prosecutorial Power Across Europe*. Berlin, Germany: Springer, 207-236.
- Dullaart, H.J. & Dubbeldam, M.C. (2007). *Wet OM-afdoening toegelicht*. Den Haag, The Netherlands: Sdu Uitgevers.
- Fijnaut, C., Van Daele, D. & Parmentier, S. (2000). *Een openbaar ministerie voor de 21ste eeuw*. Leuven, Belgium: Universitaire Pers.
- Fiselier, J.P.S. (1985). Regionale verscheidenheid in strafrechtspleging, *Delikt en Delinkwent*, 15, 204-211.

- Flight, S., Hartmann, A., Nauta, O., Hulshof, P. & Terpstra, J. (2012). *Bestuurlijke strafbeschikking en bestuurlijke boete overlast*. WODC, Ministerie van Veiligheid en Justitie.
- Foqué, R. & 't Hart, A.C. (1990). *Instrumentaliteit en rechtsbescherming. Grondslagen van een strafrechtelijke waardendiscussie*, Arnhem/Antwerpen: Gouda Quint/Kluwer rechtswetenschappen.
- Gilliéron, G. (2014). *Public Prosecutors in the United States and Europe. A Comparative Analysis with Special Focus on Switzerland, France, and Germany*. Heidelberg, Germany: Springer.
- Groenhuijsen, M. & Kooijmans, T. (Eds) (2012), *The Reform of the Dutch Code of Criminal Procedure in Comparative Perspective*, Leiden, The Netherlands: Nijhoff Publishers.
- Groenhuijsen, M. S. & Simmelink, J. B. H. M. (2005), Het wetsvoorstel OM-afdoening op het grensvlak van juridische techniek en strafprocessuele uitgangspunten, in: Jordaans, A.H.E.C., Mevis P.A.M., Wöretshofer, J., *Praktisch strafrecht, Liber amicorum J.M. Reijntjes*, Nijmegen, The Netherlands: Wolf Legal Publishers, 171-196.
- Groenhuijsen, M. S. (1995). Rechtshandhaving aan het einde van de twintigste eeuw. *Delikt en Delinkwent*, 9(25), 982-988.
- Hague, R., Harrop, M. & Breslin, S. (1998). *Comparative Government and Politics: An Introduction*, 4th edition. Basingtoke, UK: Macmillan.
- Hartmann, A.R. (2001). Buitengerechtelijke afdoening, in M.S. Groenhuijsen & G. Knigge (eds.), *Het onderzoek ter zitting. Eerste interimrapport onderzoeksproject Strafvordering 2001*. Deventer, The Netherlands: Kluwer, 59-90.
- Hartmann, A.R. (2002). Buitengerechtelijke afdoening II, in M.S. Groenhuijsen & G. Knigge (eds.), *Dwangmiddelen en rechtsmiddelen. Derde interimrapport onderzoeksproject Strafvordering 2001*. Deventer, The Netherlands: Kluwer, 79-198.
- Hartmann, A.R. (2010). De bestuurlijke strafbeschikking: panacee voor de gemeentelijke handhaving? *PROCES*, 89(2), 64-75.
- Hawkins, K. (Ed.). (1992). *The Use of Discretion*. Oxford, UK: Clarendon Press.

- Hirsch Ballin, M.F.H. (2012). *Anticipative Criminal Investigation. Theory and Counterterrorism Practice in the Netherlands and the United States* (diss.), The Hague, The Netherlands: T.M.C. Asser Press.
- Hutton, N. (1995). Sentencing, rationality, and computer technology. *Journal of Law and Society*, 22(4), 549-570.
- Hutzler, D. (2010). *Ausgleich struktureller Garantiedefizite im Strafbefehlsverfahren. Eine Analyse der zürcherischen, schweizerischen und deutschen Regelungen, unter besonderer Berücksichtigung der Geständnisfunktion*. Baden-Baden, Germany: Nomos.
- Jehle, J-M. & Wade, M. (2006). *Coping with Overloaded Criminal Justice Systems. The Rise of Prosecutorial Power Across Europe*. Berlin, Germany: Springer.
- Jongman, R.W. & Schilt, T. (1976). Gelet op de persoon van de verdachte, *Tijdschrift voor Criminologie*, 6, 273-287.
- Jurgens, G.T.J.M. (2007). Harmoniseren of integreren? De strafbeschikking en de bestuurlijke boete vergeleken, in Loeber, L. (ed.) (2007). *Het wetsvoorstel OM-afdoening en de verhouding tussen strafrechtelijke en bestuursrechtelijke handhaving. Vereniging voor wetgeving en wetgevingsbeleid*. Nijmegen, The Netherlands: Wolf Legal Publishers, 21-70.
- Kalidien, S.N. & De Heer-de Lange, N.E. (2013). *Criminaliteit en rechtshandhaving 2012. Ontwikkelingen en samenhangen*. CBS, WODC, Raad voor de Rechtspraak. Den Haag: Boom Uitgevers.
- Kessler, M. & Keulen, B.F. (2008). *De strafbeschikking*. Deventer, The Netherlands: Kluwer.
- Kleinknecht, T. & Meyer-Gossner, L. (1999). Strafprozessordnung, Gerichtsverfassungsgesetz, Nebengesetze und ergänzende Bestimmungen in Beck'sche Kurz-Kommentare, 6. München, Germany: Beck'sche Verlagsbuchhandlung.
- Knigge, G. (1994). De strafvordering in het geding, in *Herbezinning op (de grondslagen van) het Wetboek van Strafvordering, Preadviezen van J. Remmelink, G. Knigge, Th. De Roos, W. Sorgdrager*, Zwolle: W.E.J. Tjeenk Willink, Handelingen Nederlandse Juristen-vereniging, 124, 1994-I, 37-116.

- Knigge, G. (2002). Dwangmiddelen en rechtsmiddelen. Algemeen deel, in M.S. Groenhuijsen & G. Knigge (eds.), *Dwangmiddelen en rechtsmiddelen. Derde interimrapport onderzoeksproject Strafvordering 2001*. Deventer, The Netherlands: Kluwer, 15-36.
- Kooijmans, T. (2007). Note 5.1 to art. 257a-257h, in A.L. Melai & M.S. Groenhuijsen et al (ed.), *Het Wetboek van Strafvordering*, Deventer, The Netherlands: Kluwer, 1-116.
- Kooijmans, T. (2007). De strafbeschikking in verkeerszaken, *Verkeersrecht*, 7-8, 201-207.
- Kooijmans, T. (2012). The Extrajudicial Disposal of Criminal Cases, in Groenhuijsen, M. & Kooijmans, T. (Eds), *The Reform of the Dutch Code Criminal Procedure in Comparative Perspective*, Leiden, The Netherlands: Nijhoff Publishers, 81-106.
- Langbein, J.H. (1974). Controlling Prosecutorial Discretion in Germany. *The University of Chicago Law Review*, 41(3), 439-467.
- Lappi-Seppälä, T. (2008). Crime prevention and community sanctions in Scandinavia, in Work product of the 135th international senior seminar, Resource Material Series No. 74, UNAFEI, Japan, 20-52. Accessed on 11 September, 2014 through: http://www.unafei.or.jp/english/pdf/RS_No74/No74_00All.pdf
- Loeber, L. (ed.) (2007). *Het wetsvoorstel OM-afdoening en de verhouding tussen strafrechtelijke en bestuursrechtelijke handhaving. Vereniging voor wetgeving en wetgevingsbeleid*. Nijmegen, The Netherlands: Wolf Legal Publishers.
- Mevis, P.A.M. (2004) Strafbeschikking openbaar ministerie, WAHV en 'kleine ergernissen'. *Delikt en Delinkwent*, 34(4), 353-368.
- Meyer-Goßner, L. & Schmitt, B. (2012). *Strafprozessordnung: Gerichtsverfassungsgesetz, Nebengesetze und ergänzende Bestimmungen*. Munich, Germany: C.H. Beck.
- Pakes, F. (2010). *Comparative Criminal Justice*. Second Edition. Devon, UK: Willan Publishing.
- Peters, L.J.J. (2012). *Vonnissafspraken in strafzaken. Een rechtsvergelijkende studie naar een vorm van onderhandelingsjustitie in Italië, Duitsland en Frankrijk* (diss.). Nijmegen, The Netherlands: Wolf Legal Publishers.
- Pfeiffer, G. (1987). *Karlsruher Kommentar zur Strafprozessordnung und zum Gerichtsverfassungsgesetz mit Einführungsgesetz*. München, Germany: Beck'sche Verlagsbuchhandlung.
- Pratt, J. (2007). *Penal Populism*. London, UK: Taylor and Francis.

- Radtke, H. (1994). Zur Systematik des Strafklageverbrauchs verfahrenserledigender Entscheidungen im Strafprozess, in Maiwald, M. (ed), *Schriften zum Strafrecht und Strafprozessrecht*, 13. Frankfurt am Main, Germany: Peter Lang.
- Riklin, F. (2006). Die Strafprozessrechtsreform in der Schweiz. *Goltdammer's Archiv für Strafrecht*, 153, 495-514.
- Riklin, F. (2007). Der Strafbefehl im deutschen und im schweizerischen Strafprozessrecht – eine rechtsvergleichende Betrachtung. In Müller-Dietz, H. et al (Eds.), *Festschrift für Heike Jung. Zum 65 Geburtstag am 23.* Baden-Baden, Germany: Nomos, 761-779.
- Roberts, J. V., Stalans, L. J., Indermaur, D., & Hough, M. (2003). *Penal populism and public opinion: Lessons from five countries*. New York: Oxford University Press.
- Rovers, B. (1999). *Klassenjustitie. Overzicht van onderzoek naar selectiviteit in de Nederlandse Strafrechtketen*. Rotterdam, The Netherlands: Erasmus University.
- Roxin, C. (1998). *Strafverfahrensrecht. Ein Studienbuch in Kurzlehrbücher für das juristische Studium*. München, Germany: Beck'sche Verlagsbuchhandlung.
- Schubarth, M. (2007). Zurück zum Großinquisitor? Zur rechtsstaatlichen Problematik des Strafbefehls. In: Niggli, M.A., Hurtado Pozo, J. & Quelo, N. (Eds.), *Festschrift für Franz Riklin. Zur Emeritierung und zugleich dem 67. Geburtstag*. Zurich, Switzerland: Schulthess, 527-537.
- Slotboom, A., Koppe, H., Passchier, I., de Jonge, L., & Meijer, R. (1992). De relatie tussen eis en vonnis: Strafvordering en straftoemeting in vier arrondissementen. *Justitiële Verkenningen*, 18(8), 59-7.
- Supreme Court of the Canton of Zug (2012). *Accountability report 2011. Rechterschaftsbericht 2011 des Obergerichts des Kantons Zugs*. Supreme Court of the Canton of Zug, Zug.
- Tak, P.J.P. (2008). *The Dutch Criminal Justice System*. Nijmegen, The Netherlands: Wolf Legal Publishers.
- Tak, P.J.P. & Fiselier, J.P.S. (2002). *Duitsland-Nederland en de afdoening van strafzaken*, Nijmegen, The Netherlands: Wolf Legal Publishers.

- 't Hart, A.C. (1997). Democratie en rechtsstaat, in *De meerwaarde van het strafrecht. Essays en annotaties*, Den Haag, The Netherlands: SDU, 97-104.
- Tonry, M., & Frase, R. S. (Eds.). (2001). *Sentencing and sanctions in Western countries*. New York: Oxford University Press.
- Tonry, M. (2007). Determinants of Penal Policies, *Crime and Justice*, 36(1), 1-48.
- Van Daele, D. (2000). Het openbaar ministerie en de afhandeling van strafzaken in Duitsland. Leuven, Belgium: Universitaire Pers.
- Van Daele, D. (2003). *Het openbaar ministerie en de afhandeling van strafzaken in Nederland*. Leuven, Belgium: Universitaire Pers.
- Van de Bunt, H. G. (1985). *Officieren van justitie: Verslag van een participierend observatieonderzoek*. Zwolle, The Netherlands: Tjeenk Willink.
- Van de Bunt, H.G. & Van Gelder, J-L. (2012). The Dutch Prosecution Service, *Crime & Justice*, 41(1), 117-140.
- Van den Brûle, I. (2014). Gezocht: rol voor de advocatuur bij ZSM, *PROCES*, 93(1), 89-96.
- Van den Wyngaert, C. (2006). *Strafrecht, strafprocesrecht en internationaal strafrecht in hoofdlijnen*. Antwerpen-Apeldoorn: Maklu.
- Van der Horst, M. & Plaisier, M.J.A. (2007). OM en rechter, *Delikt en Delinkwent*, 23(3), 311-319.
- Weigend, T. (2012). Reform proposals on Dutch criminal procedure – a German perspective, in Groenhuijsen, M. & Kooijmans, T. (Eds), *The Reform of the Dutch Code Criminal Procedure in Comparative Perspective*, Leiden, The Netherlands: Nijhoff Publishers, 155-173.
- Went, F.H. (2007). De Wet OM-afdoening. Van transactie naar strafbeschikking, *Online publication*. Accessed on 16-09-2014 via http://www.floriaanwent.com/uploads/1/4/2/4/14249324/de_wet_om-afdoening.pdf
- Wijkerslooth, J.L (2007). De Strafbeschikking. In Loeber, L. (ed.). *Het wetsvoorstel OM-afdoening en de verhouding tussen strafrechtelijke en bestuursrechtelijke*

handhaving. Vereniging voor wetgeving en wetgevingsbeleid. Nijmegen, Netherlands: Wolf Legal Publishers, 1-20.

Wong, C. (2012). *Overview of the Swedish Criminal Procedure*. Lund University Faculty of Law. Accessed on 11 September, 2014 through: http://works.bepress.com/cgi/viewcontent.cgi?article=1024&context=christoffer_wong

Zila, J. (2006). The Prosecution Service Function within the French Criminal Justice System, in Jehle, J-M. & Wade, M. (Eds), *Coping with Overloaded Criminal Justice Systems. The Rise of Prosecutorial Power Across Europe*. Berlin, Germany: Springer, 285-311.

Zwiers, M. (2011). *The European Public Prosecutor's Office. Analysis of a Multilevel Criminal Justice System*. Cambridge, UK: Intersentia.

Government publications

Parliamentary Papers

Parliamentary Papers II, 2002/03, 28 684, 1 (Veiligheidsnota 'Naar een veiliger samenleving')

Parliamentary Papers II, 2004/05, 29 849, 3 (Explanatory Memorandum)

Parliamentary Papers II, 2004/05, 29 849, 5

Parliamentary Papers II, 2004/05, 29 849, 6

Parliamentary Papers II, 2004/05, 29 849, 7

Parliamentary Papers II, 2004/05, 29 849, 9

Parliamentary Papers II, 2004/05, 29 849, 12

Parliamentary Papers II, 2004/05, 29 849, 14

Parliamentary Papers II, 2004/05, 29 849, 16

Parliamentary Papers II, 2004/05, 29 849, 17

Parliamentary Papers I, 2005/06, 29 849, C

Parliamentary Papers I, 2005/06 29 849, D

Parliamentary Papers I, 2005/06 29 849, E

Parliamentary Papers II, 2005/06, 30 699, 3

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Gazette

Staatsblad 2006, 330 (Wet OM-afdoening 7 juli 2006)

Staatsblad 2007, 160 (Wet OM-afdoening 7 april 2007)

Staatsblad 2007, 354 (Wet wederzijdse erkenning en tenuitvoerling van strafrechtelijke sancties)

Staatscourant 2008, 19 (Aanwijzing OM-afdoening)

Staatscourant 2013, 33003 (Aanwijzing OM-strafbeschikking)

Staatscourant 2011, 10937

Case law

ECHR 29 February 1980 Deweer v Belgium

ECHR 2 March 1987 Monnell & Morris v United Kingdom

ECHR 21 September 1994 Fayed v United Kingdom

HR 23 September 2003, LJN AG 3621