

This article is published in a peer-reviewed section of the Utrecht Law Review

Dutch ‘ZSM Settlements’ in the Face of Procedural Justice: The Sooner the Better?

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1. Introduction

Almost all criminal justice systems (if not all) have incorporated mechanisms to avoid that each and every criminal case reaches the trial court, or – alternatively – that all criminal cases are to be tried ‘in full’. If all criminal defendants would have their ‘day in court’, most criminal justice systems would not be able to function properly, due to a massive overload of cases. In the American criminal justice system, for example, plea bargaining functions as a mechanism for the out-of-court resolution of the vast majority of criminal cases. As such, a plea bargain involves a guilty plea by the defendant in return for certain concessions from the Prosecutor, subject to the approval of the court. It avoids lengthy trials (by jury) and uncertainty about their outcome.

In the Dutch criminal justice system, the desire for an out-of-court settlement of criminal cases can also be noted. Traditionally, in the Netherlands criminal cases may be settled out of court by means of a so-called ‘transaction’ (*transactie*): an out-of-court settlement in which the suspect/defendant¹ agrees to meet certain conditions (for example, to pay a fine and/or to compensate the victim) in order to avoid being prosecuted and tried by the court. As such, transactions do not involve an admission of guilt (or a guilty plea), nor do they require the approval of the court: it is a consensual agreement between two parties to avoid prosecution, to which the court is not privy. If the offer of an out-of-court settlement by means of a transaction is rejected or ignored by the defendant, the Public Prosecutor will have to charge the defendant and bring him or her to trial.

In order to avoid delays in the (out-of-court) settlement of criminal cases, since 2008 the Dutch Public Prosecution Service (*Openbaar Ministerie*) has the autonomous ability to offer an out-of-court settlement of a different (non-consensual) kind, called a ‘penalty order’ (*strafbeschikking*).² A penalty

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1 In the US criminal justice system – and in common law systems in general – the term ‘suspect’ refers to a (known) person suspected of having committed a crime. The term ‘defendant’ refers to a persons who has been arrested or bound over for trial. In the Dutch language, there is no formal distinction between the two. In both situations, the person suspected of having committed the crime is called a ‘verdachte’; either because there is a reasonable ground for suspecting that he has committed a crime, or because he has been criminally charged on behalf of the prosecutor. A Dutch public prosecutor does not need the authority of the court (or a judge) to do so.

2 Law of 7 July 2006, *Staatsblad* 2006, 330, entered into force by Law of 21 December 2007 (date of enforcement: 1 February 2008). By means of a penalty order the public prosecutor may impose – among others – community service (with a maximum of 180 hours), a fine, paying compensation to the victim, and/or a disqualification from driving (with a maximum of 6 months). The imposition of a prison

order is a unilateral decision by the public prosecutor that does not require consensus between prosecutor and defendant: penalty orders can simply be imposed on the defendant by the public prosecutor without the latter's consent. In order for the defendant to exercise his right to be tried by an independent and impartial tribunal established by law (as guaranteed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms, hereafter: European Convention) in the face of a penalty order that has been imposed on him, the defendant cannot remain idle: instead, he has to *actively* oppose the imposition of a penalty order, by initiating proceedings himself. If the defendant simply ignores the penalty order, the order becomes final (after 2 weeks) and can be executed (by the Dutch Public Prosecution Service).³ Because penalty orders by law (and thus: formally) can only be imposed by the Public Prosecutor when there is sufficient evidence as regards the offence at issue, not opposing such an order (or complying with the order) is taken as an admission of guilt on the part of the defendant. As a result, a penalty order that has become final has (almost) the same status as a court decision in which the defendant has been found guilty as charged.

Alongside these developments, recently the Dutch Public Prosecution Service has focused its attention on developing a 'road map' for the more speedy resolution of criminal cases. The aim of the road map is to quickly 'fetter out' criminal cases that need not (necessarily) be dealt with by a criminal court from the perspective of the Public Prosecutor and to settle these cases out of court in the shortest timeframe possible. Developing such a road map is believed by the Dutch Public Prosecution Service to significantly contribute to a visible and noticeable correction of punishable behaviour,⁴ thereby strengthening the confidence of society (victims included) in the criminal justice system as such.⁵ In the Netherlands, this 'road map' is known as the 'ZSM'.

In the Dutch language, ZSM stands for *Zo Snel, Slim, Selectief, Simpel, Samen en Samenlevingsgericht Mogelijk*.⁶ An adequate English translation of ZSM is not easy to provide, although 'As Rapid, Astute, Selective, Simple, With One Another and Society-oriented as Possible' seems to capture its gist. The process is aimed at deciding on the most preferable way to resolve frequently occurring crime cases 'as soon as possible' (ASAP) and conclusively and quickly settling all cases that do not warrant the attention of a trial judge (or court), but speediness is not its only objective. Instead, the (official) aim of the process is to resolve frequently occurring crime (cases) in a rapid, astute, selective, simple and society-oriented way,⁷ paying due attention to the interests of defendants, victims and society alike. Currently, it is aimed at (conclusively) deciding the 'defendant's fate' within 7 days after arrest (and preferably within a much shorter time frame). To the extent that the decision results in an out-of-court settlement, the aim is to do so primarily by means of imposing a penalty order (rather than by means of offering a transaction), given the advantages of such an order.

The underlying assumption of ZSM – and its accompanying focus on the rapid (out-of-court) resolution of criminal cases is that 'speed' is beneficial to all involved: to defendants, to victims, to the police (and the Prosecution Service) and to society as such. The question that concerns us here is whether that assumption is correct. Does such a process indeed do justice to all involved, and particularly defendants and (purported) victims? But perhaps even more so, the question that concerns us (here) is how to go about assessing the underlying assumption: by what notion(s) should we start to assess the process towards the rapid (out-of-court) resolution of criminal cases?

As such, striving towards a more rapid (out-of-court) resolution of criminal cases seems vulnerable to criticism, among other things in light of the requirements that can be derived from the right to a fair trial as guaranteed under Article 6 of the European Convention. This article, *inter alia*, stipulates under Paragraph 1 that everyone is entitled to a fair and public hearing within a reasonable time by an

sentence or the deprivation of liberty by means of a penalty order is not possible (Art. 257(a) Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*)).

3 In the Netherlands less serious crimes are dealt with by a single trial judge (*politierechter*). More serious crimes are dealt with by a trial court, comprised of 3 judges. There is no jury system in the Netherlands.

4 See, among others, *Perspectief op 2015. Een zichtbaar, merkbaar en herkenbaar OM*, p. 16.

5 Factsheet ZSM, available at <<https://www.om.nl/onderwerpen/werkwijze-van-het-om/@24445/factsheet-zsm/>> (last accessed 29 September 2014).

6 Ibid.

7 Because the multiple meanings of the 'S' in the Dutch term 'ZSM' and the lack of an English term covering these multiple aspects, in the following the original term will be used.

independent and impartial tribunal established by law, whatever crime the defendant is charged with. When a criminal case is dealt with in a final and conclusive manner before a trial by an independent and impartial tribunal or judge, such a practice may be at odds with the guarantees under Article 6. How fair is the desire to ‘fast track’ the out-of-court resolution of criminal cases vis-à-vis suspects/defendants, judged from the viewpoint of Article 6? Does it abide by the overarching principle(s) incorporated in that article? And if not: in what way(s) is it lacking?

At the same time, we recognize that the guarantees incorporated in Article 6 of the European Convention may seem somewhat ill-suited to comment on the ‘fairness’ of the rapid (out-of-court) resolution of cases for all involved. While Article 6 does have a bearing on some aspects related to out-of-court settlements, such as (the waiver of) the right of access to a court and to a fair and public hearing by an independent and impartial tribunal, it does not seem to have a bearing on other aspects of such settlements, such as the question of what facilities (as incorporated in Article 6(3)) the defendant should be able to enjoy within the ZSM process (with a view towards a possible out-of-court settlement) as such. And while Article 6 is important from the point of view of suspects, it does not necessarily have a bearing on the standing of others who may be involved, including victims. Although the European Court of Human Rights (hereafter: ECHR) has long held the view that victims indeed have rights of their own,⁸ in the end the ‘Article 6 fairness’ is determined by assessing the procedure as a whole that the defendant has experienced: it is not judged by the way in which it benefits (purported) victims.⁹ ZSM as such is very much ‘geared’ towards victims and the need to ‘live up’ to their needs.¹⁰ We should therefore ask what notion(s) should we ‘measure’ as to whether ZSM fulfils this aim, if the goal is to determine whether ZSM’s objective of the rapid (out-of-court) resolution of criminal cases does justice to suspects and victims alike?

We believe that the way forward is to analyze the ZSM process and more particularly its focus on rapid (out-of-court) resolution not only in light of the (legal) requirements of Article 6, but also (and much more so) in the light of the social-scientific notion of procedural justice: the notion that recognizes that people’s perception of the fairness of legal proceedings is mainly dependent on them experiencing that they are being treated fairly and decently, and that they believe that the procedure followed to that effect was fair.

In the following, we will first look at the origins, aim(s) and essence of the Dutch ZSM process (Section 2-3). Next, we will elaborate on the challenges and pitfalls of this process against the ‘backdrop’ of the principles enshrined in Article 6 of the European Convention (Section 4). We will then discuss the notion of procedural justice (Section 5) and investigate the challenges and pitfalls of ZSM in relation to procedural justice as experienced by the suspect and the victim (Section 6). Finally, we will offer some (preliminary) conclusions derived from our analysis (Section 7).

2. Origins and aim(s) of ZSM

Following the introduction of the penalty order in 2008, the Dutch Public Prosecution Service started to direct its attention towards developing a method aimed at the speedy, selective, and victim-oriented resolution of criminal cases within a very short period of time. The project is known as ‘ZSM’. It was launched in March 2011 and was implemented nationwide in 2013.¹¹

As such, ZSM is not a way of *settling* cases out of court as such: instead, it is meant as a process by which to decide on the most preferable (and ‘meaningful’) way to deal with a particular criminal (‘common crime’) case in the shortest time frame possible. That most preferable way may be to charge

8 See, among others, *Doorson v. The Netherlands*, 26 March 1996 (20524/92), Para. 70: ‘It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty and security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organize their criminal proceedings in such a way that those interests are not unjustifiably imperiled’.

9 See also N.J.M. Kwakman, ‘Europa en slachtoffers van delicten’, 2012 *Strafblad*, no. 4, pp. 265-275.

10 Harry Crielaars, Director of Victim Support Netherlands has stated in an interview that he sees an out-of-court solution through ZSM as being beneficial for all parties, and especially for the victim. (2013 *Opportun*, no. 3, pp. 7-9).

11 See J.J.A. Lucas, ‘ZSM – een huis dat samen gebouwd wordt, staat steviger’, 2013 *Strafblad*, no. 4, pp. 282-288.

the defendant and bring him before a trial judge (a single judge) or a trial court (3 judges). However, the most preferable way to deal with a criminal case and its accompanying defendant may also be to offer the defendant a transaction or to impose a penalty order. ZSM is a method to quickly fetter out criminal cases that do not need to go to trial: it does not as such 'dictate' a particular outcome. That being said, and given that the Dutch Department of Justice and Security has long emphasized that transactions in the long run should give way to penalty orders, the focus will generally be on out-of-court settlements by means of the penalty order.¹²

Striving towards a more efficient way of dealing with common crime is not a recent development in Dutch criminal law. The Dutch criminal justice system is a system that deals fairly efficiently with crimes when such cases reach the trial courts; also due to the absence of (trial by) a jury, criminal cases (including murder trials) are dealt with by the trial courts in a matter of days. The only downside was (and is) that it might take several months (and in some cases even years) before cases actually reach the trial court as such. According to a report published in 2012, a 'run of the mill' criminal case at that time generally took about 38 weeks to be dealt with in one way or another in the Netherlands.¹³

The (current) goal is to deal with 'common crime' cases within 7 days after the arrest of the suspect at the latest, but preferably within a much shorter time frame (if possible, within 1 day after arrest).¹⁴ The Dutch Public Prosecution Service sees great possibilities for the 'ZSM approach': the aim is to apply the ZSM approach to at least two-thirds of all 'simple' criminal cases in 2015. By mid-2013, more than 11,000 (out of 15,000) criminal cases were being dealt with in that manner (within 7 days) on a monthly basis.¹⁵ In 40% of these cases, a decision entailing the resolution of the case was reached within one single day.¹⁶

3. The essence of the ZSM approach¹⁷

In order to attain its intended aim of deciding on the best way to resolve criminal cases as soon as possible, the ZSM approach changes the 'order of things' that normally take place within a Dutch criminal (pre) trial process. Instead of consecutively gathering information about (a) the crime, (b) the suspect, (c) the victim and (d) other information necessary to decide, all the information is gathered simultaneously and directly passed on to the Public Prosecutor, in order for the latter to decide as quickly as possible. Given the (short) time frame, most information will be passed on to the Public Prosecutor in digital (or oral) form: there is simply no time to write down the information in an official report (*proces-verbaal*) which has been common practice for Dutch police officers. After a decision has been reached, the suspect is informed about the Public Prosecutor's intention of how to deal with the case. Should that intended decision be to impose a penalty order, the defendant may even decide to pay the imposed fine before he leaves the police station, and then to be on his way (and all in one day if possible).

Whether an out-of-court settlement (and what kind of settlement) is deemed to be the most appropriate in a given case not only depends on the crime the defendant is suspected of committing, but is also dependent on his criminal record and/or personal situation and circumstances. In order for the Public Prosecutor to be able to make such decision(s) as quickly as possible and based upon all the information available to the police and Public Prosecutor, the Public Prosecutor works closely together with institutions such as the Child Care and Protection Board (*Raad voor de Kinderbescherming*), the Dutch Probation Service (*Reclassering Nederland*) and Victim Support Netherlands (*Slachtofferhulp Nederland*): instead of the traditional way of (generally) involving these institutions on a step by step

12 *Kamerstukken I* 2005-06, 29 849, C, p. 22. See also: P.M. Frielink, 'ZSM en OM-strafbeschikking floreren niet op Rechtspraak.nl', 2013 *Strafblad*, no. 4, pp. 277-280; J. Crijns et al., 'De officier van justitie van de 21^e eeuw', in M. Groenhuijsen et al. (eds.), *Roosachtig Strafrecht*, 2013, pp. 141-165 (p. 159). According to the Dutch Public Prosecution Service, in 2012, more than 37% of all out-of-court settlements took the form of a penalty order (43,900 out of 117,900 out-of-court settlements): <<http://www.jaarberichtom.nl/FbContent.ashx/downloads/OM-Kerncijfers-2012.pdf>> (last accessed 29 September 2014).

13 WODC, 'Prestaties in de strafrechtketen', *Kamerstukken II* 2011-12, 33 173, no. 1-2. See also Openbaar Ministerie, *Jaarbericht* 2012, pp. 42-43 <<http://www.jaarberichtom.nl/FbContent.ashx/downloads/OM-Jaarbericht-2012.pdf>> (last accessed 13 January, 2014).

14 Initially, the aim was to deal with frequently occurring crime cases within 3 days after arrest. Among others, see N.J.M. Kwakman, 'Snelrecht en de ZSM-aanpak', 2012 *Delikt en Delinkwent*, no. 3, pp. 188-205.

15 See P.M. Frielink & P.W. van der Kruijs, 'ZSSSSSSM', 2013 *Strafblad*, no. 4, pp. 275-276.

16 *Ibid.* See also P. Vermaas, 'ZSM motor van verandering', 2013 *Opportuin*, no 7, pp. 12-13.

17 This part of the contribution is mainly derived from P.T.C. van Kampen, 'ZSM (&) tegenspraak', 2013 *Strafblad*, no. 4, pp. 289-296.

basis (one after the other), these institutions are now simultaneously involved.¹⁸ To that effect, all these institutions (including the Public Prosecutor) are (preferably physically) gathered around one single table at the police station; there, all pending cases are debated by all the institutions involved. The order of dealing with cases is governed by a (computer) screen, indicating what cases are being dealt with at the time, what actions and activities should take place (and who is doing what), and how much time is left before the suspect should either be released or ordered by the (assistant) public prosecutor to be detained in pre-trial custody for 3 days.¹⁹ Defence counsel is not part of the debate around this table.

From the point of view of the Public Prosecution Service and the Minister of Justice and Security, being responsible for the Public Prosecution Service, the process is highly beneficial for all involved. First, the defendant's case is dealt with almost immediately, which is (or may be) highly beneficial to the defendant. To the extent that the case is settled out of court in the process, the bureaucratic process is significantly reduced and the defendant does not have to wait for months for the outcome of the case. It is also fairly beneficial for the victim of the crime (if any), for exactly the same reasons.²⁰ And last but not least, the process is said to be highly beneficial to society because it allows for the rapid succession of assessing the case, punishing the (perceived) offender and (particularly if the process results in the imposition of a penalty order) the execution of the punishment, thereby giving a clear warning to potential offenders (or the specific offender whose case is being dealt with) that this particular kind of behaviour is not tolerated by society and will be punished: there is no escaping.²¹ It greatly reduces administrative burdens and purportedly leads to more efficient punishments, lower costs and a greater sense of security among citizens. Who, indeed, could find fault with such a process?²²

4. Challenges and pitfalls against the backdrop of Article 6

As stated, the intended aim of ZSM is to quickly fetter out all criminal cases that – from point of view of the Public Prosecutor – do not (necessarily) warrant the attention of a trial court. Given the time frame within which that decision is preferably to be made, that means that in a substantial number of cases the aim is to reach a decision as to the intended route of the criminal case while the suspect/defendant is being detained at the police station, and therefore not able to leave the station of his own free will.²³ To the extent that the intended 'route' is to offer an out-of-court settlement to such defendants (by means of a transaction) or to impose such a settlement (by means of a penalty order), the outcome can only be 'legitimate' or 'just' from point of view of Article 6 of the European Convention if the defendant *knowingly, voluntarily and intelligently* waives his right to a fair trial.²⁴ And while neither the letter nor the spirit of Article 6 prevents a person from waiving of his own free will, either expressly or tacitly, his entitlement of access to a court under Article 6,²⁵ a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance.²⁶ As the ECHR has consistently held, 'before an accused can be said to have by implication, through his conduct, waived an important right under Article 6, it must be shown that he

18 Among others, see Lucas, *supra* note 11, p. 282.

19 See Lucas, *supra* note 11, p. 283.

20 The urge for victim satisfaction in the criminal process is part of a trend that has likewise already been going on for some years. Traditionally, the Dutch criminal system is focussed on the (suspected) offender, rather than the victim. In January 2005, victim impact statements were introduced with regard to the most serious offences (those carrying a penalty of more than eight years imprisonment and those mentioned in Art. 302 of the Code of Criminal Procedure). In January 2011, the Act for the Improvement of the Position of Victims in Criminal Procedure (*Wet versterking positie slachtoffers*) entered into effect. As a result, a separate title (IIIA, Art. 51a-h of the Dutch Code of Criminal Procedure) was created, completely dedicated to the rights of victims, providing them with an independent status in criminal procedure law. Currently, a more prominent place for the victim within the criminal process is being debated. The focus on victims' rights has no doubt had its impact on the development of the ZSM process. See Lucas, *supra* note 11, pp. 282-283.

21 Factsheet ZSM, *supra* note 5.

22 See P.W. van der Kruijs, 'ZSM is niet Zo Secuur Mogelijk, maar TV, Totale Verrommeling', 2013 *Strafblad*, no. 4, p. 297.

23 See also Van Kampen, *supra* note 17, p. 290.

24 According to the case law of the ECHR, as 'a matter of principle the waiver of the right must be a knowing, voluntary and intelligent act, done with sufficient awareness of the relevant circumstances'. *Damir Sibgatullin v. Rusland*, 24 April 2012 (1413/05), Para. 48.

25 *Talat Tunç v. Turkey*, 27 March 2007, (32432/96), Para. 59.

26 See, among others, *Stoyanov-Kobuladze v. Bulgaria*, 25 March 2014 (25714/05), Para. 39.

could reasonably have foreseen what the consequences of his conduct would be.²⁷ From point of view of Article 6, the defendant's quick access to *meaningful* information thus plays a crucial role.

Against the background of ZSM, however, that presents a major problem (or if one will; a challenge). Given the short time frame in which the Public Prosecutor aims to make a decision, most of the information available to the Public Prosecutor (and the police, and all the other official institutions involved) is not available in writing. Instead, it is either available only in oral form, or recorded in (summarized) draft in digital form.²⁸ The (computer) system in which the information is recorded is accessible to the police, the Prosecutor and the institutions involved: however, neither the defendant nor his counsel (if the defendant enjoys the benefit of counsel at that point in time) has access to that system. Instead, for the most part, the Public Prosecutor presents the information to the defendant in oral form. The information provided includes the suspect's own statement as well as the statements of witnesses and information from the Child Care and Protection Board, the Dutch Probation Service and Victim Support Netherlands. Even assuming that the Public Prosecutor informs the defendant of all the information available (to the Public Prosecutor), the question is whether the defendant at that moment is able to autonomously process that information, weigh his options, and make an informed choice about his future.

One could argue – and defence lawyers in the Netherlands have argued – that a defendant is not able to make that choice without enjoying the benefit of assistance by counsel.²⁹ In their view, the assistance of counsel is key to the legal protection of defendants. When faced with the possibility of criminal prosecution, and within the context of the Dutch criminal justice system as such, the defendant is generally the only lay person (non-professional) involved in the whole process. He is faced with a powerful Public Prosecution Service, a well-organized police force acting under the supervision of the Public Prosecution Service, and professional judges. Within that context, the assistance of counsel is a key element in the defendant's legal protection, because it 'emancipates' the defendant, thereby actually allowing him to play a meaningful role in that process. That is not only important for the defendant, but also for the criminal process as a whole.³⁰

From the point of view of Article 6 of the European Convention, they may indeed have a point. In the case of *Damir Sibgatullin*, the Russian authorities put forward that the defendant had waived his right to question witnesses on his behalf by leaving (fleeing) the country. Had he acted 'diligently', the defendant could have avoided the situation that led to the impairment of his rights. The ECHR did not agree with that argument and noted that the conclusion of the Russian authorities that he implicitly waived his rights was 'more salient in a case of a person without sufficient knowledge of his prosecution and of the charges against him and without the benefit of legal advice to be cautioned on the course of his actions, including on the possibility of his conduct being interpreted as an implied waiver of his fair trial rights'.³¹

In fact, one could argue that the assistance of counsel is even more essential during ZSM, given the time frame available, the fact that the defendant will generally be detained during the process, the seemingly beneficial resolution of the criminal case within that time frame, as well as the potential and irretrievable consequences of the defendant's decision. To a defendant, it may *seem* beneficial to accept an out-of-court settlement offered to him by the Public Prosecutor, because it allows him (or her) to go home, to avoid a public trial and to be done with the case almost immediately. In order to achieve that result, the defendant has to (quickly) decide whether or not to accept the Prosecutor's offer (or order), based on the (oral) information presented to him. That offer may involve paying damages to the victim, paying a fine to the State in order to avoid a public trial, as well as other sanctions (such as community service). If the Public Prosecutor's decision amounts to the imposition of a penalty order, however, accepting that order (by immediately complying with it) or by not timely opposing that order at the same time will have serious and irretrievable consequences for the defendant. As already indicated, complying

27 *Yerikhina v. Ukraine*, 15 November 2012 (12167/05), Para. 65; *Petrina v. Croatia*, 13 February 2014 (31379/10), Para. 45.

28 Among others, see Lucas, *supra* note 11, p. 284.

29 See Van Kampen, *supra* note 17, p. 289. See also J. Leliveld, 'ZSM bij afhandeling van strafzaken', 2012 *Nederlands Juristenblad*, no. 28, pp. 1952-1954 (p. 1953).

30 Van der Kruijs, *supra* note 22, p. 298; Th.A. de Roos, 'Verdediging van belangen: het belang van de verdediging', 1991, p. 15.

31 *Damir Sibgatullin v. Rusland*, 24 April 2012 (1413/05), Para. 47.

with a penalty offer is taken to be an (implicit) admission of guilt. As such, due weight is given to it and will be given to it when it comes to the defendant's criminal record. That being the case, the acceptance of a penalty order (by means of complying with that order or not timely initiating proceedings in the face of such an order) in the future may result in a denial of a so-called 'Certificate of (Good) Conduct' (*Verklaring Omtrent het Gedrag*), which is needed for all kinds of employment in the Netherlands. Even more so, complying with a penalty offer also entails a waiver of the defendant's right of access to the courts, meaning that the defendant can *never* retract his initial decision to do so.

In light of all this, it would indeed seem important within ZSM as such to actually provide defendants with the assistance of counsel, so as to ensure that the defendant is being informed of (a) the information available to the Public Prosecutor, (b) the defendant's options and (c) the consequences of his decision in both the short and long term. But within the context of ZSM, it is not that easy. Basically, that system seems to be more or less 'geared' towards preventing defence counsel from having 'a foot in the door'.

Since the decision of the ECHR in *Salduz v. Turkey*,³² arrested criminal defendants in the Netherlands have a right to assistance by counsel before they are interrogated by the police. According to the guidelines of the Public Prosecutor's Office following that decision (and the decisions of the Dutch Supreme Court regarding the right to assistance by counsel),³³ in petty cases and cases involving crimes that do not allow for pre-trial custody, defendants can waive that right *without* consulting a lawyer.³⁴ Added to this, in the case of minor crimes (exactly the kind of offences 'targeted' by ZSM) and based on the guidelines of the Public Prosecutor's office, defendants have a right to assistance by counsel, but they are not entitled to *free* legal aid: if they invoke their right to counsel, they will have to pay for that privilege.³⁵ Moreover, it will take time for that (non-*pro bono*) criminal lawyer to arrive at the police station to provide assistance (unless he is already there). Consequently, criminal defendants are (usually) presented with a choice (by the police), that choice being either to wait for a lawyer (which may take some time and might well involve costs for that legal assistance), or to forego the assistance of counsel and autonomously make the decision as regards the settlement offered to him (and possibly go home a little earlier).

For most criminal defendants, particularly first offenders, that might not be such a difficult decision to make: presented with their options, it is quite likely that they will opt for the latter and waive their right to assistance by counsel. In the last few years (since the introduction of ZSM in March 2011) several *thousand* suspects have decided to waive their right to counsel. In October 2012, the Commission on 'Innovating the (organisation of the) Criminal Bar' reported a total of 13,000 ZSM cases: in almost all of these cases the defendants were *not* represented by counsel.³⁶ None of them had 'the benefit of advice to be cautioned on the course of his actions, including on the possibility of his conduct being interpreted as an implied waiver of his fair trial rights', as the EHCR phrased it in *Damir Sibgatullin*.³⁷ That is to say: they *might* have had the benefit of advice to be cautioned on the course of their actions, but in that case, the advice did not come from counsel for the defence. Instead, it came from police officers or the Public Prosecutor. The mere fact that information is provided to defendants by the police or the Public Prosecutor *as such* may not be overly troubling. Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings requires Member States to promptly provide suspects or accused persons with information concerning the right of access to a lawyer. It also requires Member States to provide suspects or accused persons who are arrested or detained with a Letter of Rights containing information about the right of access to a lawyer. That information should be provided either orally or in writing, 'with clear and

32 *NJ* 2009, 214.

33 ECLI:NL:HR:2009:BH3079; ECLI:NL:HR:2009:BH3081; ECLI:NL:HR:2009:BH3084.

34 *Aanwijzing rechtsbijstand politieverhoor* (2010A007).

35 Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings does not amend that situation. Although the Directive is (fully) applicable when suspects or accused persons are deprived of their liberty irrespective of the crime they are suspected of committing (Art. 2), and admonishes Member States to make the necessary arrangements to ensure that such persons are in a position to exercise effectively the right of access to a lawyer, including by arranging for the assistance of a lawyer when the person concerned does not have one (unless they have waived their right), the Directive does not hold that such assistance should be provided free of charge. Art. 11 of the Directive states that 'the Directive is without prejudice to national law in relation to legal aid, which shall apply in accordance with the Charter and the ECHR'.

36 Commissie Innovatie Strafrechtadvocatuur, *Herbezinning op de rol van de raadsman in de voorfase van het strafproces*, 18 October 2012, p. 16.

37 *Damir Sibgatullin v. Russia*, 24 April 2012 (1413/05), Para. 47.

sufficient information in simple and understandable language, about the content of the right concerned and the possible consequences of waiving it'. In accordance with the case law of the ECHR, the waiver itself needs to be voluntary and unequivocal (Article 9 of the Directive).

Accordingly, to the extent that defendants are provided with such information and thereupon waive their right to counsel, that waiver as such may not present much of an issue in light of the Directive and/or Article 6 of the European Convention.

However, within the context of 'out-of-court ZSM settlements', it would appear that such a waiver entails *much more* than simply waiving the right to counsel: in the process, the defendant also waives his right to be adequately informed about his legal position vis-à-vis the proposed out-of-court settlement and the consequences of his decision to accept that out-of-court settlement. To the extent that the out-of-court settlement takes the form of a penalty order that the defendant does not (timely) oppose or that he even complies with by paying the imposed fine before leaving the police station, the defendant actually waives his right of access to a court. These consequences are irretrievable: revoking the waiver (of access to court) is not possible. In that respect, the 'ZSM penalty order' differs from cases that are settled out of court by means of a transaction; in such instances, defendants are able to revoke their waiver and enjoy the right to counsel and the right of access to a court if they decide that they want to enjoy these rights later on. Penalty orders require legal action being taken by the defendant within two weeks after the order has been imposed. When the order has been complied with, defendants can no longer institute such proceedings. Without the assistance of counsel, it is not at all clear whether defendants actually get that 'message'.

Meanwhile, the pressure is on for Public Prosecutors to offer an out-of-court settlement or (much more so) to impose a penalty order. The police and the Public Prosecutor have a potential interest in the outcome of ZSM, that interest being to avoid criminal trials,³⁸ to minimize bureaucratic processes and to save time and money.³⁹ That may be in the interest of the defendant, too. As one author put it, procedurally speaking, the defendant is 'blind':⁴⁰ for the defendant to see clearly – to be able to determine what his interest actually is, and whether that interest is best served with a waiver of his right of access to a court – he needs (reliable) information from a trusted source. In the vast majority of ZSM cases that information is currently not (readily) available to the defendant.

Given the essential characteristics of ZSM, ZSM – or rather the combination of ZSM and the imposition of penalty orders – does indeed appear somewhat at odds with the overarching principle(s) of Article 6 of the European Convention, that principle being that defendants have a right of access to a court and can only waive that right knowingly and intelligently.

Although Article 6 does not entail a victim's right to a (fair) trial for the defendant (in criminal cases), one could argue that this 'pitfall' may equally concern victims. While victims as such and from the outset may seem to have an even greater interest in a speedy out-of-court resolution of criminal cases, that may not necessarily be in their interest. After all, for the victim there is no way of 'going back' either: generally, when a penalty order has been imposed and the defendant has paid his dues, the case will never be tried by a criminal court.⁴¹ That is: unless the victim is willing to initiate a complaint against the non-prosecution of the defendant and the Court of Appeal agrees with the complainant that the defendant should have been prosecuted, the penalty order notwithstanding.⁴² Alternatively, the victim may initiate civil proceedings: such proceedings, however, are costly and cumbersome (as well as lengthy). In many ZSM cases (concerning frequently occurring, common crime), calculating damages will be fairly easy. Still, an initially seemingly simple case with clearly defined damages may turn out to be more complex than expected later on. De Leeuw gives the example of a victim of a simple assault who

38 See T. Spronken, 'Het strafrecht als vergiet en het ZSM-model als snelkookpan', 2012 *Nieuwsbrief Strafrecht*, pp. 373-374 (p. 374).

39 See Van Kampen, *supra* note 17, p. 293; Van der Kruijs, *supra* note 22, pp. 300-302. Within the 'Dutch context', in which Public Prosecutors are traditionally seen as part of the Judiciary, the actual (physical) presence of the Public Prosecutor at the police station raises additional questions, for example whether the Public Prosecutor, being a judicial officer, is able to maintain a sufficient distance from the police. See Crijns et al., *supra* note 12, p. 164; E. Sikkema & F. Kristen, 'Strafbeschikking en ZSM: Verschuivingen binnen de strafrechtshandhaving', in F. de Jong & R.S.B. Kool (eds.), *Relaties van gezag en verantwoordelijkheid: strafrechtelijke ontwikkelingen*, 2012, pp. 179-205 (p. 196).

40 Van der Kruijs, *supra* note 22, p. 303.

41 S. van der Aa & M.S. Groenhuijsen, 'Slachtofferrechten in het strafproces: drie stapjes naar voren en een stapje terug?', 2012 *Ars Aequi*, no. 9, pp. 603-611.

42 Art. 255(a)(1) Dutch Code of Criminal Procedure. See also Van der Kruijs, *supra* note 22, p. 304.

suffered damage to his teeth as a result. He received damages after a quick out-of-court settlement. A few months later, however, the damage was shown to be much greater than expected. This extra damage could only be recovered through (lengthy, costly and cumbersome) civil proceedings, since the criminal case had already been settled.⁴³ A rapid (out of court) resolution may also cause problems with regard to psychological damage, that only emerges after some time.⁴⁴ It can be concluded that from the point of view of victims of common crime, a quick out-of-court resolution thus *may* indeed (appear to) be the preferred ‘resolution of choice’, but whether the process does justice to them in the final outcome (and to defendants alike) is hard to say from the outset.

5. The notion of procedural justice

It is here that we believe that the notion of procedural justice may have an added value to evaluate how defendants *and* victims think about the fairness of the process. From the point of view of procedural justice it is not so much the outcome that counts, but rather the process as such. While distributive justice is concerned with the outcome of the procedure, procedural justice is concerned with the impact of the procedure itself, and not so much with its outcome. In general terms, as stated earlier, it can be said that procedural justice is experienced when people know that they are being treated fairly and decently, and that they believe that the procedure followed to that effect was fair.

The notion of procedural justice was introduced by Thibaut (a psychologist) and Walker (a lawyer) in 1975. Their research findings showed that participants in civil procedures preferred procedures in which they were allowed a degree of input in the procedure above procedures that allowed them no input. From this, Thibaut and Walker concluded that litigants were more satisfied with the outcome of the case when they were included in the decision-making process as such, irrespective of the outcome of the case.⁴⁵ From this research, they presented the notion that it was not so much the outcome of the case, but mainly the fairness of the proceedings that people care about, in particular the ability of parties to influence the trial proceedings.⁴⁶

The American psychologist Tyler further developed the notion of procedural justice. According to his theory, the legitimacy of criminal proceedings mainly depends on the question of how citizens are addressed and treated by the legal authorities. Tyler maintains that the concepts underlying procedural justice have developed from research showing that the manner in which disputes are handled by the courts has an important impact upon people’s evaluations of their experiences in the court system, as was reflected in the earlier research by Thibaut and Walker. Tyler concludes that the way in which people and their problems are managed in their dealings with the courts has more influence on the question as to whether people accept and abide by the decisions made by the courts (both immediately and over time), than the actual outcome of their case.⁴⁷ This is not only true when the procedure’s outcome is favourable to them, but also when people ‘lose’: according to Tyler, people will accept a negative outcome of a case more readily when (in their view) the proceedings as such were fair. Moreover, this leads to positive views about the legal system.⁴⁸ This, according to Tyler, underlines the importance of the notion of procedural justice for court proceedings. ‘Because it provides all parties with desirable experiences with the courts, procedural justice is a key to the development of stable and lasting solutions to conflicts.’⁴⁹ Studies find that citizens’ general commitment to obeying the law is increased and trust and confidence in legal authorities increases when they experience procedural justice in legal settings, even when they receive a negative outcome.⁵⁰

43 K. de Leeuw, ‘ZSM-procedure en slachtoffers: haastige spoed is zelden goed?’, 2014 *Secjure* (law faculty magazine Tilburg University), no. 3, pp. 18-20, referring to M. Siesling, ‘Innovative new procedures to improve advocacy of victim’s needs’, a paper presented during the 14th world symposium of the World Society of Victimology in The Hague 20-24 May 2012.

44 Kwakman, *supra* note 14, p. 198, with references.

45 J. Thibaut & L. Walker, *Procedural Justice: A Psychological Analysis*, 1975.

46 These findings gave rise to further research on procedural justice and its implications for legal, political, interpersonal, and work-related settings: E.A. Lind & T.R. Tyler, *The Social Psychology of Procedural Justice*, 1988.

47 T.R. Tyler, ‘Procedural Justice and the Courts’, 2007/2008 *Court Review* 44, no. 1/2, p. 26.

48 *Ibid.*, pp. 26-27.

49 *Ibid.*, p. 27.

50 *Ibid.*, p. 28.

When we look at 'ZSM settlements', it is readily apparent that this is not a procedure before the courts. Still, according to Tyler, the notion of procedural justice can be applied to such a process. In his view, the notion of procedural justice is not only applicable to formal procedures such as trials, but also to 'informal procedures, including settlement conferences, mediation sessions and arbitration hearings'.⁵¹ Thus, the notion of procedural justice can be applied to ZSM as well.

But what elements exactly constitute procedural justice: what are the elements or aspects that should be emphasized by the legal authorities in order to achieve procedural justice? Tyler has identified four key principles of procedural justice: voice, neutrality, respect and trust.⁵²

The principle of having a 'voice' entails that people have the opportunity to tell their side of the story in their own words before decisions are made about how to resolve the dispute or problem. When people have the possibility to voice their perspective, this positively influences their experience with the legal system when they feel that the authority has sincerely considered their arguments before making a decision.⁵³ According to Tyler and Lind in a 1988 work on the social psychology of procedural justice the principle of having a voice in the proceedings qualifies as one of the main elements of procedural justice.⁵⁴ The principle of 'neutrality' means that people bring cases to the court because they view judges as neutral, principled decision makers who make decisions based upon rules and not on personal opinions and who apply legal rules consistently across people and over cases. The principle of 'respect' entails that legal authorities, such as police officers, court clerks and judges, as representatives of the state, must show respect for people and their rights in order to demonstrate to people that they are viewed as important and valuable, and are included within the rights and protection that form one aspect of the connection that people have to the government and the law.

Last but not least, the principle of 'trust' implies that the character of the decision maker is a central attribute in influencing the public evaluation of the legal authorities. Key elements here involve issues of sincerity and caring. Tyler notes that with regard to the influence of procedural concerns, the principles of respect, trust and neutrality directly affect the overall evaluation of procedural justice, while the 'voice' aspect indirectly affects this evaluation, and seems to 'shape' the other three principles.⁵⁵ As a result, a defect in the principle of having a voice does not constitute a lack of procedural justice per se, but shapes the other principles and may result in a diminished sense of the fairness of procedures.

6. ZSM settlements & procedural justice

Most notably, the first aspect of 'out-of-court ZSM settlements' that appears troubling from a procedural justice perspective is the principle of 'neutrality'. ZSM focuses on the ability of the Public Prosecutor to autonomously deal with cases by offering out-of-court settlements to criminal defendants. Although in the Netherlands the Public Prosecutor (being a judicial officer) is required to act in 'a magistrate way', having due regard to the interests of suspects and defendants, the Public Prosecutor at the same time is the one actor that supervises criminal investigations directed against suspects. In this phase of the proceedings, then, there is no *neutral*, principled decision maker who decides how the case should be dealt with, as required by the principle of neutrality. This is especially problematic considering the fact that the focus during ZSM will generally be on an out-of-court settlement by means of a penalty order. Unless the defendant decides to initiate proceedings against the order, his case will not be brought before the courts. In this way, many cases will be dealt with without intervention by an independent judge. The crucial and, in many cases, final decision-making role of the Public Prosecutor in ZSM may cast doubts on the side of the suspect regarding the impartial, transparent and consistent application of the rules in his particular case, which in turn may give rise to doubts as to whether the principle of neutrality is experienced, and if so to what extent, by defendants during the ZSM process.

51 Ibid., p. 26.

52 Ibid., pp. 30-31. See also T.R. Tyler, 'What is Procedural Justice: Criteria used by Citizens to assess the Fairness of Legal Procedures', 1998 *Law & Society Review* 22, no. 1.

53 According to Tyler, the opportunity for applicants to tell their side of the story before decisions are made, mentioned as a crucial element in the research by Thibaut and Walker, is often described as having a voice in the proceedings. Ibid., p. 26.

54 Lind & Tyler, supra note 46.

55 Tyler, supra note 47, p. 31.

From the point of view of the defendant, the principle of having a ‘voice’ may likewise be found wanting in the process. In the previous section, it was outlined that representation by defence counsel is a problematic aspect of ZSM. As stated before, the principle of having a voice entails the possibility for persons to be able to voice their opinions on the case. It needs no explanation that assistance by a lawyer increases the possibility for a suspect or defendant to voice his opinions in the procedure, not only because it may enable him to (actually) be heard during the process, but also to assist him in using his possibilities to voice his opinions in a meaningful way. In light of the fact that ZSM is a speedy process that takes place during the time in which the suspect is being deprived of his liberty (and is thus in a vulnerable position), without any involvement of a judge, legal assistance may be vital to make sure that the principle of having a voice is adequately secured. An interesting question would be to (empirically) assess whether legal assistance provided during ZSM, allowing the defendant a degree of input in the procedure, influences the procedural justice as experienced by him.

Furthermore, the principle of having a voice may be under pressure during ZSM because of the fact that in the vast majority of cases, case information is only presented to the suspect in oral form, as highlighted in the previous sections. It can be questioned whether defendants are able to make an informed choice if they are only informed in oral form without the assistance of defence counsel. This lack of (full?) and written documentation may hinder the defendant (and if assisted by defence counsel also his counsel) in being able to adequately prepare the case and to make use of the possibility to voice his opinions on the case in an adequate and sensible way.

Besides, ZSM raises interesting questions with regard to the principles of respect and trust. During the speedy ZSM process representatives of the state, most notably the Public Prosecutor, must respect people’s rights. But, as we have noted earlier, the lack of assistance by defence counsel during this process raises doubts as to whether the suspect’s rights are in fact adequately secured. This may influence the feeling people have about their case being taken seriously by the legal system. Moreover, ZSM is a process within the criminal law system, a process in which a citizen is confronted with a powerful Public Prosecution Service. Principles such as trust are inherently put under pressure in such processes. Providing people with information about the process, their rights and the consequences of their choices during it all demonstrates respect for suspects and their rights. This may also increase the principle of trust as experienced by the suspect, feeling that the authorities are also considering the suspect’s views and are acting in the best interests of all the parties involved.

The lack of neutrality in the process of ZSM, but also problems with regard to the possibility to voice opinions on the case and the principles of respect and trust, are likely to negatively affect the overall evaluation of procedural justice as experienced by suspects. During ZSM the defendant’s case is dealt with almost immediately and he does not have to wait months for the outcome of this case. From the point of view of the Public Prosecutor’s Office, ZSM settlements are generally highly beneficial to the defendant, mainly because of the speedy resolution of the criminal case. An interesting point for further research would be to investigate how this potential beneficial aspect of ZSM settlements for the suspect relates to the potentially diminished sense of procedural justice as experienced by the suspect.

We acknowledge that procedural justice as experienced by the suspect is one side of the coin. But how about ZSM and the experience of fairness during that process by the victim? In order to evaluate ZSM as a whole, it is important to also take into account the fairness of the proceedings as experienced by the victim(s) involved in the committed crime, especially considering the fact that one of the proposed benefits of the procedure is that the victim ‘is better off’ with a quick response to the crime committed. As stated earlier, from the viewpoint of the Public Prosecution Service, ZSM settlements are deemed to be highly beneficial for the victim, who sees that immediate action is taken against those who have done him wrong. As such, the process is qualified as being highly ‘victim-oriented’. Yet, given that the outcome is not the ‘mainstay’ of procedural justice, the question is whether the focus on ‘doing right’ to victims by ensuring that damages are paid to the victim as quickly as possible is indeed the right focus. After all, from the procedural justice perspective the process as such is the focal point. This raises the question of how the notion of procedural justice relates to ZSM as experienced by victims.

Procedural justice is important for victims, since research has shown that procedural justice may protect victims from secondary victimization by criminal proceedings.⁵⁶ Research on victims' needs has shown that victims – like defendants – mainly seem to want to be treated with respect and to have the opportunity to provide an input in the process. Wemmers et al., for example, conclude that victims who feel that they have been treated fairly are more satisfied with the criminal justice authorities and institutions than victims who feel that they have not been treated fairly.⁵⁷ According to these authors, a central finding in victimological research, identical to research on procedural justice, is that in interactions with the authorities, people are more concerned with the treatment they receive than with the outcome of the interaction as such.⁵⁸ It was found that victims are especially concerned about being treated with dignity and respect. Furthermore, the opportunity to express their views and to feel that these views are being taken into consideration by the authorities appear to be of key importance to victims.⁵⁹ Accordingly, the principles of respect and having a voice as formulated by Tyler are important for victims as well in assessing their experiences with the legal system.

As described in previous sections, Victim Support Netherlands is included in the ZSM decision-making process. Regarding the principle of having a voice, it would be interesting to (empirically) investigate whether this means that the victim feels that he is indeed being heard. In a 2008 review of empirical research into the needs of victims since 1980, the Dutch Research and Documentation Centre (WODC) of the Ministry of Justice concluded that victims do feel the need to be able to provide an input in the criminal proceedings in a broad sense. On some points, the power of approval was found to be a clear expression of this need. At the same time, it was shown that there are also victims who do not have this need.⁶⁰

Procedural justice may thus be experienced very differently amongst (groups of) victims of crime. The importance for victims to be heard was also reflected in the outcome of research into the effect of oral or written victim impact statements in the Netherlands. Here, it was found that submitting an oral or written Victim Impact Statement had a (minor) positive effect on the perceived control over recovery and the experience of procedural justice by the respondents.⁶¹ Although such Victim Impact Statements do not play a role in the settlement of common crime cases in ZSM this finding underlines that possibilities for victims to express their opinions during criminal proceedings can contribute to the experience of procedural justice. It would be interesting to assess whether victims in the ZSM do feel that they have a say in the procedure through them being represented by the involvement of Victim Support Netherlands in ZSM. In other words: do they feel 'heard' in the ZSM process? As victims have diverse needs and desires, it can be imagined that some victims may consider a rapid out-of-court settlement to be highly beneficial for them (since one can then quickly resume daily life again), while others may think that such a settlement allows offenders to be 'let off easy' and is too much 'goal-oriented'. Although the ZSM, with its focus on the speediness of the procedure, is theoretically highly victim-oriented, it would be relevant to assess whether this is really the case. Do victims perceive the speediness in resolving cases really as beneficial to them?

It can be concluded that the notion of procedural justice raises questions as to the empirical dimension of procedural justice (i.e. how people perceive and experience the proceeding as such) for both defendants and victims. Some of the pitfalls that were described in the assessment of Article 6 of the European Convention are reflected in the analysis of ZSM from the procedural justice perspective. This is not remarkable since both are concerned with the fairness of the proceeding. We have concluded that especially the procedural justice perspective requires an analysis of the experiences of defendants and victims with ZSM in practice. Remarkably, empirical data on procedural justice are conspicuous by their

56 U. Orth, 'Secondary Victimization of Crime Victims by Criminal Proceedings', 2002 *Social Justice Research* 15, no. 4, pp. 313-325.

57 J.A. Wemmers et al., 'What is Procedural Justice: Criteria Used by Dutch Victims to Assess the Fairness of Criminal Justice Procedures', 1995 *Social Justice Research* 8, no. 4, p. 330, with references.

58 *Ibid.*, p. 333.

59 *Ibid.*, p. 347.

60 A. ten Boom et al., *Behoeften van slachtoffers van delicten, Een systematische literatuurstudie naar behoeften zoals door slachtoffers zelf geuit*, WODC 2008. See also A. ten Boom & K.F. Kuijpers, 'Victims' needs as basic human needs', 2012 *International Review of Victimology* 18, no. 2, pp. 155-179.

61 K. Lens et al., *Het spreekrecht in Nederland. Een bijdrage aan het emotioneel herstel van slachtoffers?*, WODC 2010.

absence. In 2011 the Public Prosecution Service started with ZSM in 5 pilot-study regions (Amsterdam, Utrecht, The Hague, Rotterdam and Den Bosch) and the Public Prosecution Service Central Processing Unit (*Centrale Verwerking Openbaar Ministerie, CVOM*).⁶² On the basis of the experiences obtained during the pilot projects the Public Prosecution Office asked PricewaterhouseCoopers and Significant to commence management research in 2012.⁶³ Nevertheless, this research did not contain substantive empirical research on ZSM and the perception of these settlements by those who were confronted with it.

7. Is sooner (much) better?

In this contribution, the Dutch ZSM process and its focus on the rapid (out-of-court) resolution of common crime cases was analyzed from the perspective of both the requirements of Article 6 of the European Convention and the notion of 'procedural justice'. The ZSM project was launched in March 2011 and implemented nationwide in 2013. From a legal perspective, ZSM raises questions, especially with regard to the (legal) position of the defendant in that process and – to the extent that the process amounts to an out-of-court settlement by means of a penalty order – more particularly his waiver of rights incorporated in Article 6. To the extent that the out-of-court resolution takes the form of penalty orders, victims likewise waive their 'rights'. The overarching principle of fairness enshrined in Article 6, however, concerns defendants and not victims.

In order to further assess the question of 'doing justice' to all involved, we have analyzed the ZSM process and its focus on the speedy resolution of criminal cases from the perspective of procedural justice as described by Tyler. We concluded that the described pitfalls of ZSM settlements are likely to have a bearing on the appreciation of procedural justice as experienced by defendants and victims. The positive effects of ZSM for victims remain speculative, since these effects have not (yet) been the subject of research analysis.

According to the Dutch Public Prosecution Service, ZSM, with its focus on the rapid (and final) resolution of criminal cases, is highly beneficial for all parties involved. To date, however, no empirical in-depth research has been carried out on ZSM in relation to procedural justice. Such research is needed because ZSM is based on the credo 'the sooner, the better', yet it remains unclear if, and if so to what extent, ZSM really contributes (and if so to what extent) to the perceived (procedural) fairness of those involved in the process. The lack of such research is all the more remarkable, since the main objective of the introduction of ZSM directly touches upon notions of procedural justice, i.e., to strengthen the confidence of society in the criminal justice system as such. Procedures that satisfy procedural justice requirements not only have an encouraging effect on satisfaction with the process and decision acceptance by both the defendant and the victim involved, but also contribute to trust and confidence in the criminal justice system as a whole by the public.

For this reason, the notion of procedural justice can, and in our view should, be used as a benchmark to evaluate whether the aims of the introduction and the large-scale application of ZSM settlements significantly contribute to the quality of criminal proceedings, or must be qualified as a simple economy measure to reduce costs instead, only paying lip-service to the notion of procedural justice. The need for such substantive empirical research is bolstered by the fact that ZSM is already being applied on a large scale and it is the intention that it will apply to at least two-thirds of all 'simple' criminal cases in 2015. It is about time to investigate if, and if so to what extent, ZSM and its focus on the speedy resolution of criminal cases, particularly when that resolution is to impose a penalty order, does indeed contribute to procedural justice as experienced by the parties that are directly influenced by it. ¶

62 Commissie Innovatie Strafrechtadvocatuur, *Herbezinning op de rol van de raadsman in de voorfase van het strafproces*, 18 oktober 2013, p. 2.

63 The report 'Bedrijfskundig onderzoek ZSM-ketenpartners' by PricewaterhouseCoopers and Significant cannot (or can no longer) be found online. See Spronken for a brief discussion of this report: Spronken, supra note 38, pp. 375-376.