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A BRIEF SURVEY OF THE AUSTRIAN DIVERSIFICATION CONCEPT

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Summary: The criminal procedural reform of the year 2000 has brought drastic changes for the Austrian criminal procedural system: The former double track system of punishment and preventive measures has now been transformed into a triple track system of punishment, preventive measures and measures of diversification which enable both prosecutors and courts to settle criminal cases in a completely different and informal way, without verdict or sentence. Instead of a formal decision, there can be a period of probation with or without instructions, the payment of a fine, social work or an out-of-court settlement. The article will describe the conditions under which the above-mentioned measures may be applied and will give a brief overview of the way proceedings are carried out when a case is settled by means of diversification.

Keywords: Diversification, out-of-court settlement, probation, instructions, social work, fine, compensation, severe blame, special prevention, general prevention, criminal procedural reform, triple track system, voluntariness, presumption of innocence, diversification register

I. INTRODUCTION

A. Introductory Case:

Adam (A) and Bill (B), both in their cars, are trying to obtain the same parking space. In the end, they are blocking each other´s way, none of them having succeeded. So A gets out of his car, goes over to B and kicks his foot against B´s car. B is furious. He jumps out of his car as well and punches A in the face with his fist. Within minutes, A´s eye turns black.

Looking at the case from the point of substantive law, one sees that A has committed **damage of property** according to § 125 Penal Code[1], and B has rendered himself liable to prosecution because of **physical injury** according to § 83 Penal Code. Therefore, under normal circumstances (and up until the year 2000 regularly), the Austrian state would have to react to the incident with the launch of **criminal proceedings.** Firstly, there would be **preliminary proceedings** in which the public prosecutor has to decide if there is enough evidence to proceed with the case and to bring charges. After the **interlocutory proceedings** in which the court has to decide if the charges which are brought forward are sufficient to open a trial, there would then be the **main trial** with the hearing of the case, the verdict and the sentence. In many cases, there would also be a **procedure of appeal** and **executory proceedings.** All of this, of course, is a **huge expenditure** of personnel, budget and time, which in case of serious delinquency is no doubt justified, but very often seems disproportionate with misdemeanours and other forms of minor offences. For that reason, Austrian legal scientists and politicians had discussed for many years if it was really necessary to pursue the whole course of criminal proceedings in cases with minor offences such as the one indicated above or if there were **alternative and better ways** for the state to react to those kinds of delinquency.

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[1] Unless mentioned differently, the provisions referred to in the text are part of the Austrian legal system.

B. Definition: "Diversification"

The above-mentioned alternative forms of settling cases are called **diversification** which is an American expression dating from the 1960´s and means that criminal procedure is taken away from the traditional scheme which was mentioned above and is transformed into more **informal ways** of dealing with minor offences [5, p. 125; 22, p. 15; 34, p. 259; 44, p. 56]: Proceedings could, for example, either be ended by other means than a verdict and sentence or could, on the other hand, not be opened at all. All of that, however, does not mean that diversification leads to **decriminalisation** [6, p. 12; 10, p. 7; 30, p. 445]. The deeds which are subject to diversification are still criminal offences and are unlawful − it is only the legal consequence which is different when proceedings are diversified. For that reason, diversification is seen as a **procedural alternative to decriminalisation** [5, p. 136; 24, p. 536].

C. Historical Roots

In Austria and Germany, **roots of diversification** go back to 1882 when ***Franz v.Liszt*** (1851 − 1919) published his **Marburg programme** [43, p. 1]. In this, he described the main purpose of punishment as the so-called „special prevention" in the sense that the perpetrator shall regret his acts and shall refrain from committing further crimes. To reach that aim, *v.Liszt* wanted to organize houses of correction in which improvement should be achieved through work and education. The second important historical source of diversification is the **double track system** of punishment and preventive measures which was first published in the draft for a Swiss Penal Code, written by ***Carl Stooss´*** (1819 − 1934) in 1893 [26, p. 38], but was not established in the Austrian Penal Code before 1975. According to this system, the regular state reaction to crime has to be punishment but in cases where the perpetrator is in any way mentally incapable and therefore not to blame but is still dangerous to the public, other sanctions, i.e. preventive measures, can be imposed on him [17, p. 4]. In Austria, for example, such a sanction can be detention in a clinic for the therapy of mentally handicapped persons or in institutions for drug treatment according to §§ 21 f Penal Code. Those preventive measures are already similar to diversification but not quite the same because they can only be imposed when the perpetrator poses a certain danger for others.

D. Other Fields of Law

There are not only historical sources of diversification. Similar measures which have been taken as an example are also included in other branches of law such as the **Addictive Drugs Act.** In this field of law, the basic idea since the early Seventies had been "therapy instead of punishment" [22, p. 16; 21, p. 83], so that delinquents could avoid charges under the condition that they underwent specific health-related measures such as drug counselling, withdrawal etc: According to § 35 (6) Addictive Drugs Act, for example, the case will be dropped if − in addition to certain other requirements − the perpetrator agrees to undergo certain health-related measures, and according to § 39 Addictive Drugs Act, punishment can be suspended until after the health treatment.

Another branch of law which has for long been a „playground" for alternative measures is **juvenile penal law.** Since the early Eighties there have been various model projects in which criminal proceedings were settled in a completely informal way[2], i.e. without verdict or sentence, the basic idea being „education instead of punishment". For example, under § 6 Juvenile Penal Act, the public prosecutor can completely abstain from bringing charges of certain offences (i.e. offences for which the maximum punishment is five years in prison or „only" a pecuniary fine) if he doesn´t think them necessary to motivate the juvenile perpetrator to refrain from criminal acts in the future. According to § 7 Juvenile Penal Act, genuine measures of diversification had been established long before such provisions were layed down for adults (especially the out-of-court settlement and charity work instead of punishment), and today, the scope of application of these measures is still wider than that of the measures for adults which are included in the Criminal Procedure Code3. In German juvenile penal law, similar principles have been established: According to § 5 German Juvenile Penal Code, punishment has to be the ultimate remedy − preferably, the court shall impose educational measures, such as social training etc. Today, more than three quarters of all Austrian juvenile criminal cases are settled by diversional means [16, p. 63].

After the huge success of diversification in the fields of drug and juvenile penal law, establishing respective measures **into adult criminal law** was, of course, discussed [2, p. 551]. Various proposals were made, and in 1992, a **model project** called „Out-of-court Settlement for Adults" was started in some judicial districts [25, p. 337; 12, p. 1; 34, p. 265; 8, p. 145]. The legal basis for this project was § 42 Penal Code, a provision which grants exemption from punishment under certain circumstances and which was interpreted extensively for the purposes of the project. Gradually, the project was extended to the whole Austrian jurisdiction, and in the year 2000 a wide reform of criminal procedural law came into force, thus establishing a whole system of diversional measures into the Criminal Procedure Code. This system, which is included in §§ 90a to m Criminal Procedure Code, is explicitly called „diversification" and is a very wide-ranging concept (contrary to Germany where only a few diversional measures with a

[2] In Linz (Austria), for example, there had been a model project of conflict settling which included the assistance of mediators as well as round-table meetings and which had been very successful for many years [41, p. 441; 36, p. 88; 39, p. 114].

[3] For example, the out-of-court settlement does **not depend on the victim´s consent,** and in principle, **every offence** committed by a juvenile is open to diversification as long as nobody has died as a consequence of the deeds and the blame which lies on the perpetrator is not a severe one; see § 7 Juvenile Penal Code.

restricted scope of application are established in adult criminal law[4]).

II. THE CRIMINAL PROCEDURAL REFORM OF 2000

As we have mentioned before, on January 1st 2000, the most important **reform of Austria´s Criminal Procedure Code** for the last few decades entered into force [6, p. 11; 18, p. 190]. This concept is so far-reaching that some legal scientists say that the traditional **double track system** of punishment and preventive measures has been transformed into a **triple track system** of punishment, preventive measures and diversification [20, p. 134]. There has been a radical change in the understanding of the whole criminal system [44, p. 56] which has led to the situation that nowadays, there are only half as many guilty verdicts as before the reform. More than 50 per cent of all criminal cases are settled by means of diversification − in 2004, 45.185 cases (41.849 of them cases of adult criminal law) ended with guilty verdicts [40, p. 30 and 32], and 47.072 cases with measures of diversification [4, p. 423].

A. Legal Requirements for Diversification:

Ending a case by using measures of diversificaton is only possible if the following requirements are fulfilled:

1. The offence in question must be a **minor or moderately severe** one: According to § 90a (2) n. 3 Criminal Procedure Code, the deed must **not have caused the death** of another person[5] (not even by negligence), and according to § 90a (2) n. 1 Criminal Procedure Code, the offence must **not lie within the jurisdiction of a jury.** To see the latter aspect in the right perspective, one has to know that in Austria, juries have original jurisdiction over all offences which are under a maximum penalty of more than five years in prison (§ 13 (2) n. 1 Criminal Procedure Code). Therefore every offence which is under penalty of imprisonment for up to five years can, in principle, be settled by means of diversification. This, of course, shows again how far-reaching this concept is since the category of offences mentioned before includes deliberate and serious bodily injury (§ 87 (1) Penal Code) as well as certain cases of severe fraud (e.g. § 147 (1) n. 1 Penal Code). In Germany, on the contrary, measures which are similar to diversification are provided only for cases of misdemeanors which are under penalty of up to one year in prison or of a fine, according to § 153a German Criminal Procedure Code.

2. The offence must be **open to public prosecution** [10, p. 13] (which most offences in Austria are). A private prosecutor who, in Austria, would be in charge of certain cases of breach of honour, insult or libel, must not offer formal means of diversification to the suspect[6] − diversification is to remain solely in the hands of the state[7].

3. According to § 90a (1) Criminal Procedure Code, the **facts of the case** must be clear. This requirement means that there must be enough evidence for the prosecution to proceed with the case, i.e. to bring charges. A guilty verdict must be very probable, and a withdrawal of the prosecution, which would be the usual move in case of insufficient evidence, must be out of the question. In this context, and according to § 90k (1) Criminal Procedure Code, the public prosecutor is entitled to carry out investigations himself [12, p. 71] which he normally must not do under the present Criminal Procedure Code[8]. In this respect, it has to be noted that diversification must never be misused to avoid further investigation of doubtful or questionable cases [14, p. 332; 30, p. 447]. A confession or an admission of guilt, however, is not necessary in order to apply the alternative means of settling a case [10, p. 13; 19, p. 91].

4. According to § 90a (2) n. 2 Criminal Procedure Code, the **blame** which lies on the suspect must not be severe. In order to find out if this is the case, all the conditions which would be relevant for the measure of the sentence, if the case was settled in the traditional way by issuing a verdict and sentence, have to be considered [30, p. 450; 12, p. 17; 10, p. 16]: The gravity of the physical element of the crime (i.e. the physical action itself as well as its result[9]; *actus reus* in common law systems) as well as the gravity of the mental element (*mens rea*) must, in sum, not be "remarkable and exceptional" (OGH 13 Os 111/00, EvBl 2001/46 = JBl 2001, 328 m Anm *Schütz;* LGSt Wien 13a Bl 491/00, ZVR 2001/77).

5. Finally, a formal verdict and a punishment must neither be necessary in order to make potential other offenders refrain from committing future crimial deeds **("general prevention")** nor to make the specific perpetrator abstain from repeating his acts **("special prevention").** For both requirements, all the circumstances of the respective case as well as the possible effect of a diversional settlement have to be considered, and often enough will lead to the conclusion that ending the case by means of diversification will have a better effect as far as preventive issues are concerned than just suspending a sentence on probation [10, p. 23]. In this respect, it has to be noted that repetition of offences is not a formal impediment for diversification, though it will, of course,

[4] See for example § 153a Geman Criminal Procedure Code.

[5] According to an expert commission which was initiated by the former Austrian minister of justice, *Böhmdorfer,* § 90a (2) n. 3 Criminal Procedure Code should be deleted or at least not be applied in cases of slightest negligence which sometimes also ends in the death of a person [1, p. 553].

[6] §§ 90a to m Criminal Procedure Code always refer to the "suspect" and not to the "perpetrator". The reason for this is the fact that the presumption of innocence is maintained despite a diversional settlement [10, p. 5].

[7] Similar possibilities for private prosecutors are described at [19, p. 88].

[8] This concept will be modified under the oncoming criminal procedural reform in 2008 [32, p. 156].

[9] The latter requirement according to OGH, 12 Os 45/04, JBl 2005, 397.

diminish the suspect´s chances of a diversional settlement in many cases [12, p. 22; 19, p. 92].

B. Diversification in Practise (I)

If all of the requirements mentioned before are fulfilled, the case can, in principle, be settled by means of diversification. In this respect, it should be noted that according to §§ 90l Criminal Procedure Code it is primarily the **public prosecutor alone** who carries out the process of diversification − instead of preferring charges and instead of a trial. Unlike in Germany where the court has to approve of such plans made by the public prosecutor (§ 153a German Criminal Procedure Code), in Austria the court has no say in this process [24, p. 564]. Only after the public prosecutor has preferred charges (because he thinks the above-mentioned requirements are not met), the application of the provisions relating to diversification falls within the competence of the **court itself:** If, during the trial, the court comes to the conclusion that the conditions for diversification are fulfilled, it has to launch the respective measures instead of a verdict (§ 90b Criminal Procedure Code). If, in this case, the public prosecutor suddenly changes his mind during the trial and now thinks that diversification would be appropriate, he can only make a respective proposal to the court according to § 90l Criminal Procedure Code. The **substantive provisions** in §§ 90a to m Criminal Procedure Code however, by which the conditions for a diversificational settlement are established, apply equally for the public prosecutor on the one hand and the court on the other hand: Both the public prosecutor and the court can drop the case under the same conditions, and it is just for the sake of simplicity that in the following, we are only going to speak of the public prosecutor dropping a case after diversification.

C. Types of Diversional Measures

If a public prosecutor comes to the conclusion that the above-mentioned conditions are fulfilled and that settling the case by means of diversification is possible, he has to decide further **which measure of diversification** he will choose. These measures can be the following:

1. The public prosecutor can fix a **period of probation** of one to two years during which the suspect must not commit any more offences. If not combined with any other obligations, this measure which is established in § 90f (1) Criminal Procedure Code, is, of course, the one which is least burdensome for the suspect **(plain or simple probation)** and is therefore applied only in case of smallest offences [12, p. 33; 31, p. 158]. According to § 90f (2) Criminal Procedure Code, however, the public prosecutor can also choose to **combine the probation with certain instructions** in the sense of § 51 Penal Code such as not to approach the victim, to abstain from alcohol or to attend psychological and other courses for safe driving [37, p. 177; 18, p. 188][10] or an anti-aggression-training [22, p. 22]. The costs of such courses have to be paid by the suspect himself [10, p. 47; 39, p. 122]. In this context, the Institute of Social Politics at the Johannes Kepler University Linz (Austria) once offered a special seminar which was attended by over 50 suspects of "Neo-Nazi" offences as part of their probation instructions. Those lectures in which the suspects learned about historical facts and came into contact with university students turned out to be very successful [18, p. 188]. Apart from the above-mentioned instructions, the prosecutor can also ask the probation to be combined with the **social care of a probation officer** (§ 52 Penal Code). In 2004, 14.627 Austrian criminal cases were settled by simple probation, and in 1.941 cases, probation on certain terms was chosen [4, p. 422].

2. According to § 90c Criminal Procedure Code, the public prosecutor can also choose to ask the suspect to pay a **fine** of up to 180 daily rates plus the costs of the proceedings which have to be paid within 14 days from the delivery of the prosecutor´s offer. This measure also poses a relatively low burden as the suspect can free himself of the matter easily by one single act, i.e. by paying the requested sum. Also, this way of settling a case is a very economical one, especially as far as the length of proceedings and the (human as well as material) ressources are concerned. Therefore, in practice, nearly two thirds of all cases are settled in that manner, although there is, of course, a certain danger that the suspect may just "buy himself out" of the matter[11]. This measure of diversification is primarily applied in order to settle cases of mass delinquency such as shoplifting and traffic accidents [10, p. 35; 33, p. 105; 18, p. 188] but also in cases of economic crimes [1, p. 554]. In 2004, it was applied in 27.059 cases [4, p. 422].

3. The third type of diversional measures is an **out-of-court settlement** according to § 90g Criminal Procedure Code which is, however, more than just payment of damages [12, p. 38]. The suspect shall face his victim and shall take responsibility for his deeds, which he can do not only by paying his victim compensation but also by apologizing or − in exceptional cases − even by performing some work for the victim [10, p. 58]. In order to reach that aim, the public prosecutor can call in a mediator who is often a social worker and who brings all the parties of the case together and tries to settle the matter amicably by reaching an agreement and, if possible, a reconciliation. In the course of this process, and according to § 90g (4) Criminal Procedure Code, the mediator has to submit various reports to the public prosecutor in order to provide him with all the information which is necessary for prosecution´s further moves [12, p. 39; 35, p. 81]. The out-of-court settlement, of course, strongly depends on the victim´s co-operation. If

[10] In practise, however, and contrary to what was expected before the reform, those courses are not offered very often [11, p. 418].

[11] On the other hand, the suspect has to restrict himself financially for a certain period of time which makes meeting this requirement a bit more difficult than it seems at first sight [29, p. 99; 17, p. 302; 10, p. 32].

the victim does not want to participate in this kind of settlement, the public prosecutor must not impose it on the parties but has to think about other possible means of diversification which could be applied. The only exception to this is when the victim denies participation out of revenge or other irrational reasons[12]. The out-of-court settlement is usually applied to all kinds of offences which are connected with a conflict in the widest sense: spontaneous as well as long-lasting latent difficulties and sometimes even cases of domestic violence can be settled in the above-mentioned manner [10, p. 57 and 65; 12, p. 41][13]. According to some legal experts, an out-of-court settlement shall be chosen prior to all other types of diversification as long as it is suitable to the case in question [10, p. 58]. For the suspect, of course, this method of diversification is a lot more difficult to fulfil than those which we have described above. It requires time and energy and in most cases causes emotional strain for the perpetrator who has to sit face to face with his victim. Therefore, in 2004, the out-of-court settlement was applied in "only" 9.530 cases [4, p. 422].

4. The last type of diversional measures which is provided for in § 90d Criminal Procedure Code is **social work** which has to be performed in the suspect´s spare time and without payment. This type of diversification is perhaps the most intensive one and is therefore reserved for offences of at least average gravity and is usually not applied in cases of misdemeanours. Every public prosecutor holds a list of institutions (such as hospitals, homes for the elderly etc) which are suitable and ready to accept suspects who are willing to participate in this kind of diversional measure[14]. According to § 90e (1) Criminal Procedure Code, the total amount of work performed by the suspect must not exceed 240 hours in 6 months whereby the maximum weekly amount is 40 hours and the maximum daily amount is 8 hours. In practise, this kind of diversification was chosen in "only" 2.134 cases in 2004 [4. p. 422].

D. Diversification in Practise (II)

The types of diversification which we have mentioned above can be applied only **alternatively** and **must not be combined** with each other (OGH 12 Os 16/04, EvBl 2004/154). The only thing which may be asked in addition is a flat share of the costs of up to 250 € (according to § 388 Criminal Procedure Code) as well as the **compensation of the actual damage**[15] in cases where such compensation is "possible and suitable" according to § 90c (3) Criminal Procedure Code[16]. The public prosecutor decides at his own discretion which method he thinks is most suitable for the case in question, and if he cannot come to this decision himself (e.g. because of the suspect´s personality or reactions which are too difficult to judge in advance) then he has the possibility to consult a **clearing office** which is provided for in § 29 Probation of Offenders Act and which will help with the decision [35, p. 83]. According to the recommendations of an expert commission which was initiated by former Austrian minister of justice, *Dieter Böhmdorfer,* public prosecutors should favour "socially constructive" measures of diversification, i.e. the out-of-court settlement and social work whereas simple probation and the payment of a fine should be offered in fewer cases [1, p. 554].

As soon as the **public prosecutor** has come to the conclusion that the conditions for diversification are fulfilled and has chosen a type of settlement which he thinks suitable for the case in question[17], he has to tell the suspect about his plans and has to ask him if he would like to participate in the diversional settlement. At the same time, he must fully inform the suspect of all the details and consequences of such a move [12, p. 50]. In most cases, this **offer of diversification** will be a formal and written one according to § 90j Criminal Procedure Code, but in practise, especially in case of an out-of-court settlement, prosecutors often accept the assistance of social workers who act as mediators. Some public prosecutors even organise round-table diversification meetings which include the prosecutors as well as social workers, suspects and their lawyers. These meetings have turned out to be very successful, though, of course, they require a lot of time and intensive preparation which is why they cannot be carried out as often as prosecutors would like to [18, p. 189; 28, p. 54]. After the suspect has thus been fully informed, it is no longer up to the public prosecution to decide in which way or if the proceedings continue at all: From that time, the **suspect alone has to decide** if he accepts the public prosecutor´s offer or if he does not. Diversification is solely done on a **voluntary basis** and cannot in any way be imposed on the suspect [44, p. 57]. This **principle of voluntariness** is one of the key elements of the procedural reform of the year 2000, and although in practise, there will be a certain amount of "social pressure" on the suspect to accept the prosecutor´s offer, the novelty of this element lies in the fact that now for the first time, the suspect has a right to choose and to steer the proceedings in a certain direction [10, p. 14 and 15 with further reference]:

If the suspect **accepts** the offer, he will then be told by the public prosecutor that the case will rest until all the diversional instructions will be fulfilled and only

[12] Critical remarks to this exception have been published at [12, p. 37]; for further aspects see [19, p. 92].

[13] In case of domestic violence, diversification should only be applied if it can fulfil the purposes of prevention better than a punishment [15, p. 127].

[14] Some legal experts postulate that the kind of social work which is chosen by the public prosecutor should mirror the offence in question [39, p. 117; 10, p. 42]. Others criticise this position and say that such a reflection should rather be chosen in connection with an out-of-court settlement [38, p. 133 with further reference].

[15] Additional compensation of damages has been demanded in over 60 % of cases [18, p. 189].

[16] Most legal scientists, however, emphasize that a "victim-friendly" interpretation of the passage mentioned in the text is necessary [6, p. 17; 12, p. 26].

[17] The prosecutor can choose whichever type he thinks is best – there is no order of precedence [38, p. 113; 39, p. 116].

then will be closed completely. This final settlement will then have the effect of *res judicata,* so that the suspect cannot be charged with the deeds in question again (*ne bis in idem*)[18]. If, on the contrary, the suspect **does not accept** the offer, the public prosecution must go on with the case and bring formal charges against the suspect (§ 90h (1) Criminal Procedure Code). Formal charges will also be brought if the suspect accepts the offer in the beginning but then realises that the conditions are too difficult for him to meet. In this case, he can ask the public prosecutor to withdraw the offer of diversification and to go on with the proceedings[19]. If it is only the type of diversional instruction the suspect is not content with, he can also only refuse the offer but cannot formally demand the offer to be altered [38, p. 144].

E. Consequences of Diversification:

1. When a case is settled by means of diversification, this settlement is registered in the so-called **diversification register** (instead of the penal register) for a period of five years (§ 90m Criminal Procedure Code). This register is kept at the public prosecutor´s office in order to provide prosecutors with all the internal information which is needed in case future suspicions against the same person should arise [44, p. 57; 10, p. 86]. (In principle, a second offer of diversification in a different case is possible.) At first glance, it does not seem to make any difference for the perpetrator if his deeds are entered in the penal or in the diversifcation register, but this classification is, in fact of some importance: Anybody who can prove a legal interest in it can have access to the penal register whereas the diversification register is solely dedicated to the purposes of the public prosecution.

2. Despite the suspect has accepted the offer of diversification, he is still **presumed innocent** and without criminal record [14, p. 334]. The fact that he has taken part in the diversification process voluntarily must not be (mis)judged as a confession (OGH 15 Os 1/02, EvBl 2002/153). It only shows that − for whatever reason − the suspect is ready to take responsibility for the offence in question [23, p. 35; 14, p. 335; 34, p. 265; 13, p. 275].

F. Difficulties Related to the New Diversification Concept:

1. Principles of Austrian Criminal Procedural Law

The new diversification concept has raised some difficulties with respect to the **principles** of Austria´s criminal procedural system: Firstly, the position which the **public prosecutor** holds within the criminal procedure is no longer clear. In substance, he is now a kind of **"judge before the judge"** who, at his own discretion defines the conditions which must be met in order to settle a case without a court verdict [30, p. 445; 44, p. 56]. His function has now gone beyond that of being just the party who brings the charges [27, p. 895; 7, p. 221], and some say that this new role can hardly be integrated into our traditional criminal procedural system: One difficulty lies within the fact that the dealings and decisions which the public prosecutor takes in the course of a diversional settlement are all taken *in camera,* i.e. they cannot be seen and understood by the public and therefore lack transparency [30, p. 447]. Furthermore, and according to § 2 Public Prosecution Act, Austrian prosecutors are subject to their superiors´ directives, which judges, of course, are not. In this connection, many legal experts have repeated the postulations which they had made for many years and in which they now again demand that the prosecutors´ subjection to directives should − at least in connection with diversification − be abolished [30, p. 446; 34, p. 272].

Secondly, it has to be considered that until the procedural reform of 2000, Austria had a **strict principle of legality** which in respect of criminal law meant that as soon as the prosecutor heard about a criminal deed, he had to investigate and if there were enough grounds of suspicion, he was obliged to bring charges (see § 34 (1) Criminal Procedure Code). Now, however, at least as far as minor and average offences are concerned, our criminal procedural law has acquired a **principle of bound opportunity** which − within certain limits − lets the prosecution decide if charges are brought or not [34, p. 269; 12, p. 8].

Finally, the diversification concept is in danger of infringing **Art 6 European Convention on Human Rights.** According to this provision, criminal cases have to be determined by a **tribunal.** This tribunal has to be independent which Austrian public prosecutors who are subject to their superiors´ instructions, are not. To solve that conflict, legal scientists have explained that on the one hand, most cases of diversification lack formal charges which would require a tribunal to decide the case, and on the other hand, the above-mentioned measures of diversification cannot be seen as sanctions which is why it is also not necessary to have a tribunal to impose them [12, p. 10; 10, p. 8].

2. Voluntariness

The **voluntary basis** which diversification is said to be built upon is only a reputed one. In most cases the suspect is not legally trained and will therefore choose to believe what he is told by the public prosecutor, especially if he predicts that there will be enough evidence for a conviction and that if the suspect does not accept the diversification offer he will probably be convicted. For the suspect, the public prosecutor embodies a legal authority whose word has power, so that refusing his of-

[18] A reopening of the case can be launched only on grounds of new evidence in the sense of § 352 (1) Criminal Procedure Code and only to the disadvantage of the suspect, not in his favour (OGH 15 Os 18/05v, RZ 2005/22).

[19] If, as a result of these proceedings, the suspect is convicted, any performance which was given during the original attempt of diversification will be taken into account as far as the measure of the sentence is concerned (§ 90h (5) Criminal Procedure Code). If he is acquitted, however, he will be refunded a fine which he has paid eventually but otherwise will not be given any compensation − a provision which has been highly criticised by many legal experts [30, p. 452; 20, p. 137].

fer poses a considerable risk [33, p. 103; 30, p. 452; 44, p. 57; 24, p. 560]. It is therefore true that a certain amount of social pressure will lie on the suspect and will limit the voluntariness to a certain extent. On the other hand, however, it has to be noted that without an offer of diversification, the suspect would not be in a better position. An offer of diversification is just an additional possibility for the state to react to delinquency and does not exclude the regular criminal proceedings which have to be carried out anyway if diversification fails [42, p. 25; 14, p. 333].

3. The Victim´s Position

One of the central issues of the criminal procedural reform of 2000 was to improve the legal position of the victim [8, p. 145; 12, p. 76]. In this context, and according to § 90i Criminal Procedure Code, the victims´ interests have to be considered and supported at every stage of the diversification process: Victims have to be informed of all their procedural rights and have to be told about suitable victims´ organisations, they can bring a person of confidence and have to be heard before the prosecutor drops the case for a settlement by means of diversification[20]. Also, the above-mentioned compensation of actual damages is a main requirement in all four types of diversional settlements, and as we have mentioned above, the out-of-court settlement even depends on the victim´s consent. The problem with this apparent improvement, however, is that there is no procedural way to legally enforce these rights: Firstly, the victim has **no say in the decision of dropping the case** for a diversification settlement [9, p. 45; 30, p. 453]. He cannot bring **subsidiary charges** and can only accept the public prosecutor´s decision. Secondly, seeking **compensation of damages** by means of **private participation** in the criminal proceedings according to § 47 Criminal Procedure Code will not be possible in many cases because there will be no formal proceedings in which he could participate [30, p. 453]. For the victim, this turns out to be yet another disadvantage as we consider the above-mentioned fact that compensation of damages can be but need not necessarily be asked in combination with the four different types of diversification. For that reason, many victims who seek compensation will now have to take civil actions against the suspects and by doing that, they will have to face a higher risk of costs and lower chances of success [30, p. 454]. All in all, the victim now strongly depends on the public prosecutor´s discretion to observe the rights which the procedural reform of 2000 has given him [30, p. 455; 9, p. 46].

G. Case: Having said all of this, it becomes evident that settlement by means of diversification is, in principle, possible: The facts of the case are clear, and both offences are open to diversification: Damage of property according to § 125 Penal Code is under penalty of up to six months in prison or of a fine (maximum: 360 daily rates), physical injury according to § 83 Penal Code is under penalty of up to one year in prison or of a fine (maximum: 360 daily rates). Neither offence falls under the jurisdiction of a jury (both are tried before the district court according to § 9 (1) n. 1 Criminal Procedure Code), and both offences are open to public prosecution. As a consequence of the accident, nobody has died, and the blame which lies on A and B is not severe − the offences are minor ones and the result of a conflict of everyday life. As far as general and special prevention are concerned, a punishment does not seem necessary in order to make A and B as well as other people abstain from criminal deeds.

The prosecutor will therefore make a diversification offer to both A and B in which he will probably ask them to pay a fine as well as the costs of the proceedings. Considering the conflict situation in which the two offences were committed, the prosecutor could also offer an out-of-court settlement with the help of a mediator though this type could be slightly too grave in comparison to the triviality of the situation (which can be said about diversification through social work as well). Simple probation, on the contrary, seems to be too easy a reaction for such a situation, and probation combined with certain instructions does not seem suitable to this kind of case.

III. CONCLUSION

The new diversification concept has indeed brought advantages for the judicial practise. Firstly, the relationship between members of the judiciary and institutions of social work has improved considerably. Meetings, conferences and various forms of co-operation have increased the mutual understanding and acceptance of opposite views and different aspects [18, p. 189]. Secondly, diversification is a very economical way to deal with (mass) delinquency. Cases can now be settled at a much earlier stage and less formally than before the reform which has also considerably reduced the workload of courts. To the suspect who is, in fact, guilty, diversification is a favourable possibility to choose because it gives him a chance to return to legality in an easy and unofficial way. It is only the suspect who is actually innocent to whom diversification can be a disadvantage because he can easily be pressed into accepting an obligation which would never be placed upon him if the proceedings were carried out in the traditional way.

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[20] See the enumeration of victims´ rights published at [12, p. 77].

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TRUMPA AUSTRIJOS DIVERSIFIKAVIMO KONCEPCIJOS APŽVALGA

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S a n t r a u k a

Ilgą laiką Austrijos teisinėje sistemoje dėl kiekvienos nusikalstamos veikos reikėjo vykdyti baudžiamąjį procesą, įskaitant ikiteisminio tyrimo procedūras, parengiamąjį teismo posėdį, teisminį nagrinėjimą, nuosprendžio priėmimą, apeliacinį ir vykdomuosius procesus. Visa tai reikalauja didelių finansinių išlaidų, žmogiškųjų išteklių ir laiko. Šios išlaidos visiškai pateisinamos, kai kalbama apie sunkius nusikaltimus, tačiau jos nėra proporcingos, kai nagrinėjami nelabai pavojingi pažeidimai. Austrijoje moksliniu ir politiniu lygiais nuo seno buvo diskutuojama, ar iš tiesų visais atvejais, kai padaroma nusikalstama veika, turi būti taikomas visas baudžiamojo proceso priemonių „krepšelis“, ar nėra alternatyvių ir geresnių būdų valstybei reaguoti į tam tikrus nedidelio sunkumo pažeidimus. Šios alternatyvios bylų išsprendimo formos Austrijoje vadinamos diversifikavimu. Tai reiškia nutolimą nuo tradicinės baudžiamojo proceso schemos, nesunkių bylų sprendimą neformalesniu būdu.

2000 m. baudžiamojo proceso reforma drastiškai pakeitė Austrijos baudžiamojo proceso sistemą: anksčiau žinoma

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dviejų krypčių – bausmių ir prevencininių priemonių – sistema buvo pakeista trijų krypčių procesu, kurį sudaro bausmė, prevencinės priemonės ir diversifikavimas. Būtent diversifikavimas suteikia prokurorams ir teismams teisę nagrinėti baudžiamąsias bylas visiškai kitokiu neformaliu būdu – nepriimant apkaltinamojo nuosprendžio. Vietoj formalaus sprendimo procesas prokuroro sprendimu gali pasibaigti probacija su arba be apribojimų, baudos sumokėjimu, socialiniais darbais arba sureguliavimu už teismo ribų. Straipsnyje nagrinėjamos teisinės sąlygos, kurioms esant minėtos diskrecinės priemonės gali būti skiriamos, pateikiama trumpa diversifikavimo procedūrų apžvalga, aptariami teigiami reformos padariniai ir rizikos, konkrečių bylų turinys.

Pagrindinės sąvokos: diversifikavimas, sureguliavimas už teismo ribų, probacija, apribojimai, socialiniai darbai, bauda, kompensacija, sunki kaltė, speciali prevencija, baudžiamojo proceso reforma, trijų krypčių sistema, savanoriškumas, nekaltumo prezumpcija, diversifikacinis registras.