

THE EUROPEAN PUBLIC  
PROSECUTOR'S OFFICE

Analysis of a Multilevel Criminal  
Justice System

Martijn Willem ZWIERS



intersentia

Cambridge – Antwerp – Portland

Intersentia Ltd  
Trinity House | Cambridge Business Park | Cowley Road  
Cambridge | CB4 0WZ | United Kingdom  
mail@intersentia.co.uk

*Distribution for the UK:*  
Hart Publishing Ltd.  
16C Worcester Place  
Oxford OX1 2JW  
UK  
Tel.: +44 1865 51 75 30  
Email: mail@hartpub.co.uk

*Distribution for the USA and Canada:*  
International Specialized Book Services  
920 NE 58th Ave. Suite 300  
Portland, OR 97213  
USA  
Tel.: +1 800 944 6190 (toll free)  
Email: info@isbs.com

*Distribution for Austria:*  
Neuer Wissenschaftlicher Verlag  
Argentinierstraße 42/6  
1040 Wien  
Austria  
Tel.: +43 1 535 61 03 24  
Email: office@nvw.at

*Distribution for other countries:*  
Intersentia Publishers  
Groenstraat 31  
2640 Mortsel  
Belgium  
Tel.: +32 3 680 15 50  
Email: mail@intersentia.be

The European Public Prosecutor's Office. Analysis of a Multilevel Criminal  
Justice System  
Martijn Willem Zwiers

© 2011 Intersentia  
Cambridge – Antwerp – Portland  
www.intersentia.com | www.intersentia.co.uk

Cover illustration: Francisco de Goya (1746-1828), Etching, Plate 28 from 'Los  
desastres de la guerra'

ISBN 978-1-78068-029-3  
NUR 824

British Library Cataloguing in Publication Data. A catalogue record for this  
book is available from the British Library.

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any  
other means, without written permission from the publisher.

*for my father*

## ACKNOWLEDGEMENTS

First of all, I would especially like to thank Muriel for her patience. Ever since I left Maastricht University and started work as a judge-in-training, this thesis has been “nearly finished”. However, it has been two years now, and during this period a substantial slice of my free time has gone into finishing this manuscript instead of to family matters. Muriel had to cover for this, which she did almost without complaining.

I also thank my father and mother, who stimulated me to take on this challenge and who helped me keep my eye on the ball and finish it.

I furthermore sincerely thank Prof. Mr. Luc Verhey and Prof. Mr. André Klip. They complemented each other well both in respect of their fields of expertise and in their working style. They also allowed me all the freedom to shape this thesis and my time at the law faculty as I wanted. They also supported me well when a rather negative personal experience had put pressure on my progress. And they knew well when it was necessary to step up and keep up the pressure.

I would further like to thank Mr. Dr. Annemiek Derks and Mr. Joop Drijkoningen for their support. Apart from doing a fine job as my instructors at the civil law section of the District Court of Roermond, they went out of their way in enabling me to combine finishing the manuscript with successfully completing this part of my training. Apart from thanking Annemiek and Joop specifically, I would also like to thank the District Court of Roermond itself. The organisation was always very supportive of and enthusiastic about my effort to finish the book. Had this been otherwise, I doubt I would have been able to finish it.

Finally, I thank Mr. Dr. Danielle Wenders, my roommate at the law faculty, for the nice time together, as well as the other colleagues of the “capgroep”, and wish them luck!

# CONTENTS

<i>Acknowledgements</i> .....	vii
-------------------------------	-----

## Chapter 1

Introduction .....	1
1. The Inevitability of the European Public Prosecutor’s Office .....	1
1.1. Jack-in-the-Box .....	1
1.2. Background Developments .....	3
1.3. Raison d’être .....	6
2. Scope of the Research .....	7
3. Constitutional Embedment .....	10
3.1. Introduction .....	10
3.2. Subsidiarity and Proportionality .....	10
3.3. Accountability .....	12
3.3.1. Accountability: Definition .....	12
3.3.2. Accountability: Scope .....	17
3.4. Public Prosecution: Constitutional Perspective .....	18
4. Structure .....	21
4.1. Introduction – General Structure .....	21
4.2. Prosecution Service Models .....	21
4.2.1. The Council of Europe’s Recommendations .....	21
4.2.2. The Member States’ Prosecution Services .....	22
4.2.2.1. The Member States’ Prosecution Services: Rationale .....	22
4.2.2.2. The Member States’ Prosecution Services: Method .....	23
4.2.2.3. The Member States’ Prosecution Services: Scope ..	25
4.3. The European Union’s Institutional System .....	26
4.3.1. The European Union’s Institutional System: Rationale .....	26
4.3.2. The Position and Accountability of the (European) Council .....	27
4.3.3. Institutional Balance, Multilevel Governance, and Agencies .....	28
4.3.4. The European Union’s Institutional System: Scope .....	30
4.4. EU Criminal Law Enforcement .....	31
4.4.1. Eurojust .....	31
4.4.2. EU Criminal Law Enforcement: Scope .....	32

4.5. Competition Law Enforcement .....	33
4.6. Synthesis .....	35
5. Method .....	36

Chapter 2

Prosecution Service Models .....	37
1. Introduction .....	37
2. International Guidelines on the Status of the Public Prosecution Service .....	38
2.1. Introduction .....	38
2.2. Function, Status and Role of the Public Prosecution Service .....	39
2.3. Position of Prosecutors .....	40
2.4. Opportunity or Legality Principle and Policy Making .....	44
2.5. Prosecutor and Police .....	47
3. Prosecution Service Models: Preliminary remarks .....	47
4. The French Model .....	50
4.1. Introduction .....	50
4.2. Example System: France .....	51
4.2.1. General Organisation .....	51
4.2.2. Hierarchy .....	51
4.2.3. Prosecution Service and Minister of Justice .....	52
4.2.4. Budget .....	56
4.2.5. Opportunity Principle and Prosecution Policy .....	56
4.2.6. Prosecutor and Police .....	57
4.3. Belgium, Denmark, Luxembourg, the Netherlands, and Scotland .	58
4.3.1. General Organisation & Hierarchy .....	59
4.3.2. Prosecution Service and Minister of Justice .....	62
4.3.3. Opportunity Principle and Prosecution Policy .....	67
4.3.4. Prosecutor and Police .....	69
4.4. Comparative Synthesis: the French Model .....	71
4.4.1. Introduction .....	71
4.4.2. General Organisation and Minister of Justice .....	71
4.4.2.1. Degree of Centralisation and Hierarchy .....	71
4.4.2.2. Minister of Justice and Prosecution Service .....	72
4.4.3. Opportunity Principle and Prosecution Policy .....	74
4.4.4. Prosecutor and Police .....	75
4.4.5. Conclusion .....	75
5. The English Model .....	76
5.1. Introduction .....	76
5.2. Example System: England & Wales .....	77
5.2.1. General Organisation .....	77
5.2.2. Hierarchy .....	79
5.2.3. Prosecution Service and Minister of Justice .....	80

5.2.4.	Opportunity Principle and Prosecution Policy . . . . .	82
5.2.5.	Prosecutor and Police . . . . .	84
5.3.	Northern Ireland and Ireland . . . . .	86
5.3.1.	The Northern Irish Public Prosecution Service . . . . .	86
5.3.2.	Ireland . . . . .	88
5.3.2.1.	General Organisation . . . . .	88
5.3.2.2.	Hierarchy . . . . .	89
5.3.2.3.	Prosecution Service and Minister of Justice . . . . .	90
5.3.2.4.	Opportunity Principle and Prosecution Policy . . . . .	90
5.3.2.5.	Prosecutor and Police . . . . .	91
5.4.	Comparative Synthesis: the English Model . . . . .	92
5.4.1.	Introduction . . . . .	92
5.4.2.	General Organisation and Minister of Justice . . . . .	92
5.4.2.1.	Degree of Centralisation and Hierarchy . . . . .	92
5.4.2.2.	Minister of Justice and Prosecution Service . . . . .	93
5.4.3.	Opportunity Principle and Prosecution Policy . . . . .	94
5.4.4.	Prosecutor and Police . . . . .	95
5.5.	Conclusion . . . . .	96
6.	The German Model . . . . .	96
6.1.	Introduction . . . . .	96
6.2.	Example System: Germany . . . . .	96
6.2.1.	General Organisation . . . . .	96
6.2.2.	Prosecution Service and Minister of Justice . . . . .	98
6.2.3.	Legality Principle and Prosecution Policy . . . . .	101
6.2.4.	Prosecutor and Police . . . . .	105
6.3.	Austria and Poland . . . . .	106
6.3.1.	General Organisation . . . . .	106
6.3.2.	Prosecution Service and Minister of Justice . . . . .	108
6.3.3.	Legality Principle and Prosecution Policy . . . . .	110
6.3.4.	Prosecutor and Police . . . . .	112
6.4.	Comparative Synthesis: the German Model . . . . .	113
6.4.1.	Introduction . . . . .	113
6.4.2.	General Organisation and Hierarchy . . . . .	113
6.4.3.	Minister of Justice and Prosecution Service . . . . .	114
6.4.4.	Legality Principle and Prosecution Policy . . . . .	115
6.4.5.	Prosecutor and Police . . . . .	116
6.4.6.	Conclusion . . . . .	116
7.	The Eastern and Southern European Model . . . . .	116
7.1.	Introduction . . . . .	116
7.2.	Status of the Prosecution Service . . . . .	118

7.2.1.	Prosecutor-General Appointed Primarily by the Government . . . . .	118
7.2.2.	Prosecutor-General Appointment Requires Parliamentary Approval. . . . .	126
7.3.	Legality Principle and Prosecution Policy. . . . .	129
7.4.	Prosecutor and Police . . . . .	133
7.5.	Conclusion . . . . .	137
8.	The Italian Model. . . . .	138
8.1.	Introduction . . . . .	138
8.2.	General Organisation and Minister of Justice . . . . .	138
8.2.1.	Degree of Centralisation and Hierarchy . . . . .	138
8.2.2.	CSM and State Prosecution Council . . . . .	141
8.2.3.	Prosecution Service and Minister of Justice . . . . .	143
8.2.3.1.	Instructions and Budget . . . . .	143
8.2.3.2.	Appointment and Discipline . . . . .	144
8.2.3.3.	Accountability. . . . .	145
8.2.4.	Legality Principle and Prosecution Policy. . . . .	147
8.2.5.	Prosecutor and Police . . . . .	149
8.2.6.	Conclusion . . . . .	151
9.	Conclusion . . . . .	152

Chapter 3

	The Institutional Context . . . . .	153
1.	Introduction . . . . .	153
2.	The Institutional Actors . . . . .	154
2.1.	The European Council . . . . .	154
2.1.1.	Function . . . . .	154
2.1.2.	Structure . . . . .	157
2.2.	The Council of Ministers . . . . .	158
2.2.1.	Function . . . . .	158
2.2.2.	Internal Structure . . . . .	161
2.2.3.	Accountability . . . . .	165
2.2.4.	Conclusion . . . . .	168
2.3.	The Commission . . . . .	168
2.4.	The European Parliament. . . . .	173
2.5.	The European Court of Justice. . . . .	174
2.6.	The National Parliaments. . . . .	177
2.7.	Conclusion . . . . .	178
3.	Institutional Balance . . . . .	179
3.1.	Introduction . . . . .	179
3.2.	Meroni . . . . .	180
3.3.	Institutional Balance Further Examined. . . . .	182
3.4.	Institutional Balance and Delegation of Competences . . . . .	185
3.5.	Conclusion . . . . .	190



4.	Multilevel Governance, Networks, and Accountability .....	191
4.1.	Introduction .....	191
4.2.	The Multilevel Nature of EU Government.....	192
4.3.	Accountability and Multilevel Governance.....	195
4.4.	Conclusion .....	200
5.	Agencies.....	201
5.1.	Introduction .....	201
5.2.	Definition .....	201
5.3.	Types of Agency.....	203
5.4.	Rationales for Setting Up Agencies.....	208
5.5.	Regulatory Agencies – Current Situation .....	210
5.5.1.	General .....	210
5.5.2.	Internal Structure .....	211
5.5.3.	Status and Accountability .....	214
5.5.4.	Agencies’ Budgets .....	216
5.6.	Regulatory Agencies – Future Directions .....	218
5.6.1.	General .....	218
5.6.2.	The Communication on Regulatory Agencies .....	218
5.6.3.	The European Parliament’s Position .....	222
5.6.4.	The Council’s Position .....	224
5.6.5.	The Draft Interinstitutional Agreement .....	224
5.6.6.	Resolution on the Draft Interinstitutional Agreement ...	227
5.6.7.	Council’s Position .....	229
5.6.8.	European Agencies – The Way Forward .....	229
5.7.	Conclusion .....	231
6.	The Area of Freedom, Security and Justice .....	233
6.1.	Introduction .....	233
6.2.	Judicial Cooperation in Criminal Matters.....	234
6.3.	Eurojust .....	236
6.4.	Police Cooperation .....	238
6.5.	Passerelle, Enhanced Cooperation and Emergency Brake .....	239
6.5.1.	Introduction.....	239
6.5.2.	<i>Passerelle</i> .....	240
6.5.3.	Emergency Brake.....	241
6.5.4.	Enhanced Cooperation.....	242
7.	Conclusion .....	246
 Chapter 4		
	Eurojust .....	249
1.	Introduction .....	249
2.	Pro-Eurojust .....	249
3.	The Decision on the Strengthening of Eurojust .....	253
4.	Tasks and Competences .....	255

5.	Organisation	261
5.1.	General Organisation	261
5.2.	President and Vice-Presidents	263
5.3.	The National Members	265
5.3.1.	Original Situation	266
5.3.2.	Amended Situation	269
6.	Information Provision to Eurojust	273
7.	Eurojust National Coordination System	274
8.	Administrative Director and Other Staff	275
9.	Relations with Other Actors	277
9.1.	European Judicial Network and Other Networks	278
9.2.	The Commission and the Council	281
9.3.	The European Anti-Fraud Office	282
9.4.	Europol	285
9.5.	Third States and International Organisations	286
10.	Policymaking	287
11.	Accountability	294
12.	Budget	296
12.1.	General	296
12.2.	Adoption and Implementation of the Budget	298
12.3.	Budgetary Control	299
13.	Eurojust's Statute Compared to EU Regulatory Agencies	300
14.	Conclusion	301

## Chapter 5

	Competition Law Enforcement	303
1.	Introduction	303
2.	Regulation 1/2003 in General	304
2.1.	Historical Background	304
2.2.	Regulation 1/2003	308
2.2.1.	General	308
2.2.2.	The Legal Framework	311
2.2.3.	Information Exchange	312
2.2.4.	Relations with Member State Courts	313
3.	European Competition Network and Commission Leadership	313
3.1.	Introduction	313
3.2.	European Competition Network and Case Allocation	315
3.2.1.	European Competition Network	315
3.2.2.	Advisory Committees	317
3.3.	Case Allocation	318
3.3.1.	General Procedure	318

3.3.2.	Case Allocation to the National Competition Authorities . . . . .	319
3.3.3.	Case Allocation to the Commission. . . . .	320
3.4.	Commission Leadership and Policymaking . . . . .	321
3.4.1.	The Commission's Central Position . . . . .	321
3.4.2.	Policy Making by Commission and European Competition Network. . . . .	323
3.4.2.1.	The Commission's Competences . . . . .	323
3.4.2.2.	Regulatory Convergence . . . . .	325
3.5.	The CFI on Regulation 1/2003 . . . . .	328
3.6.	Conclusion . . . . .	332
4.	The Constitutional Position of the Competition Authorities . . . . .	333
4.1.	Introduction . . . . .	333
4.2.	The National Competition Authorities . . . . .	333
4.3.	The Commission . . . . .	335
4.3.1.	General Remarks . . . . .	335
4.3.2.	Competition Law Decision-Making within the Commission . . . . .	337
5.	The Competition Law Regime in Practice . . . . .	340
5.1.	Introduction . . . . .	340
5.2.	The European Competition Network in Practice . . . . .	341
5.3.	Convergence and Agency Escape . . . . .	346
6.	Conclusions. . . . .	350
Chapter 6		
	What Form of European Public Prosecutor's Office for Europe? . . . . .	355
1.	Introduction . . . . .	355
2.	Pre-Lisbon Proposals . . . . .	355
2.1.	General . . . . .	356
2.1.1.	Competences . . . . .	356
2.1.2.	The Deputy System . . . . .	357
2.1.3.	Deputies: Single Hat or Double Hats? . . . . .	359
2.1.4.	Prosecutor-General and Status of the Office. . . . .	360
2.1.5.	Infrastructure and Budget. . . . .	362
2.2.	Procedural Law Issues. . . . .	362
2.2.1.	The Pre-trial Stage . . . . .	362
2.2.2.	The Trial Stage . . . . .	366
2.2.3.	Judicial Review. . . . .	367
2.3.	Execution of Sentences . . . . .	369
2.4.	Substantive Law . . . . .	369
2.5.	Relationship with Other Actors. . . . .	370
2.6.	The Ensuing Discussion . . . . .	372

2.6.1.	Status . . . . .	372
2.6.2.	The Proposed Model for Supranational Law Enforcement. 374	
2.6.2.1.	Division of Competences . . . . .	374
2.6.2.2.	Decentralised Structure. . . . .	374
2.6.2.3.	The Pre-trial Stage . . . . .	377
2.6.2.4.	Legality Principle . . . . .	378
2.6.2.5.	Committal Court . . . . .	379
2.6.3.	Relationship with Other Actors and Third Countries. . . . .	380
2.7.	The Follow-Up to the Green Paper . . . . .	381
3.	The Legal Basis: Article 86 TFEU . . . . .	385
3.1.	Introduction . . . . .	385
3.2.	The Legislative Procedure. . . . .	387
3.3.	Substantive Jurisdiction . . . . .	388
3.3.1.	Basic Jurisdiction. . . . .	388
3.3.2.	Extended Jurisdiction. . . . .	391
3.4.	Substantive Law . . . . .	393
3.5.	Competences. . . . .	396
3.5.1.	“Investigating” . . . . .	396
3.5.1.1.	The National Police Forces and Europol. . . . .	396
3.5.1.2.	The European Anti-Fraud Office . . . . .	398
3.5.2.	Prosecution and Enforcement of Sentences . . . . .	402
3.5.2.1.	“Prosecuting” and “bringing to judgment” . . . . .	402
3.5.2.2.	Demanding a Sentence . . . . .	403
3.5.2.3.	Appeals. . . . .	403
3.5.2.4.	Enforcement of Sentences . . . . .	403
3.5.2.5.	Out-of-Court Settlements . . . . .	404
3.6.	Forum, Jurisdiction and Procedural Law . . . . .	405
3.7.	The European Court of Justice. . . . .	407
4.	An Enforcement Network under the Council? . . . . .	409
4.1.	General Status. . . . .	409
4.2.	Structure . . . . .	412
4.2.1.	Introduction . . . . .	412
4.2.2.	Towards a Multilevel Network Actor? . . . . .	416
4.3.	The European Parquet. . . . .	423
4.3.1.	General Remarks. . . . .	423
4.3.2.	Advisory Competences. . . . .	425
4.3.3.	European <i>Parquet</i> Without Proper Capacity to Prosecute. . . . .	425
4.3.4.	European <i>Parquet</i> With Proper Capacity to Prosecute. . . . .	428
4.3.5.	Internal Hierarchy. . . . .	429
4.3.6.	Information Chains. . . . .	433
4.3.7.	Discipline . . . . .	434

4.4.	Substantive Law . . . . .	435
4.5.	Procedural Issues . . . . .	436
4.5.1.	Evidence and Information Exchange . . . . .	436
4.5.2.	Case Allocation . . . . .	437
5.	Constitutional Status . . . . .	440
5.1.	Introduction . . . . .	440
5.2.	Prosecutor-General . . . . .	441
5.2.1.	General . . . . .	441
5.2.2.	Appointment . . . . .	441
5.2.3.	Dismissal . . . . .	445
5.3.	Instructions by the Executive . . . . .	448
5.3.1.	Discretion and Policymaking . . . . .	448
5.3.2.	General Instructions and Prosecution Policymaking . . . . .	453
5.3.3.	Instructions in Individual Cases . . . . .	457
5.4.	Accountability . . . . .	460
5.4.1.	Improvements in the TFEU . . . . .	460
5.4.2.	Overall Accountability . . . . .	462
5.4.3.	Piecemeal Accountability . . . . .	463
5.4.4.	Conclusion . . . . .	464
5.5.	Judicial Review . . . . .	467
5.6.	Budget . . . . .	469
6.	The Way Forward . . . . .	470
6.1.	Decision Points . . . . .	470
6.2.	The Way Forward . . . . .	476
7.	Conclusion . . . . .	478
	<i>Samenvatting</i> . . . . .	481
	Bibliography . . . . .	485
	Curriculum vitae . . . . .	503