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From Sisyphus to Octopus: Towards a Modern Public Prosecutor's Office in Belgium

INTRODUCTION

Since a fair number of years, Belgium has witnessed widespread, and at times heated, debates about the functioning of the administration of criminal justice. Politicians, lawyers, judges, policemen and academics alike have been, and remain to be, engaged in fierce discussions about the overall effectiveness of the system in dealing with a great variety and an increasing number of criminal offences, and about the urgent need for drastic reforms. In a fairly consistent manner, the discussions have centred around the role of the police and that of the Public Prosecutor's Office, and the relationships between them. The discussions reached their provisional peak in the aftermath of the system's failures in the case Dutroux, of the disappeared and the murdered girls, that swept Belgium as a major moral and political earthquake in the summer of 1996, and made it the centre of world attention for a couple of weeks. Following these dramatic events, drastic reforms in policy and practice have been introduced. The latest set of fundamental reforms was rooted in the important 'Octopus' agreement of May 1998, which aimed at preparing the police and the Public Prosecutor's Office, and the criminal justice system as a whole, for the major challenges of the 21st century.[1]

In this contribution, we will sketch the headlines for the future of the Public Prosecutor's Office in Belgium, the challenges it is to face, and the answers that can be provided. In order to undertake this prospective work in an adequate way, we have looked back quite frequently into the developments and discussions of the last twenty years. The structure of this text follows a general scheme. First, we will briefly present the general characteristics of the Public Prosecutor's Office in Belgium. That overview will provide us with the necessary elements to discuss three crucial aspects, namely its constitutional position, its internal and external organisation, and the disposition of criminal cases outside of trial. At the end, we present our conclusions

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1. The Octopus agreement can be found in: C. Fijnaut, F. Goossens, F. Hutsebaut and D. Van Daele, *Het Belgisch politiewezen. Wetgeving, beleid, literatuur inzake politie, bestuur en justitie* (The Belgian Police Service, Legislation, Policy, and Literature Concerning Police, Administration and Justice), Antwerpen, Kluwer, 1999, 486 pp., pp. 386–405.

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and recommendations. Throughout the text, we will pay attention to the two major issues of effectiveness and of legitimacy, that will deeply influence the development of the Public Prosecutor's Office in the years and decades ahead. This contribution heavily draws on the final report of a four-year research project on the functioning of the Public Prosecutor's Office in Belgium and the disposition of criminal cases outside of trial.[2]

1. GENERAL CHARACTERISTICS OF THE PUBLIC PROSECUTOR'S OFFICE IN BELGIUM

In this part, we present some basic facts and figures about the structure of the Belgian Public Prosecutor's Office. Then, we give a concise overview of the major debates concerning this institution and of some important reforms that have taken place during the last twenty years. Finally, we will take a look at the type of research conducted on its role and its functioning.

1.1. General outline

As in most other countries, the Public Prosecutor's Office in Belgium is structured according to a hierarchical model (*Arts. 137–155 Code Judiciaire*). The bottom of the pyramid consists of 27 prosecutors (*procureurs du Roi*), one for each judicial district. They, and their substitutes, are responsible for exercising the criminal procedure in regular criminal matters at the level of the police courts and the correctional courts. One set of criminal offences, namely those in social and labour matters, is excluded from their competence and falls within the jurisdiction of 22 labour auditors (*auditeurs de travail*), and their substitutes. Both the district prosecutors and the labour auditors exercise their functions under the hierarchical supervision of 5 prosecutors-general (*procureurs-généraux*), one for each court of appeal, assisted by their substitutes and by advocates-general. All prosecutors-general together form the assembly or the board (*collège des procureurs-généraux*). This board is assisted by maximum 5 so-called national magistrates (*magistrats nationaux*), who coordinate the criminal investigations for offences that go beyond the geographical borders of the districts. Both the individual prosecutors-general and the assembly fall under the hierarchical supervision of the Minister of Justice. Finally, the prosecutor-general at the supreme court (*cour de cassation*) also forms part of the Public Prosecutor's Office, but is not its hierarchical superior. All in all, the Public Prosecutor's Office is a relatively small institution. According to the 1999 statistics by the Ministry of Justice, it consists of less than 800 magistrates, about 650 of them at the district level, and approximately 125 at the level of the courts of appeal. The magistrates are supported by around 2,300 legal and administrative staff.

2. C. Fijnaut, D. Van Daele and S. Parmentier, *Een openbaar ministerie voor de 21ste eeuw* (A Public Prosecutor's Office for the 21st Century), Leuven, Universitaire Pers Leuven, 2000, 266 pp.

In a civil law country like Belgium, the Public Prosecutor's Office has often been characterized as '*the engine and the watchdog of the criminal procedure*'.[3] This expression refers to its omnipresent position in criminal matters: it is the Public Prosecutor who starts the criminal procedure before the criminal judge (apart from the possibility for victims to present themselves as *partie civile*); his office also looks after the composition of the criminal file; he closely watches the criminal proceedings as they take place; and, finally, the office overlooks the execution of punishments and other measures pronounced by the criminal judge. In fulfilling these tasks, the Public Prosecutor's Office has traditionally been considered to act as a unity, as '*one and indivisible*'.[4] In order to enhance this unity in practice, the assembly of prosecutors-general is entrusted with the competences to elaborate and to coordinate in a coherent manner the criminal policy as decided by the Minister of Justice by means of guidelines. Moreover, it bears overall responsibility for the adequate functioning of the Public Prosecutor's Office in the country.

Highlighting its formal competence to initiate the criminal procedure should not obfuscate the fact that the task of the Public Prosecutor's Office is far broader. In practice, it receives huge masses of files, well over one million per year, from the police and from special inspection services. Because it is totally impossible to bring all these cases before the criminal judge, the prosecutors possess extensive powers not to refer them to the court, but to dispose of them in 'alternative' ways, i.e. through dismissal, transaction, or penal mediation (*cfr. infra*). In the past, district prosecutors, little bound by general guidelines, have enjoyed substantial discretion at the local level in dealing with criminal cases and in organising their local services.

1.2. Fierce debates and drastic reforms

The broad competences sketched above clearly justify the description of the Public Prosecutor's Office as 'the spider in the web' of the criminal justice process. Given its pivotal role, the question emerges whether this has given rise to discussions and to which extent. The answer is evidently in the affirmative. In neighbouring countries, and even in Belgium itself, it is frequently thought that the debates about the Public Prosecutor's Office were triggered by the Dutroux case. Although they have certainly increased in depth and size during the last couple of years, it would be shortsighted to limit the discussions, and those about the criminal justice system in general, to the deplorable events since 1996. The last two decades have witnessed fierce, and sometimes passionate, debates in the political, the judicial and the academic arenas about virtually all aspects of the Public Prosecutor's Office. It may suffice at this stage to just mention the most important problems. Over the years, the criminal procedure has undergone increasing pressure, due to the rapid inflation of criminal norms and to mounting crime figures. Faced with these challenges, the criminal justice system

3. Most recently in: R. Verstraeten, *Handboek strafvordering* (Handbook on Criminal Procedure), Antwerpen, Maklu, 1999, p. 50.
4. J. Matthijs, *Openbaar ministerie* (The Public Prosecutor's Office), Gent, Story Scientia, 1983, pp. 64–67.

has shown an increasing incapability to process these growing case-loads, partly due to an inconsistent policy in the disposition of criminal cases. The same inconsistency has sometimes led to a selective and haphazard approach to criminal justice, without sufficient guarantees for fundamental principles such as equality before the law and legal certainty for all citizens. Over the years, the accumulation of these problems produced a real 'crisis of legitimacy' of the Public Prosecutor's Office, and even of the criminal justice system in general. In our view, this situation finds a telling illustration in the ancient Greek image of Sisyphus who over and over again had to push uphill a huge stone block that inevitably rolled back downhill, a vicious circle without beginning nor end.

This is not to say that no reforms have taken place in the same period. Since the 1980s, two new laws have expanded the competences of the Public Prosecutor's Office to dispose of criminal cases outside of trial. The law of 28 June 1984 extended the existing possibility to terminate a criminal case by proposing a transaction to the offender, in the form of an amount of money to be paid, in exchange for dropping the criminal charges. Ten years later, the law of 10 February 1994 introduced the possibility for the prosecutors to resort to mediation in penal matters for certain offences and under certain conditions. Through the law of 4 March 1997, the assembly of prosecutors-general, which had existed in practice for a number of years, was given a legal basis, thereby providing for a new relationship with the top of the Public Prosecutor's Office and the Minister of Justice. The most drastic reform movement, however, was started in May 1998, following the 'Octopus' agreement, so-called because it was concluded by eight political parties, including opposition parties. This agreement was the product of intense negotiations following the escape from police custody of public enemy number one, Marc Dutroux, one month earlier. The Octopus agreement, and the laws that stem from it, constitute an unprecedented effort to introduce major changes to the internal structure of the Public Prosecutor's Office. Each of these reforms will be discussed in further detail below.

1.3. Mixed scientific research

During the last twenty years, a substantial amount of research on the Public Prosecutor's Office has seen the light of day, most of it conducted from a legal or normative perspective. Floods of literature have treated such 'classical' chapters as the nature of the *Office*, particularly *vis-à-vis* the executive power, and its role in the overall architecture of the *Rechtsstaat*.[5] Other publications have dealt with its legal competences, its internal organisation, and its relationship with the other actors in the criminal

5. *See* i.a.: J. Vande Lanotte, 'Bedenkingen bij de "onafhankelijkheid" van het openbaar ministerie' (Considerations on the 'independence' of the Public Prosecutor's Office), Rechtskundig Weekblad, 1990–1991, pp. 1001–1014; Hof van Cassatie (ed.), *Een eigentijds openbaar ministerie. Handelingen van het Colloquium gehouden op het Paleis van Justitie te Brussel op 7 en 8 oktober 1994* (A Contemporary Public Prosecutor's Office. Proceedings of the Colloquium held at the Palace of Justice in Brussels on 7–8 October 1994), Brussel, Belgisch Staatsblad, 1994, 379 pp.

justice process, such as the police and the judicial power.[6] It is noteworthy that the vast majority of publications is quite specific in covering one or only a handful of aspects of the Public Prosecutor's Office. The last global treatise dates back to the 1983 book of J. Matthijs, at that time emeritus prosecutor-general at the Court of Appeal of Ghent and emeritus professor at the Free University of Brussels.[7]

The clear dominance of the legal approach to the Public Prosecutor's Office has not precluded publications from a social science perspective in the said period, but these remain scant and can be counted on two hands. One of the most thorough scientific empirical investigations was conducted at the end of the 1980s, by C. Janssen and J. Vervaele on the policy of three district prosecution offices of dismiss cases for four types of criminal offences.[8] For the first time on a national scale, sound figures were produced about the strikingly high level of dismissals by the Belgian prosecutors. In recent years, J. Goethals and F. Hutsebaut looked into the policy of three district prosecution offices with regard to sexual offences in three different periods preceding the Dutroux case.[9] Also their figures point at a high level of dismissals. In the early 1990s, L. Dupont, S. Christiaensen & P. Claes conducted innovative exploratory research of a qualitative nature about the needs and expectations of magistrates belonging to five different judicial districts.[10] They concluded that there existed a huge discrepancy between the actual workload and the available resources, so as to jeopardise both the legal protection of the parties and the aim of crime control. Our own empirical research on the disposition by the Public Prosecutor's Office of criminal cases outside cases outside of trial, which is discussed *in extenso* later on, builds on this research tradition, and makes use of different methodologies to gain a better picture of the legal and the practical implications (*cfr. infra*).[11] Apart from this scientific research, mention should also be made of several audits on the problems of specific district offices, conducted of private consultancy firms at the request of the minister of Justice or of the Public Prosecutor's Office itself, and the intention to improve the day-to-day functioning of these district offices.[12]

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6. *See* i.a.: G. Verhegge, 'Beschouwingen bij het beleid van het openbaar ministerie' (Observations on the Policy of the Public Prosecutor's Office), Rechtskundig Weekblad, 1983, pp. 1345–1370; K. Velle, *Het openbaar ministerie in België (1796–1995): organisatie, bevoegdheden en archiefvorming* (The Public Prosecutor's Office in Belgium: Organisation, Competences and Record keeping), Brussel, Algemeen Rijksarchief, 1995, 410 pp.
7. J. Matthijs, *Openbaar ministerie* (The Public Prosecutor's Office), Gent, Story Scientia, 1983, 452 pp.
8. C. Janssen and J. Vervaele, *Le ministère public et la politique de classement sans suite*, Brussel, Bruylant, 1990, 418 pp.
9. J. Goethals, F. Hutsebaut, E. Lecompte and N. Kumps, *Het strafrechtelijk beleid inzake seksueel geweld* (Criminal Policy Regarding Sexual Violence), Leuven/Bruxelles, s.l., 1998, 221 pp.
10. L. Dupont, S. Christiaensen and P. Claes, *Het strafrechtelijke vooronderzoek en de voorlopige hechtenis: een verkennend onderzoek* (Criminal Investigation and Pre-trial Detention: An Exploratory Study), Leuven, Institute for Criminal Law, 1991, 458 pp.
11. C. Fijnaut, D. Van Daele and S. Parmentier, *op. cit.*
12. For an overview, *see*: C. Fijnaut, D. Van Daele and S. Parmentier, *op. cit.*, pp. 48–52.

2. THE CONSTITUTIONAL POSITION OF THE PUBLIC PROSECUTOR'S OFFICE

It was suggested earlier that legendary discussions have taken place over the years about the exact relationship between de Public Prosecutor's Office and the minister of Justice. In fact, these discussions form only part of a broader debate, centered around the issue of the exact position of the Prosecutor's Office in the whole of the state structure, and more specifically around the question whether it belongs to the judicial branch or to the executive branch of the *trias politica*, or maybe to both branches at the same time.

It is self-evident that the issue of its position in between the judicial and the executive power has been tackled in different ways. Most authors have traditionally taken the viewpoint that the Public Prosecutor's Office belongs to both branches, on the basis of a double functionality.[13] On the one hand, it is considered part of the executive power for starting the criminal procedure and for leading it through written proceedings to a final judgement which terminates a criminal case. On the other hand, it is thought to fulfill judicial functions by assisting the criminal judge and by providing him with information on the interpretation of the law(s). Other authors have argued that the Public Prosecutor's Office should be seen as an autonomous part of the independent judicial power. In their view, the fact that it is a privileged partner of the Minister of Justice with whom it has many contacts on different matters, such as criminal policy, its internal organisation, etc., does not alter this status.[14]

The theoretical discussion to which power the Public Prosecutor's Office actually belongs sometimes resembles the abstract one on the exact gender of the angels. Nevertheless, it also goes at the heart of the relationship between the Prosecutor's Office and the Minister of Justice, in other words to the concrete question whether it is independent from the Minister of Justice or whether it is subordinate to him. Traditionally, the so-called 'judicial' position has been the dominant one. In this view, it is accepted that the Minister of Justice disposes of a certain, limited, supervision over the Public Prosecutor's Office, and that he has the legal competence to order the prosecution of specific cases (the positive right of injunction). It does remain the ultimate responsibility of the prosecutors-general, however, to investigate and to prosecute criminal offences. Perhaps not coincidentally, this position was frequently and vigorously defended by members of the Public Prosecutor's Office itself, from the famous prosecutor-general Hayoit de Termicourt (as early as 1935), to his successors Matthijs (1983) and Du Jardin (1994). Some authors have suggested that this theory was specifically developed by the prosecutors-general in order to increase the powers of their Office.[15] Thereby, they easily overlook the fact that not all

13. I.a.: R. Hayoit de Termicourt, 'Propos sur le ministère public', *Revue de droit pénal et de criminologie*, 1936, pp. 980–985.
14. J. Du Jardin, 'Bestaansreden en opdracht van het openbaar ministerie' (The Reason of Existence and the Task of the Public Prosecutor's Office), in: Hof van Cassatie, *op. cit.*, pp. 11–35.
15. I.a.: J. Vervaele, 'Het openbaar ministerie in de strafrechtspleging: vergt strafrechtsbeleid een nieuwe definitie van de trias politica?' (The Public Prosecutor's Office in Criminal Proceedings: Does Criminal Policy Require a New Definition of the Trias Politica?), *Rechtskundig Weekblad*, 1990–1991, pp. 1014–1023.

prosecutors-general have followed the same line, but that some have explicitly distanced themselves from such position.[16] In the 1980s, a new perspective on the relationship between the Public Prosecutor's Office and the Minister of Justice started to emerge. This was largely due to the important work of the parliamentary inquiry commission on terrorism and banditism in the period 1987–1990, set up in the aftermath of several large-scale criminal cases such as the attacks by the 'gang of Nijvel'[17] and by the left-wing 'CCC'.[18] This commission on several occasions expressed severe criticism *vis-à-vis* the Public Prosecutor's Office, not only for its incapacity to coordinate the work of the several police services in an adequate manner, but also for not even being capable of organising the necessary coordination and communication structures among the various local and central units of the Prosecutor's Office. In its conclusions, the commission strongly asserted that criminal policy should be the responsibility of the Minister of Justice only, be it that this should be decided and controlled in concertation with the group of prosecutors-general. This 'political' position was, unlikely to be coincidental, primarily defended by persons in elected parliamentary functions, but also attracted support from academics.[19]

In its reactions to this major parliamentary report, the government hardly paid any attention to the organisation and the functioning of the Public Prosecutor's Office, let alone to the doctrinal divergences as to its relationship with the Minister of Justice. It did, however, take the important decision to 1994 to establish a new Service for Criminal Policy, entrusted with the task to assist the Minister of Justice in his responsibility to develop criminal policy in concertation with the prosecutors-general, and to exert some form of control on the Public Prosecutor's Office. Article 1 of the Royal Decree of 14 January 1994, explicitly states that 'the criminal policy is decided by the Minister of Justice in concertation with the prosecutors-general'. By providing that the minister bears the ultimate responsibility for the investigation and prosecution policies and is the one accountable to parliament, the decree basically decided in favour of the 'political' position.

This approach was confirmed in stronger terms in the spring of 1996, when the government decided to institutionalise the assembly of prosecutors-general, which had operated without a legal basis for a number of years. On that occasion, it took the opportunity to fundamentally review the relationship between the Minister of Justice

16. I.a.: G. Verhegge, *loc. cit.*
17. In the years 1985–1986, small groups of masked persons committed several armed attacks against or around some shopping centres, thereby killing 28 persons. These groups became known as the 'gang of Nijvel', because they committed their first offences in this French Brabant town. The authors were never caught, which prompted the establishment of two parliamentary inquiry commissions, one in 1987–1990 to look into the phenomenon of terrorism and banditism, one in 1996–1997 to investigate if the criminal investigation had been properly conducted at the time. *See*: C. Fijnaut and R. Verstraeten, *Het strafrechtelijk onderzoek naar de 'bende van Nijvel'* (The Criminal Investigation into the 'Gang of Nijvel'), Leuven, Universitaire Pers Leuven, 1997, 2 vols., 1201 pp.
18. In the same period 1985–1986, the Cellules Communistes Combattantes (CCC) ventured several bomb attacks against banks and money transfer services, thereby killing several people. The authors were finally arrested and tried to long sentences in prison. *See*: J. Vander Velpen, *De CCC: de staat en het terrorisme* (The CCC. State and Terrorism), Berchem, EPO, 1986, 194 pp.
19. I.a.: J. Vande Lanotte, *loc. cit.*; J. Vervaele, *loc. cit.*

and the Public Prosecutor's Office. The law of 4 March 1997, which formally establishes the assembly of prosecutors-general (*collège des procureurs-généraux*), explicitly states that 'the Minister of Justice determines the guidelines of criminal policy, including those on investigation and prosecution, after having collected the advice from the assembly of prosecutors-general'. The said guidelines are binding upon all members of the Prosecutor's Office, and it is the task of the prosecutors-general to implement them within their own territory. Even if it has become clear, since 1997, that the Public Prosecutor's Office is subordinate to the Minister of Justice, this does not mean that it is reduced to a blind instrument in the minister's hands. In fact, the assembly of prosecutors-general does possess an important responsibility of its own, for the elaboration of criminal policy, and for the adequate functioning of the Office in its entirety. In practice, therefore, most aspects of criminal policy can be considered as falling under the shared responsibility of the Minister of Justice and the Public Prosecutor's Office, as represented by the assembly. It should be noted that the law has not remained a dead letter. The last few years, several fields of criminal policy have been covered by such guidelines.[20] It may suffice to mention the joint guideline of 1998, on the prosecution of the possession and small trade in illegal narcotics, the ministerial guideline of the same year on a uniform prosecution policy for driving under influence of alcohol, narcotics or medicine, a joint guideline of 1999 relating to mediation in penal matters, and the ministerial guideline of the same year concerning the investigation and prosecution of the trade in human beings and child pornography. In the light of these developments, it is clear that the law of 1997 has not only produced an important reorganisation at the top of the Public Prosecutor's Office, but that it also has a strong influence on its policy work.

Given this new understanding between the Minister of Justice and the assembly of prosecutors-general, it is to be expected that the Public Prosecutor's Office will become more closely involved in criminal policy-making in the years ahead. This of course poses an important challenge, namely that of capacity. In this context, the question arises whether the Office is sufficiently equipped to continue to formulate policy objectives, to control their implementation, and, most importantly, to evaluate their results and effectiveness. If the Public Prosecutor's Office is to play a meaningful role in each of these fields in the long run, there is no doubt that it will have to strengthen substantially its technical and scientific capacity.

3. ORGANISATION OF THE PUBLIC PROSECUTOR'S OFFICE

The constitutional position is only one angle of looking at the Public Prosecutor's Office. Another perspective is that of its organisational structure and development, which will first be discussed internally, and then externally, i.e. in relation to other players in the field of criminal justice. Even more than the constitutional developments, the last decade the foundations have been laid for the enormous changes that the organisation of the Belgian Prosecutor's Office is likely to undergo in the years to come.

20. C. Fijnaut, D. Van Daele and S. Parmentier, *op. cit.*, pp. 14–15.

3.1. Internal organisation

As indicated before, the organisational structure of the Public Prosecutor's Office is relatively simple, which makes any discussion of the internal organisation a fairly straightforward exercise.

The strict hierarchical model of organisation described above received increasing criticism in the 1980s, for being an important impediment to the badly-needed communication between the district prosecutors and the prosecutors-general. According to many commentators, also from inside the Public Prosecutor's Office, the relationship between the 'top' and the 'basis' had become very rigid, and was characterised by the absence of concertation and a lack of trust.[21] These problems were repeatedly discussed during the parliamentary debates leading to the establishment of the assembly of prosecutors-general in 1997. At a certain point, it was suggested to involve the district prosecutors more in the work of the assembly, not only to improve personal relations between the levels, but also to narrow the gap between those who make policy guidelines and those who have to implement them. Due to the reluctance of the then Minister of Justice, this proposal was not accepted, and the new law did not provide any active or participatory role for the district prosecutors.

Another problem that received attention in the 1980s was the ambiguous position of the national magistrates, who had started to coordinate several large criminal investigations on a national scale during that period. Their exact legal status and their competences had never been clearly determined, which may have contributed to their limited success in large investigations such as the 'gang of Nijvel'.[22] The law of 4 March 1997 solved this problem, by inserting a new article stating that the assembly of prosecutors-general is assisted by national magistrates, who operate under their supervision. National magistrates are also expected to cooperate with the district prosecutors, but do possess the competence to give instructions to the latter if so needed, and after having informed the respective prosecutor-general. In cases of urgency, the national magistrates can exercise all legal powers belonging to the district prosecutors, but extended to the whole national territory.

With the Octopus agreement of May 1998, eight political parties came to the conclusion that important reforms of the internal structure of the Public Prosecutor's Office were needed, in order to improve its functioning and hence its effectiveness. The underlying philosophy was that the Prosecutor's Office should concentrate in the future on its core function, namely the exercise of the criminal procedure. In order to achieve this central objective, a new division of labour between the several levels of the Public Prosecutor's Office was agreed upon. The reforms were translated into the law of 22 December 1998 on the vertical integration of the Public Prosecutor's Office, the federal prosecutor's Office and the council of district prosecutors. This law has not entered into force as a whole yet, although some specific

21. I.a.: L. De Wilde, 'Het sepotbeleid' (The Policy on Case Dismissal), Panopticon, 1982, pp. 501–517.
22. *See*: C. Fijnaut and R. Verstraeten, *op. cit.*, pp. 1127–1151.

articles have, in order to allow for the preparation of the actual reorganisation. The reforms covered four main aspects, which are highlighted here:[23]

(1) Reinforcing the prosecution offices at district level, following the principle of 'horizontal integration'. This implies first of all that the local prosecution offices in social and labour matters are to incorporate into the structure of the general district offices, where they will form a separate department; while the labour auditors can continue to work in their area of specialisation, the interaction with the magistrates in 'regular' criminal matters will increase, subject to the decision of the district prosecutor. Another element is the so-called 'horizontal mobility', whereby local magistrates, also labour auditors, become competent to exercise the criminal procedure before al courts in all judicial districts within the jurisdiction of the court of appeal. Furthermore, the agreement has provided for the establishment of a council of district prosecutors, not only to increase the interaction amount the district prosecution offices, but also to feed the discussions inside the assembly of prosecutors-general. The council will be able to exercise its advisory competence at the request of the assembly, or at its own initiative. Finally, the Octopus agreement has seriously questioned, though in diffuse wording, the actual size of the judicial districts, and has suggested that it should increase, and thus that the number of districts should decrease, in the future.

(2) Redefining the role of the offices of the 5 prosecutors-general. These offices are to assume a new, and so to speak more contemporary, function in at least four directions, by securing a coherent elaboration and coordination of criminal policy in their jurisdiction, by realising a permanent audit of the district offices, by supporting the district offices, and by development total quality management for the Public Prosecutor's Office as a whole. The counterpart of the substantial extension of the mandate of the offices of the prosecutors-general is a reduction of their present task, namely the processing of criminal cases in appeal. In principle, this will become the competence of the district offices in the future, which also implies that the prosecutors-general will no longer exercise any supervision over the district prosecutors. The net result of this major shift is also a transfer of human and material resources from the higher level to the district level.

(3) Developing the assembly of prosecutors-general, in line with the law of 1997. It is explicitly stated that the main task of the 5 prosecutors-general lies in their membership of this assembly. The assembly will receive further support from 'support magistrates' on a more permanent basis.

(4) Establishing a federal prosecutor's office, headed by a 'federal prosecutor' who is not part of the assembly of prosecutors-general. In line with the recommenda-

23. For an extensive discussion, *see*: C. Fijnaut, D. Van Daele and R. Verstraeten, 'De hervorming van het openbaar ministerie: een rechtsvergelijkend commentaar op de totstandkoming, inhoud en draagwijdte van het Octopus-akkoord' (Reforming the Public Prosecutor's Office: A Comparative Legal Analysis of the Origin, the Content and the Scope of the Octopus Agreement), in: C. Fijnaut and D. Van Daele (eds), *De hervorming van het openbaar ministerie* (Reforming the Public Prosecutor's Office), Leuven, Universitaire Pers Leuven, 1999, 454 pp., pp. 271–350, 308–350; D. Van Daele, 'De hervorming van het openbaar ministerie: de doos van Pandora' (Reforming the Public Prosecutor's Office: Pandora's Box), *Vigiles*, 1999, nr. 4, pp. 3–17.

tions of the parliamentary inquiry commissions on 'the gang of Nijvel' and 'the Dutroux case', the task of this federal office will be to exercise the criminal procedure in all cases for which it is competent. As this may lead to certain overlaps with the competences of district prosecutors, it will need substantial concertation between the two levels. Moreover, the federal prosecutor's office will assume the functions carried out now by the national magistrates. Finally, and quite importantly, it will be up to the members of this federal prosecution office to supervise the work of the new federal police.

Though concise, this overview clearly indicates the manifold and radical changes in the internal organisation of the Public Prosecutor's Office for the coming years. Can these changes be successful in reaching the overall objective of a more effective Office? In our view, the Octopus agreement and the ensuing legislation hold a number of interesting views, several of which are a logical step forward in the light of past criticisms. Nevertheless, the texts leave many questions unanswered, and clearly not the least important ones. One such topic is the actual exercise of the core function by the Public Prosecutor's Office. In this regard, it is striking that the agreement and the laws basically centre around institutional and procedural issues, but pay very little attention to the internal organisation of the prosecutor's offices in practice. How to change the rigid hierarchical culture, how to improve the communication, how to develop a vision to focus on the core functions by the district offices, none of these topics are tackled in sufficient detail. On the contrary, it is quite easily assumed that changing the Office's structures will automatically lead to changes in the functioning of the Office. Another problem relates to the new tasks of the offices of the prosecutors-general. On the one hand, they are entrusted with the novel and challenging task to develop a total quality management for the whole Public Prosecutor's Office, while on the other hand their resources, human and material, are reduced and transferred to the district offices. So much more because the offices of the prosecutors-general will no longer deal with individual cases in appeal. It is hard to see how these two developments can be compatible and can contribute to a more effective service. In the long run, they may seriously endanger the credibility of the Prosecutor's Office in the eyes of the various partners in the criminal justice process and of the population at large. A last word on the new federal prosecutor. Although in line with the needs of large criminal investigations, there is a certain risk with the 'floating position' of the federal prosecutor. This can only be solved by clarifying his precise competences and his relationship with the assembly of prosecutors-general. To conclude, given the fact that various important preconditions (regarding capacity, personnel, and internal functioning) are not yet fulfilled, there are sufficient reasons to remain rather sceptical about the outcome of the projected reforms.

With some small exceptions, the law introducing these reforms has not yet entered into force. This of course does leave more time to all partners, inside and outside the Public Prosecutor's Office, to prepare the start of the reforms. For one thing, the political agreement among the partners of the current government of July 1999 remains silent about many of the issues raised.[24] While it does confirm that the Octopus agree-

24. Government agreement, *De brug naar de eenentwintigste eeuw* (The Bridge to the 21st Century), 7 July 1999 (www.fgov.be).

ment will be carried out in all its aspects, it remains limited in proposing several measures for a swifter and more humane administration of justice, and in indicating that specialised sections for the fight against environmental crimes will be set up and that the status of the staff at the public prosecutors' offices will be upgraded. In his policy paper for the year 2000, the Minister of Justice has provided a wide number of measures to improve the organisation and the functioning of the judicial power, such as more personnel, the continuation of computerisation, etc. Specific measures to modernise the functioning of the Public Prosecutor's Office and to rationalise its policy on the disposition of cases are not found in this paper. Also the Federal Security and Detection Plan of the Minister of Justice, published in the Spring of this year and containing over a hundred concrete projects to combat crime and to increase security, devotes only indirect attention to those measures geared at improving the Office's functioning.[25] All of this implies that the reform of the Public Prosecutor's Office, which has just begun, promises to constitute a long journey, much longer than commonly accepted.

3.2. External organisation

As the spider in the web of the criminal justice administration, the Public Prosecutor's Office should also be considered in its multiple relationships with the other partners. We turn in a concise way to the investigating judge, to the police, to the special inspection services, to local government, and to the paralegal services.

3.2.1. Relationship with the investigating judge

It was suggested before that the relationship between the Public Prosecutor's Office and the judicial power has for a long time been a very intricate one, and has centred around the question whether the prosecutors and their substitutes belonged to the judicial power or not. Over the last two decades, another aspect of this relationship has risen to the forefront, concretised in the figure of the investigating judge (*juge d'instruction*). In general, it can be argued that the role of this judge in criminal cases has gradually eroded over the years.[26] This is true because it seems that the prosecutors are asking in fewer and fewer cases for a judicial investigation, in which the investigative judge has to play the central role, a decline accelerated by the formalisation of the judicial investigation itself. The net result is that the investigative judge is only called on the scene when the district prosecutor and the police cannot make sufficient progress in criminal cases without his special powers, such as those needed for a house search. On the other hand, the district prosecutors have gradually seen their powers increasing to dispose of criminal cases outside of trial during the last fifteen years, largely because of the judicial delay before the courts. These two

25. Minister of Justice, *Federaal veiligheids- en detentieplan* (Federal Security and Detention Plan), Spring 2000 (www.just.fgov.be).
26. C. Fijnaut, D. Van Daele and S. Parmentier, *op. cit.*, pp. 17–18.

major developments have almost turned the former relationships between the Public Prosecutor's Office and the investigative judge upside down whereby the former is now the leading party in the criminal investigation.

In the future, the relationship between the Public Prosecutor's Office and the courts could acquire a new dimension. If the direct prosecutors, namely, are willing and able to dispose of a large number of smaller cases outside of trial, and at an early state of the procedure, then they may find the necessary time and resources to concentrate on the 'bigger fish' and to focus on the prosecution of large and complex cases. This of course will pose new challenges to the criminal courts, who have been poorly organised in the past, and hence will have to adapt their internal organisation to this changing situation.

3.2.2. Relationship with the police

The relationship between the Public Prosecutor's Office and the police has never been an easy issue for discussion. Not only because the legal basis of this relationship was not clear until recent years, but also because of the enormous gap between the official positions and the reality of day-to-day investigations. Although the Public Prosecutor's Office, together with the Minister of Justice, traditionally held the power of supervision over the police forces,[27] for many years it hardly developed any active policy on investigation and prosecution in practice. As a result, the police nearly automatically found itself in a position to determine quasi-autonomously which forms of crime to focus on and in which way to dispose of minor offences, e.g. by way of a notification to the offender, or by a simple dismissal at the police level. The long-term consequences of such situation became problematic: the legal supervisory task of the prosecution offices gradually eroded in practice and was reduced to discussing individual cases and incidents, and moreover, the adequate functioning of the criminal justice system as an effective, efficient and meticulous system was jeopardised. This in turn produced frustrations from both sides: the police became demotivated because much of its work was simply dismissed by the district offices, while the latter became distressed because the large numbers of incoming cases prevented them from focusing on their core business, namely to investigate and to prosecute (more serious) crime.[28]

This situation underwent considerable changes in the course of the last decade. The first change came with the new police law of 5 August 1992, one of the consequences of the Pinksterplan I (*Pentecost Plan I*) adopted by the government in

27. Until today, Belgium has three police forces: the largest is the 'national police' (*Gendarmerie*), which operates on the whole national territory under the supervision of the Minister of the Interior; nearly equal in size is the 'communal police' under the supervision of the local mayor; the third and smallest force is the 'judicial police', operating under the supervision of the Public Prosecutor's Office. Following the Octopus agreement and the ensuing law of 7 December 1998, this structure will undergo radical changes in the future by moving towards an integrated police force at two levels. *See*: C. Fijnaut, B. De Ruyver and F. Goossens (eds.), *De reorganisatie van het politiewezen* (The Reorganisation of the Police Service), Leuven, Universitaire Pers Leuven, 1999, 277 pp.

28. C. Fijnaut, D. Van Daele and S. Parmentier, *op. cit.*, pp. 19–21.

1990 in the aftermath of the first parliamentary report on banditism and terrorism. Article 6 of that law stipulated that the three police forces exercise their competences under the supervision of the Minister of the Interior, and of that of the prosecutors-general and the district prosecutors. It is important that, while this passage for the first time explicitly mentions the supervision of the Public Prosecutor's Office, it also expects the supervisory authorities to develop an active policy towards the police. This line of supervision was further specified in the law Franchimont of 1998 concerning the reform of the criminal investigation by the police, and named after the chairman of the preparatory commission. The new Article 28bis of the Code of Criminal Procedure (CCP) reads that this type of investigation is carried out under the supervision of the district prosecutor. The same law also clarifies the right and even the duty of the district prosecutor to develop and to apply a real policy *vis-à-vis* the judicial police under his direct supervision (*Article 28ter CCP*). As such, these provisions bring a solution to the traditional practice whereby the absence of a deliberate and directed policy by the Public Prosecutor's Office in the fields of investigation and prosecution weakened the adequate functioning of the criminal justice system.[29] At this stage, it seems too early to evaluate whether and to which extent the district prosecutors are actually developing these policies.

It is worth mentioning another development that could give rise to a new relationship between the Public Prosecutor's Office and the police in the future. In the 1990s, a handful of prosecution offices started experimenting with what is commonly called 'Autonome Politiële Afhandeling' or A.P.A. (*autonomous disposition of cases by the police*).[30] In these projects, the police services receive a larger degree of freedom in registering and investigating a limited number of offences. The circular letter of the prosecutor-general of Ghent of December 1998, e.g., covers such offences as threats, vandalism, less serious cases of arson, certain types of theft, voluntary beating, libel, etc., while more serious offences are explicitly excluded. The ultimate objective of these experiments was to reduce the workload for the Public Prosecutor's Office, by encouraging the police forces to investigate the cases concerned still resides with the district prosecution service. In this sense, the concept 'autonomous' is misleading and should be substituted for another one. All in all, however, the experiments, which have gained legal recognition through the law Franchimont of 1998, do possess a great potential for the more adequate functioning of the criminal justice system. At this moment, they already alleviate the workload of the Public Prosecutor's Office concerning minor crimes, and thus enable them to devote more time and resources to more serious offences. In the future, of course, the pilot projects could constitute

29. A. De Nauw, 'De wet tot instelling van een college van procureurs-generaal: tussen droom en vrees, enkele verwachtingen' (The Law Establishing the Assembly of Prosecutors-General: Some Expectations Between Dream and Fear), in: P. Traest and A. De Nauw (eds.), *Strafrecht: wie is bang van het strafrecht?* (Criminal Law: Who's Afraid of Criminal Law?), Gent, Mys & Breesch, 1998, pp. 1–33, 10–13.

30. The first experiments started in 1998, at the level of the prosecutor-general of Ghent and that of the district prosecutor of Brussels. For further discussion, *see*: D. Van Daele, 'Partners in the strafrechtsbedeling: het "autonoom" optreden van de politiediensten onder verantwoordelijkheid van het openbaar ministerie' (Partners in the Criminal Justice System: the 'Autonomous' Actions by the Police Forces Under the Responsibility of the Public Prosecutor's Office), *Vigiles*, 1998, nr. 3, pp. 5–14.

the basis for more far-reaching solutions, whereby the police could indeed dispose of minor criminal cases in a swift and independent manner. Both options can contribute to the increased effectiveness of the criminal justice system, and moreover may enhance, or even restore, the credibility and the legitimacy of the system.

3.2.3. Relationship with special police services

If the Public Prosecutor's Office has traditionally been quite reticent to develop an active policy *vis-à-vis* the regular police forces, this attitude has proven even stronger in relationship to the special police services, i.e. the inspection services enforcing special criminal law. Literally dozens of such services are operating on the Belgian territory, the most prominent examples being the inspection service in social matters, the environmental inspection, the tax inspection service, the food inspection, etc. Each of these services operates under the responsibility of an administrative authority, which is ultimately subjected to the supervision of a ministry, e.g. the ministry of social affairs, the ministry of the environment, the ministry of finance, the ministry of public health, etc. The lack of concertation and coordination between the Public Prosecutor's Office and the inspection services has been highlighted time and again.[31] It has been explained by a variety of factors, such as the lack of interest and knowledge of the prosecution offices to enforce special criminal law, their fear to be drawn into administrative or even political considerations about the role of criminal law, the incongruity between the operational structure of various inspection services and the district structure of the Public Prosecutor's Office and the many divisions of the inspection services in larger and smaller entities. Despite the traditional distance between the two types of actors in the criminal justice system, it should be noted that in recent years the assembly of prosecutors-general has started to set up coordination structures in specific fields of law enforcement. Examples include the field of contractors and that of hormone criminality.

The area of inspection services is particularly interesting because these services often possess far-reaching competences of dealing with specific categories of offences, such as environmental crimes or offences against social or labour laws, without external interference from the Public Prosecutor's Office. By way of examples, both the social inspection at the federal level and the environmental inspection at the regional level, when confronted with a specific criminal offence, dispose of a wide margin of appreciation in their reactions.[32] They can limit themselves to giving a simple warning to the offender(s), with the aim to avoid repetition, or they can impose a period of

31. I.a.: N. Bauwens, 'Het beleid van het openbaar ministerie' (The Policy of the Public Prosecutor's Office), *Rechtskundig Weekblad*, 1994–1995, pp. 585–603, 591.

32. *See*: D. Van Daele and S. Christiaensen, 'De afhandeling van zaken door inspectiediensten in het sociaal strafrecht: een voorbeeld voor de commune strafrechtspleging' (The Disposition of Cases by Inspection Services in Social Criminal Law), in: C. Fijnaut and D. Van Daele (eds), *De hervorming van het openbaar ministerie* (Reforming the Public Prosecutor's Office), Leuven, Universitaire Pers Leuven, 1999, 454 pp., pp. 147–194; S. Parmentier and J. Vanheule, 'De rol van de inspectiediensten bij de handhaving van het milieurecht in Vlaanderen' (The Role of the Inspection Services in Enforcing Environmental Law in Flanders), in: C. Fijnaut and D. Van Daele, *op. cit.*, pp. 195–242

regularisation, after which the previous situation must have been restored. In the case of the social inspection, these offences are not officially registered through a *procès-verbal*, and hence the district prosecutor need not be informed. This is different in the case of the environmental inspection, that is bound to officially register all offences and to send them to the distict prosecutor for notification. The prosecutor, however, will not invoke the force of criminal law except as the *ultimum remedium*, that is when the actions or sanctions imposed by the inspection service would not produce the desired outcome. Despite the frequent differences in procedures between the many inspection services, it should be clear that most of them possess competences that are far more extended than those of the regular police services. This raises the issue of the exact relationship between the Public Prosecutor's Office and the inspection services, and more generally, between the criminal and the administrative strategies of law enforcement. The current inspection procedures suggest that large portions of law enforcement can lead to tangible results without immediate external interference by the prosecution offices. In terms of effectiveness, it is certainly time and energy saving for them to remain at the backstage until they are called upon by the inspection services. In such scenario, however, emerges the problem of legitimacy, if many types of white collar crime could be dealt with in a purely administrative manner without any further supervision or legality control by the Public Prosecutor's Office. Perhaps both concerns can easily be reconciled by striking the middle ground, namely informing the district prosecutor of the criminal offence but to invoke its sanctioning capacity only as a last remedy, as is reflected by the environmental model. It goes without saying that such approach requires concertation and coordination between the prosecutor and the various inspection services. In some types of crimes, the coordination has to be strongly structured to produce any effects, as in the field of organised crime. It is no coincidence in this respect that the 1998 inquiry commission on organised crime of the Belgian Senate recommended that the Public Prosecutor's Office would establish new and more intense relationships with the regular police forces and with the special inspection services in order to face this major challenge.[33]

3.2.4. Relationship with local government

The situation is different again in the case of the relationship between the Public Prosecutor's Office and local government. When the first parliamentary inquiry commission on banditism and terrorism produced its report in 1990, in could not but conclude that there existed a huge lack of coordination between local government, the police forces and the judicial system. This proved convincing enough for the government to heavily underline in its Pentecost Plan I the need for systematic concertation between these actors, which was concretised in the law of 1992 on the police forces. Article 10 of this law prescribes the organisation of concertations with

33. *See*: C. Fijnaut, 'De bijdrage van de Senaatscommissie "Georganiseerde criminaliteit" aan de discussie over de reorganisatie van het politiewezen (The Contribution of the Senate Commission on 'Organised Crime' to the Debate about Reorganising the Police Service), in: C. Fijnaut, B. De Ruyver and F. Goossens, *op. cit.*, pp. 57–70.

five parties, at the level of the judicial district between the district prosecutors, the mayors, and the heads of the three police regular services; at the level of each province it is the governor who takes the place of the mayors. This system, which literally could be called the 'pentagon concertation' through the involvement of the five parties mentioned, is aimed at 'encouraging the optimal coordination of the functions of administrative and judicial policing, as well as the cooperation between the police services'. Its role was further specified through the ministerial circular letter of 22 May 1995, in which it is stated that the pentagon model should allow for a better coordination between the criminal policy of the district prosecutorial services and the prevention policy of the local administrative authorities, with the ultimate goal to constitute an integrated security policy. In practice, the discussion forums identify those priority problems that the partners should tackle in a given region, and conclude specific agreements to this effect. More concretely, it means that the district prosecution office does retain its competence to dispose of criminal cases in the manner it sees fit, but in doing so it is required to take due account of the general policy agreements reached in concertation with the other four partners. Moreover, it should also consider whether local policy is compatible with the intentions and objectives of national policy as conducted by the Minister of Justice and the assembly of prosecutors-general. All in all, this means that the introduction of the pentagon concertation system has increased the pressure on the relationship of the district prosecutor and the local government, and also on the relationships inside the Public Prosecutor's Office and with the Minister of Justice.[34]

To conclude this aspect, it is worth mentioning the new law of 13 May 1999, which has introduced the possibility for local authorities to apply administrative sanctions in case of an offence against local regulations.[35] These sanctions may take the form of an administrative fine of max. 10,000 BFR, the suspension or the withdrawal of a permit or license, or the closing down of an institution. If the act also involves a criminal offence, the *procès-verbal* is sent to the district prosecutor who, within a period of one month, should decide to investigate the matter or to start a criminal prosecution. This recent piece of legislation, which is foremost intended to 'arm' local administrations for more rapid actions against insecurity and unsafety, may also, as a side effect, unburden the district prosecutor's office and allow additional time and energy for more serious crimes. It is clear that, in order to operate effectively, it requires close collaboration between the local authorities, the police forces and the prosecution offices.

3.2.5. Relationship with paralegal services

No overview of the external partners of the Public Prosecutor's Office would be complete without pointing to the important role played by the paralegal services. In the past, the relationship between the two parties was simply not an issue, since the

34. C. Fijnaut, D. Van Daele and S. Parmentier, *op. cit.*, pp. 24–26.
35. C. Fijnaut, D. Van Daele and S. Parmentier, *op. cit.*, pp. 26–27.

prosecutors could only dispose of cases in a 'digital' way, that is either by referring the case to a judge or by dismissing it altogether (sometimes under certain conditions).

This situation of course changed drastically in the last ten years, with the rapid expansion and institutionalisation of various paralegal services. It started with the establishment, in the early 1990s, the independent centres for victim assistance, which provided all kinds of legal and social services to victims of crime. Shortly afterwards, special units were created inside the district prosecution offices and the criminal courts to receive victims of crimes in an environment more adapted to their needs and the experiences they had undergone. A second major step was taken with the law of 10 February 1994, which introduced the possibility of mediation in penal matters, and required the appointment of special assistants in mediation at the district level, advisors in mediation at the level of the 5 prosecutors-general, and magistrates in mediation at both levels of the Public Prosecutor's Office. Perhaps the most radical innovations came about by the government decision of August 1996, in the midst of the Dutroux crisis. So it was decided to set up 'antennes de justice' (*aerials of justice*) as decentralised and community-oriented units of the district prosecution offices in unsafe areas. Moreover, the government agreed to create 'maisons de justice' (*houses of justice*) in each judicial district, with the objective to increase the coordination between all paralegal and parajudicial initiatives within one judicial district, and to better structure the relationships between the paralegal services and the judiciary, the bar, and the local government.[36] These partners are also represented in the steering group that coordinates all initiatives and gives advice on policy matters.

Following the French example, the *maisons de justice* physically centralise a large number of paralegal services in one place, and thus aim at creating a more transparent offer to the citizens. The first such house opened its doors in 1997, perhaps not coincidentally in the home town of the then Minister of Justice, and as of date nearly two dozen houses have been created. Due to these rapid developments, the Ministry of Justice created a special central service, and the personnel of the former paralegal services was, statutory ad physically, transferred to the houses of justice. In that same law of 7 May 1999, it is provided that the central *Service des maisons de justice* will assist the district prosecutor in the several phases of penal mediation, and the prosecutor-general in implementing his policy on the reception of victims. Thus, in the new architecture, far from separating the Public Prosecutor's Office and the paralegal services, the former maintains the ultimate supervision over these services in the areas of penal mediation and victim reception. It remains to be seen in the years to come how it will be able to develop a consistent policy in these areas. What is crystal clear, however, is that the level of human and material resources at the disposal of the houses of justice will to a very large extent determine whether this working relationship between the various partners will be successful.

36. *See*, i.a.: Ph. Mary, 'De la justice de proximité aux maisons de justice', *Revue de droit pénal et de criminologie*, 1998, pp. 293–303.

4. THE DISPOSITION OF CRIMINAL CASES OUTSIDE OF TRIAL

Sofar, we have concentrated on the constitutional position of the Public Prosecutor's Office and on its internal and external organisation. A third angle at which to study its functioning is by looking at the way it is disposing of criminal cases. If for the outside world the Prosecutor's Office's main feature seems to lie in its legal competence to prosecute criminal offences, in practice the vast majority of cases are not referred to a criminal judge. In this part, we will look at the various 'alternative' mechanisms at the disposal of the prosecutors, and we will present the major findings of our own empirical research in two prosecutorial districts in Belgium. From this discussion will emerge a number of very important challenges for the future of the Public Prosecutor's Office.

4.1. The traditional principle of discretion

Contrary to Germany, which continues to operate under the legality principle,[37] the Public Prosecutor's Office in Belgium has traditionally been entitled to apply the principle of discretion as to the disposition of criminal cases. In technical terms, this means that it possesses '*the right not to prosecute cases, or the right to waive the right to prosecute*'.[38] In many instances, the magistrate's decision not to prosecute is fairly evident, namely when prosecution is or has become (nearly) impossible. Quite frequently, the offenders of a given criminal act remain unknown, in other cases there may be suspicions against one or more persons but insufficient evidence to have strong enough a case to put before the criminal judge. In these situations, and of course when the suspect is no longer alive or when the criminal proceedings have become prescribed, the decision not to prosecute leads to a 'technical dismissal'. For decades, it has been accepted that the Prosecutor's Offices may also resort to other reasons for their decision not to prosecute, the so-called 'dismissals on policy ground'. They may consider that certain offences, though criminal by law, are relatively unimportant to give rise to prosecution, as is often the case with smaller traffic offences, or offences of a more symbolic nature, such as smoking in public places. More difficult are the situations whereby it seems inappropriate to prosecute in the light of the changing perceptions of society concerning criminal behaviour, as can be the case of the use of narcotics. To complete the picture, mention should also be made of the traditional prosecutorial practice of 'praetorian probation',[39] whereby dismissals on policy grounds were combined with certain conditions imposed on the suspect. Conditions could entail the obligation to undergo psychological or physical treatment, the prohibition to go to certain places or to meet certain people, etc. Over the last fifteen years, this practice seems to have diminished with the rise of newer mechanisms with a sound legal basis in pre-adjudication. It should be noted that the

37. For a discussion, *see*: C. Fijnaut, D. Van Daele and S. Parmentier, *op. cit.*, pp. 181–182.
38. Janssen and J. Vervaele, *op. cit.*
39. I. Aertsen, 'Het slachtoffer binnen het Belgische strafproces: recente ontwikkelingen' (The Victim in Belgian Criminal Procedure: Recent Developments), *Proces*, 1995, pp. 186–191.

distinction between technical dismissals and dismissals on policy grounds is not always as clear-cut as it may appear and that a grey area exists. Our empirical research on the disposition of cases in two district prosecution offices, e.g., has suggested that some technical dismissals are better categorised as policy dismissals, because the prosecutors were not able or not willing to mobilise additional resources to further investigate the cases and to bring the necessary evidence to the surface (*cfr. infra*).

Whatever the exact relationship between technical dismissals, dismissals on policy grounds and conditional dismissals, the full application of the principle of discretion gives rise to many problems, which have indeed attracted criticism.[40] A first aspect pertains to the parties involved in criminal offences. Whenever prosecutors dispose of a very wide margin of appreciation, it is quite hard to predict what type of decisions will be taken and for which reasons, in other words to guarantee a level of legal certainty. The degree of discretion exercised by the Public Prosecutor's Office also opens the door for arbitrary decision-making, which may infringe upon the general principle in the *Rechtsstaat* of equality before the law. In extreme situations, it may imply that in similar cases one magistrate decides to dismiss a case, while his colleague in another jurisdiction decides to initiate criminal proceedings. Our empirical research suggests that such examples are far from hypothetical, but are, or were, almost logical consequences of the system. A high proportion of dismissals is also likely to have an impact on the relationship between the Public Prosecutor's Office and the police services. As indicated before, police services may witness a decline in motivation when a large part of the cases reported by them remain without tangible consequences, which could influence their readiness to continue their job along the same lines. Finally, there is a problem of a more theoretical nature. The decisions of prosecutors that large numbers of criminal offences can be dismissed on policy grounds because they are not sufficiently important, touch upon the issue of the legitimacy of the legal system. In essence, it means that the decision by the legislative branch to impose criminal sanctions could be 'undermined' by a wide and intransparent discretion at the prosecutorial level. If many laws would appear to have only symbolic effects, this could have far-reaching consequences for the level of legal compliance, and thus also the level of criminality, in a given society. These problems could sound rather theoretical, if it were not for the fact that extensive research, including our own, unambiguously indicates that at least half of all criminal cases which enter the Belgian district prosecution offices are dismissed (*see infra*).

In the last couple of years, and particularly in the aftermath of the Dutroux case, several initiatives were taken that directly or indirectly impacted on the traditional system of dismissals. The law Franchimont of 1998, while confirming the principle of discretion, also stipulates that the district prosecutor has to give reasons for any decision to dismiss a case (*new Article 28quarter Code of Criminal Procedure*). It remains unclear, however, if such decision should be communicated to all parties of the case, or just to the injured party. Another approach comes from the assembly of prosecutors-general, who since 1997 have issued several guidelines and circular letters which clarify a more coherent policy on dismissals, e.g. in cases of the use and trade

40. C. Fijnaut, D. Van Daele and S. Parmentier, *op. cit.*, pp. 32–41.

in narcotics. All of these initiatives are geared to reducing the traditionally wise margin of appreciation of the district prosecutors, or alternatively speaking, to increasing the degree of accountability of the Public Prosecutor's Office toward the inside and the outside world. What is still lacking, to date, is a more integrated vision on dismissals, which covers at least two aspects: first of all, an answer to specific legal questions, such as the broad categories of offences liable to dismissal, the legal effects of dismissals, the parties and the procedure of communication, etc.; but also at the 'political' level, a broader vision is needed, whereby the dismissal rates themselves are discussed, and strategies can be devised to reduce them, e.g. by making more use of newer mechanisms or by strengthening the cooperation with other partners in the criminal justice process.

4.2. Additional mechanisms to dispose of criminal cases outside of trial

This situation described above, the binary choice between prosecution and dismissal, has to be nuanced to a certain extent. Already since 1935 there existed the legal possibility that offences falling under the competence of the police judge could be terminated by way of transaction, and that category of offences was extended in 1949. The 1980s, however, witnessed the increasing tendency to entrust the Public Prosecutor's Office with wider powers for the disposition of criminal cases outside of trial, first by an extension of the possibility of transaction, later through mediation in penal matters.

The law of 28 June 1984, substantially extended the use of the mechanism of transaction, whereby the district prosecutors may propose to suspects that a certain amount of money is paid in exchange for the annulment of the criminal prosecution. Henceforth, this possibility exists for a broad range of offences, namely all those punishable with a fine or with maximum five years of imprisonment, or with both of these punishments. However, a transaction can only be proposed when the prosecutor, should the particular case be brought before the criminal judge, would only demand for a fine as punishment. Another condition relates to the fact that the suspect has to recognise his responsibility for the damage inflicted, even if it has not been compensated in full to the parties concerned. Not only is the transaction subject to various conditions, it also remains optional, both for the prosecutor, and for the suspect. Neither of the two parties is obliged, either to propose it, or to accept it.

The main reason for this expansion lay in the problem of judicial backlog, which started to arise in the 1980s.[41] The extended transaction was seen as an ideal compromise between the prosecution, which would further overload the criminal courts, and the dismissal of the case, which would lead to a *de facto* impunity for a wide category of minor offences. Moreover, it was argued that the offenders would be less stigmatised than through a criminal prosecution plus punishment, and that the victims

41. *See*, i.a.: S. Christiaensen, 'Afdoening buiten proces d.m.v. transactie: een probleemstelling' (The Disposition of Cases Outside of Trial by Way of Transaction), in: S. Parmentier and B. Hubeau (eds.), *De rechter buitenspel. Conflictregeling buiten de rechtbank om* (The Judge Offside. Conflict Regulation Outside of the Court), Antwerpen, Kluwer, 1990, 150 pp., pp. 59–90.

would be compensated more easily through this new mechanism. The transaction of course also attracted criticism. Some opposed the increasing power of the Public Prosecutor's Office, which was not compensated by any external control, nor was it subject to the duty of the judiciary to give reasons for its judgments. In the long run, this was thought to weaken the level of legal protection for the citizen. Another critique concerned the potentially discriminatory character of the transaction, given the fact that the wealthier persons could 'buy off' a criminal prosecution. Finally, the legal profession strongly opposed the absence of procedural rights for the suspect and for the defence counsel. It is striking that the transaction 'new style' has only marginally been used. This was already apparent in 1990, after a couple of years of operation of the new law.[42] Ten years later, the situation has hardly changed, as is clearly illustrated by our own empirical research (*cfr. infra*). Even more striking is the absence of any coherent policy on transaction by the Public Prosecutor's Office, which could serve as a general framework for all district prosecutors and would thus address some of the criticisms voiced.

Ten years elapsed before an additional mechanism of non-trial disposition of criminal cases came into being. Almost copying the French law of the preceding year, the law of 10 February 1994, introduced in Belgium the possibility of mediation in penal matters. Henceforth, the district prosecutor can propose to offenders to compensate or to repair the damage done in exchange for the annulment of the criminal prosecution. The conditions of application of penal mediation relate to the demands of the Public Prosecutor's Office: it can only be proposed if the prosecutor does not demand more than two years of imprisonment, were the particular case to be brought before the criminal judge. This means that penal mediation can also be proposed for offences with a maximum punishment of fifteen to twenty years of imprisonment, but in which the prosecutor could demand a maximum of two years due to considerable mitigating circumstances. Mediation in penal matters implies that the district prosecutors actually mediate between the offender(s) and the victim(s) in order to determine the type of damage produced, the level of compensation required and the actual settlement procedure. In practice, this procedure is prepared and carried out by mediation assistants in the district prosecution offices, under the supervision of a specially appointed magistrate, and with the help of mediation advisors at the level of the courts of appeal. It should be noted that the concept of mediation in penal matters, although in the official title of the law, is quite misleading. The law namely provides the Public Prosecutor's Office with four different instruments, of which mediation is only one. Another instrument is therapy, whereby the prosecutor may request the offender to undergo medical or other treatment, in order to solve a problem, a disease or an addiction, that was related to the offence, or may have caused it. The third instrument at the disposal of the district prosecutor is community service by the offender of up to 120 hours. The fourth and last possibility is that the offender follows a training programme of up to the same number of hours, in order to upgrade his skills in a specific field. These four instruments can also be combined in one way or another. Also here, the bottom line is that it is up to the Public Prosecutor's Office to propose a certain measure, and to the offender, and to the victim in the case of mediation, to accept it.

42. S. Christiaensen, *loc. cit.*, pp. 71–77.

The law of 1994 had at least two objectives, on the one hand to provide a quick reaction from society to common crime in the city, and on the other hand to pay more attention to victims of crime.[43] Also here, the idea of impunity for smaller offences could be corrected, while offering the offender new opportunities to prevent similar behaviour in the future. Moreover, the possibility of an agreement between offenders and their victims was seen as a powerful illustration of the paradigm shift in criminal justice from retributive justice to restorative justice. The combination of all these elements, it was argued, could increase the confidence of the public in the criminal justice system. Many commentators considered it an important effort to organise the criminal procedure in a more rational and modern way. But of course, also criticisms were voiced. The most obvious one related to the confusion entrenched in the law of subsuming very different instruments under the single heading of penal mediation. A second critique concerned, once again, the absence of formal procedural guarantees for offenders and victims during the whole process. Finally, the net-widening effect was invoked, meaning that penal mediation, or other measures, could easily be used, not as an alternative to criminal prosecution, but as an alternative to the dismissal of a given case. During the first years, the number of cases that were dealt with through mediation rose gradually risen, although the practice remained marginal in comparison to other forms of disposition (*cfr. infra*). Another problem that came up, once again, was the disparity in application between districts. As a direct result, the assembly of prosecutors-general in 1999, decided to distribute a circular letter to harmonise the different practices, in terms of types of mediation, objectives, organisational context, and procedure.[44] In contrast to the case of transaction, these guidelines do provide a first basis of developing a genuine policy on penal mediation by the Public Prosecutor's Office.

4.3. Comparing legal measures and empirical data

The above has already suggested that no discussion on the challenges for the Public Prosecutor's Office in the future can satisfy itself with a purely theoretical legal analysis on the disposition of criminal cases outside of trial. To obtain a complete image of its actual functioning, it is crucial to enrich the theoretical part by means of some empirical data. As indicated before, the harvest in Belgium of scientific research producing hard and useful empirical data is rather limited. This was a convincing argument to conduct an empirical research of our own, some of which major findings are presented in the following paragraphs.

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43. *See*, i.a.: I. Aertsen and T. Peters, 'Mediation and Restorative Justice in Belgium', *European Journal on Criminal Policy and Research*, 1998, Vol. 6, pp. 507–525; I. Aertsen, 'Victim-Offender Mediation in Belgium', in: The European Forum for Victim-Offender Mediation and Restorative Justice (ed.), *Victim-Offender Mediation in Europe. Making Restorative Justice Work*, Leuven, Leuven University Press, 2000, 382 pp., pp. 153–192.
44. C. Fijnaut, D. Van Daele and S. Parmentier, *op. cit.*, pp. 39–41.

4.3.1. Research design

The empirical research was conducted in the period 1996–1999. It formed the second part of a broad research project on the disposition by the Public Prosecutor's Office of criminal cases outside of trial, which also comprised a theoretical and legal analysis.[45] For the empirical part, two research questions were taken as the point of departure: at the level of description, how did the disposition of criminal cases outside of trial look like in the district prosecution offices; at the level of explanation, which factors were likely to influence the methods of disposition. These two questions, if quite simple to ask, proved much more difficult to answer than expected. The main reason for these difficulties lay in a problem already discussed, namely the absence of sufficient and adequate data on the functioning of the Public Prosecutor's Office in Belgium, either due to the inexistence of figures or to the unreliability of the figures available.[46]

As a result, we developed a research methodology of our own, which consisted of two main parts. The first was of a quantitative nature: to start with, basic figures were collected on all incoming criminal files at the district prosecution offices in the year 1996, with the exception of traffic offences;[47] in March 1999, i.e. almost two and a half years afterwards, we measured how the said files had been disposed; in a second step, by means of several statistical methods, we conducted a file analysis of nearly 800 individual files in two district prosecution offices (Brussels and Ghent) for two types of offences (voluntary beating and vandalism), in order to understand the factors that influence the disposition of cases. Secondly, this quantitative approach was supplemented by a qualitative one. In this context, we conducted semi-structured interviews with about 25 magistrates and administrative personnel in the two district offices mentioned (Brussels and Ghent). Given the limitations of this contribution, only some of the major findings of this research can be presented here.[48]

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45. Research project 'Een Openbaar Ministerie voor de Eenentwintigste Eeuw. Bouwstenen voor een efficiëntere strafrechtsbedeling aan de hand van een rechtsvergelijkende en sociaalwetenschappelijke studie over de afhandeling van strafzaken (buiten proces) door het Openbaar Ministerie' (*A Public Prosecutor's Office for the 21st Century. Keys for a more efficient criminal justice system by means of a comparative legal and an empirical study on the disposition by the Public Prosecutor's Office of criminal cases outside of trial*), under the general coordination of Prof. L. Dupont, K.U. Leuven, and with finding from the Federal Office for Scientific, Technical and Cultural Affairs of the Prime Minister's Office, for the period 1996–1999.
46. For a critical analysis, *see*: S. Christiaensen and I. Van Heddegem, 'De statistische grondslag van het beleid van het openbaar ministerie in België en Nederland' (The Statistical Basis for the Policy of the Public Prosecutor's Office in Belgium and in The Netherlands), in: C. Fijnaut and D. Van Daele, *op. cit.*, pp. 41–98.
47. The figures for 1996 are subject to another limitation. The information was only retrievable from 16 district offices that were computerised at the time, out of a total number of 27; on the basis of the population figures in these districts, it is estimated that about 85% of the total case-load of all district offices was covered. For this information, we are very grateful to the Centre for Information Processing (*Centrum voor Informatieverwerking, abbreviated as C.I.V.*) of the Ministry of Justice in Brussels.
48. More details are found in: C. Fijnaut, D. Van Daele and S. Parmentier, *op. cit.*, pp. 53–85.

4.1.2. A general overview of the disposition of criminal cases by the Public Prosecutor's Office

In order to obtain a better picture of the disposition of cases, the last step in the process before the prosecutor, it was necessary to acquire more information about the first phase of this process, namely the input of files.

4.1.2.1. The input of criminal files

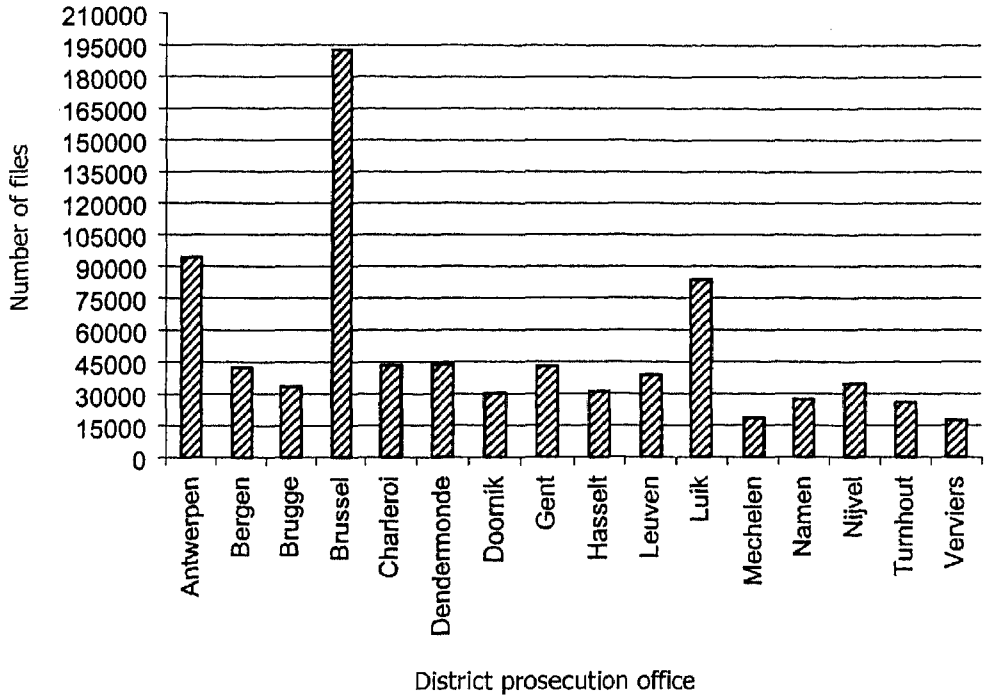
The input of criminal cases covers the total number of files opened in a given year by the district prosecution offices. According to our figures, in 1996 this total number amounted to 800,431 files, very unevenly distributed across the various district offices (Table 1 and Graph 1).

These figures are self-explanatory. As expected, the largest prosecution office in 1996 was Brussels, with more than 190,000 files (a 'very large' office), which is more than twice as much as the input of the following offices. Antwerp and Liege ('large offices'). The other offices can be divided in three categories: 'middle large A', e.g. Ghent and Leuven, 'middle large B', such as Bruges and Namur, and 'small' office, only Verviers and Mechelen. The absolute figures are of course too raw to allow for any interpretation. When related to the population figures in the same districts, it means that per inhabitant of Belgium an average of 0.1 file was opened, i.e. an

Table 1: Total number of files opened in the district prosecution offices, per office (computerised prosecution offices – input of 1996)

	Number of files
Antwerpen	94,119
Bergen	42,390
Brugge	33,547
Brussel	192,728
Charleroi	43,377
Dendermonde	43,851
Doornik	30,206
Gent	42,788
Hasselt	30,946
Leuven	38,743
Luik	83,587
Mechelen	18,610
Namen	27,450
Nijvel	34,703
Turnhout	25,980
Verviers	17,406
TOTAL	800,431

Source: C.I.V.



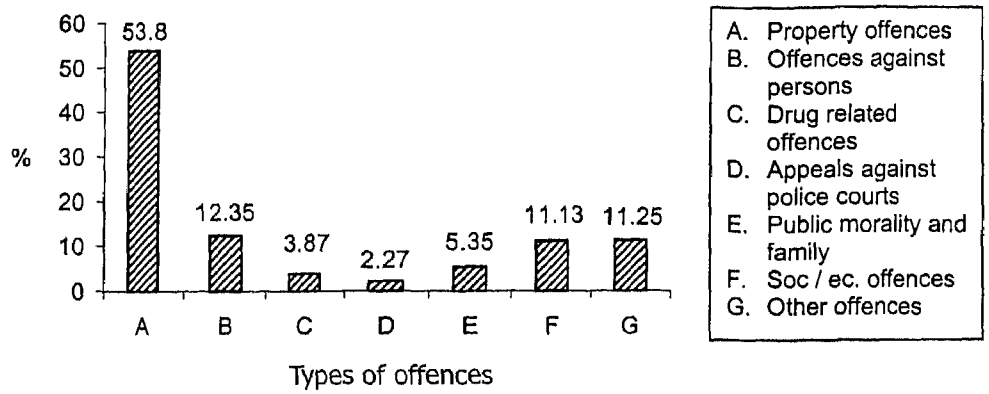
Source: C.I.V.

Graph 1: Division of incoming files per district prosecution office (computerised prosecution offices – input of 1996).

average of 1 file for every 10 inhabitants. This number was somewhat higher in Brussels and Liege (0.13 file per inhabitant), and somewhat lower in a number of other offices.

Equally important is to have a better view of the different types of incoming offences. For this purpose, we divided the enormous diversity of criminal cases into six main categories: property offences, offences against persons, drug related offences, offences against the public morality and the family, social and economic offences, and 'other' offences. The seventh category covered the appeals against the judgments of the police courts. The following graph and table give an overview of these seven categories for the 16 computerised prosecution offices in 1996.

This graph is quite transparent. The offences against property counted for more than half (53%) of all incoming files in 1996. Next, but at a much lower level, followed the offences against persons, social and economic offences, and 'other' offences. These figures are largely confirmed when it comes to comparing individual prosecution offices: 9 of the 16 prosecution offices witnessed more than 50% property offences, in some offices this was even higher (e.g. nearly 63% in Liege, and nearly 70% in Charleroi). These data lend strong support to the argument that the Public Prosecutor's Office should concentrate on developing a clear policy on the disposition of property offences, before it does so on any other category.



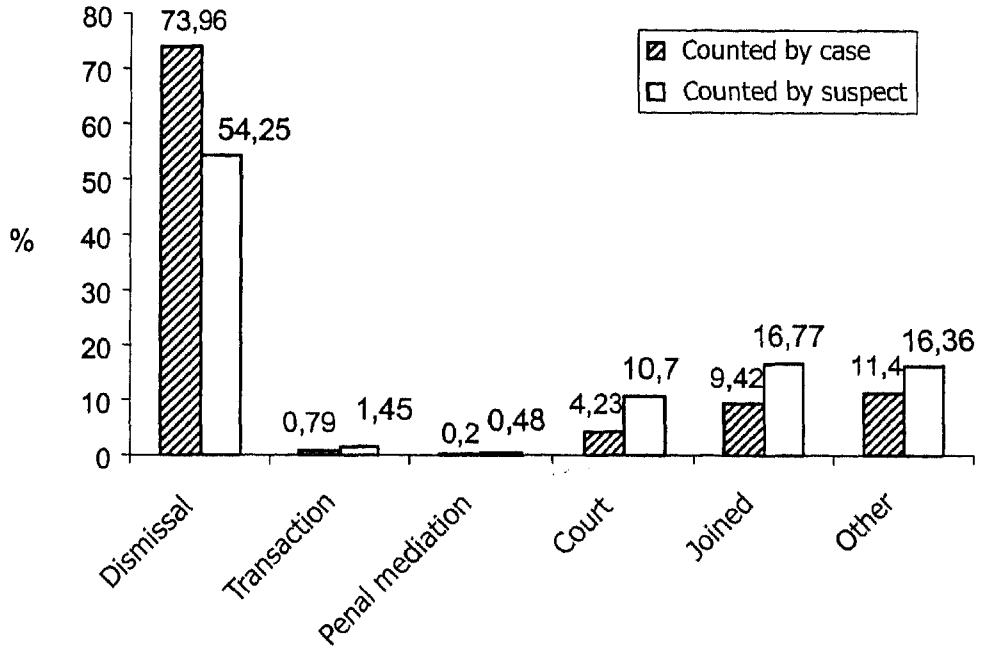
Source: C.I.V.

Graph 2: Percentaged division of the types of offences in the total input of files for the district prosecution offices (computerised prosecution offices – input of 1996).

4.1.2.2. The disposition of criminal files outside of trial

How were the incoming files disposed of by the district prosecution offices, in other words, how was their output constructed? In March 1999, we checked what had happened to all the files opened in 1996. Graph 3 represents the different methods of disposition used by the district prosecution offices: dismissal, transaction, mediation in penal matters, and prosecution before the criminal court. The fifth possibility refers to those files that were joined to others, the sixth category to 'other' files, including those still under investigation. In considering these methods of case disposition, it was important to use two different methods of counting, one by file, the other by suspect.

The conclusions are quite telling. Striking is foremost that 74% of all files were dismissed, i.e. 74 out of every 100 files that were opened (counted by file). In absolute figures, this came down to nearly 600,000 of the 800,000 incoming files. The category of dismissals covers all types, technical dismissals, dismissals on policy grounds, and conditional dismissals. Our figures do not allow any further subdivision according to these types. Another interesting conclusion is that the transaction and the penal meditation, the additional methods of disposition, were used in a very limited way, respectively in a mere 0.79% (8 files out of 1.000) and 0.2% (2 files out of 1.000) of all file (counted by file). It should be noted that many of these files contained offences without any offenders or even suspects. The numbers and proportions were of course different when we focused on those cases in which a suspect was known. But even then, the percentage of dismissals remained quite high, 54% or more than half of all incoming files in 1996 (counted by suspect). Likewise, the proportion of the additional mechanisms slightly increased, to 1.45% transactions, and to 0.48% penal mediations (counted by suspect). How did these average figures relate to the individual district prosecution offices (Table 2)?



Source: C.I.V.

Graph 3: Methods of disposition of cases, per file and per suspect, for all district prosecution offices (computerised prosecution offices – measured in March 1999 – input of 1996).

The figures per prosecution office, calculated on the basis of the total number of files, confirm the general image (Table 2). Dismissals formed the largest category, in some districts well beyond the national average of 74% (e.g. Antwerp, Brussels, Liege, but also Charleroi). On the other hand, some districts displayed a lower percentage of dismissals (such as Bruges and Mechelen). Again, differences came up when we limited ourselves to the files of the known suspects, of which an average of 54% was dismissed in 1996. Some prosecution offices had proportions above this national average (e.g. Antwerp with 65%), while others fell under the average (e.g. Bruges with 47.5%).

However, whatever measure taken, either the number of files or the number of suspects, when it came down to describing the different methods of the disposition of criminal cases outside of trial by the Public Prosecutor's Office, our empirical research clearly suggests two conclusions. The first is that in the period 1996–1999, the district prosecution services resorted quite extensively to the traditional method, the dismissal of cases, and made only minimal use of the additional methods,

Table 2: Methods of disposition of case, per district prosecution office (computerised prosecution offices – measured in March 1999 – input of 1996 – counted by file)

	Dismissal	Transaction	Penal mediation	Prosecution	Joined	Other	TOTAL
Antwerpen	76,407	301	41	4,189	5,840	7,343	94,121
	81,18	0,32	0,04	4,45	6,20	7,80	
Bergen	32,504	30	224	909	3,458	5,263	42,388
	76,68	0,07	0,53	2,14	8,16	12,42	
Brugge	19,851	233	37	2,021	7,025	4,380	33,547
	59,17	0,69	0,11	6,02	20,94	13,06	
Brussel	150,141	1,392	359	6,079	13,834	20,924	192,729
	77,90	0,72	0,19	3,15	7,18	10,86	
Charleroi	37,740	0	0	555	1,418	3,740	43,453
	86,85	0,00	0,00	1,28	3,26	8,16	
Dendermonde	26,960	1,032	60	2,830	5,949	7,019	43,850
	61,48	2,35	0,14	6,45	13,57	16,01	
Doornik	23,235	71	26	1,114	2,100	3,660	30,206
	76,92	0,24	0,09	3,69	6,95	12,12	
Gent	29,098	986	100	2,895	4,297	5,408	42,784
	68,01	2,30	0,23	6,77	10,04	12,64	
Hasselt	22,410	302	190	1,847	3,005	3,222	30,946
	72,42	0,98	0,52	5,97	9,71	10,41	
Leuven	25,572	565	156	1,517	4,038	6,802	38,741
	66,01	1,69	0,40	3,92	10,42	17,56	
Luik	64,531	234	179	2,528	9,596	6,516	83,584
	77,20	0,28	0,21	3,02	11,48	7,80	
Mechelen	11,225	182	61	2,405	1,746	2,990	18,609
	60,32	0,98	0,33	12,95	9,38	16,07	
Namen	19,488	0	95	1,001	3,957	2,909	27,450
	70,99	0,00	0,35	3,65	14,42	10,60	
Nijvel	23,341	236	59	798	4,358	5,907	34,699
	67,27	0,68	0,17	2,30	12,56	17,02	
Turnhout	17,111	587	27	2,261	3,086	2,906	25,978
	65,87	2,26	0,10	8,70	11,88	11,19	
Verviers	12,435	61	32	901	1,674	2,302	17,405
	71,44	0,35	0,18	5,18	9,62	13,23	
TOTAL	592,049	6,303	1,616	33,850	75,381	91,291	800,490
	73,96	0,79	0,20	4,23	9,42	11,40	100,00

Source: C.I.V.

transaction or mediation in penal matters. Secondly, in the same period very strong divergences existed between the various district prosecution offices, not only in their decisions to dismiss cases, but also in their application of transaction and mediation in penal matters. These differences could not be explained by the different size of the prosecution offices, nor by their variance in workload, nor by the variations in types of offences received.

4.1.3. Towards a better understanding of the decision-making process by the Public Prosecutor's Office

These two conclusions bring us to an important issue, which served as the second leading question of our empirical research: what are the main factors that are likely to influence the decision-making process of the prosecution offices and of the individual magistrates. Our file analysis in two district prosecution offices (Brussels and Ghent) for two types of offences (voluntary beating and vandalism) was meant to shed more light on this question. Later on, this statistical analysis was supplemented with qualitative interviews with magistrates and administrative staff. Only the very basic findings are represented here.[49]

First of all, it should be noted that none of the two prosecution offices operates in a vacuum when deciding how to dispose of cases outside of trial, whether to propose a transaction, whether to offer a mediation, or whether to simply dismiss the case. In both districts, there exist guidelines that specify the legal criteria to be followed by the individual magistrate in his or her decisions. In Brussels, there is a circular letter by the prosecutor-general on the dismissal of criminal cases (1993), and a number of service memoranda by the district prosecutor, on the use of transaction (1994) and on penal mediation (1995, 1998). Similarly, the district office in Ghent operates under the circular letter by its prosecutor-general on penal mediation (1994), and several service memoranda by the district prosecutor, on the dismissal of cases (1991, 1995, 1998), on transaction (1991), and on mediation in penal matters (1995, 1996). From this concise overview it follows that both district prosecution offices were, and are, clearly guided by some form of policy regarding the disposition of cases outside of trial. However, as these policies largely focus on the legal criteria of the various methods, they are not strong enough to explain the complexity of the decision-making process in individual files.

More information was found through the analysis of the individual files themselves, and after carefully testing the weight of the variables applied. When summarising our conclusions, a distinction should be made between the two types of offences investigated. As to the offence of voluntary beating, we found that two factors did have an important influence on the decision of the magistrate. The first was the type of relationship between the offender and the victim: when the two parties were strangers to each other at the time of the facts, the case was more dealt with by penal mediation or transaction; in the case of an existing relationship between the offender and

49. More details are found in: C. Fijnaut, D. Van Daele and S. Parmentier, *op. cit.*, pp. 85–97.

the victim, e.g. as a partner or ex-partner, as a neighbour, as a friend or relative, the case was more likely to be dismissed. The second explanatory factor in voluntary beating was the disablement of the victim as a result of the facts: when victims found themselves disabled, the magistrates referred the case to the criminal court more readily than treating it through other methods. In the latter case, however, the chance of a penal mediation or a transaction was higher than that of a simple dismissal. For the second type of offence, vandalism, we could only identify one major factor that exerted a significant influence on the magistrate's decision, namely the context of the facts: offenders who destroyed goods when they went out or in the context of street vandalism had a higher chance that their case be disposed of by penal mediation or transaction than offenders who committed the same fats in another context, such as conflicts between partners or among relatives, financial conflicts or traffic agression. In the latter situations, cases were more readily dismissed. In spite of the different types of offences, one similarity seemed to emerge, namely that a large portion of offences involving violence between people who know each other are dismissed. In this respect, the decision-making was not significantly different between Brussels and Ghent. The interviews with individual magistrates gave more background information on the reasons for such decisions. One argument was that any active disposition of such cases, through prosecution, but also through transaction or penal mediation, often had opposite and counterproductive effects since it tended to sharpen the conflict and to stigmatise the parties more than it helped them in coming to terms with one another. Another reason given by the magistrates interviewed was that, in their experience, things automatically eased down after a period of time and that it was not only rewarding to be confronted with such new situations when cases were brought before the judge. Finally, a third aspect related to the working environment of the magistrates: they argued that in particular mediation proved a very intensive and time-consuming activity, for which they could scarcely spare the time due to their heavy workloads.

These conclusions are not only interesting from the scientific point of view, as they provide us with new insights into some important explanatory variables that influence the disposition of criminal cases outside of trial. They are also quite relevant from the perspective of policy-making, first of all by the Public Prosecutor's Office itself. Is the policy regarding penal mediation sufficiently clear to all magistrates of a given district office? Should it lead to more streamlining between various offices? Should the Public Prosecutor's Office play a more active role in the case of violence between people who know each other? Should they receive more human and material resources to do so? Can the district prosecution offices do all of this by themselves or do they need to develop partnerships with other actors in the paralegal sphere? All of these questions clearly illustrate the intriguing character of the topic at hand and suggest the need for further research in this area.

CONCLUSIONS AND RECOMMENDATIONS

In Belgium, as in other countries, the Public Prosecutor's Office can be considered the spider in the web of the criminal justice system. This spider has been receiving criticisms and attacks from various sides, not only in the aftermath of the Dutroux case,

but also long before that time. In this contribution, we have given an overview of the main issues that surround the Public Prosecutor's Office and of the developments that have taken place over the last twenty years.

In general, it is clear that the Public Prosecutor's Office has served as a battle ground for many and drastic reforms in the administration of criminal justice. We have particularly paid attention to three major aspects. It constitutional position, an area of fierce debates in the past, has been clarified in recent years with a more consistent relationship between the Minister of Justice and the assembly of prosecutors-general. As a result, the internal organisation of the Public Prosecutor's Office has undergone considerable changes, which promises to be even more drastic when the Octopus agreement is fully implemented. However, as Octopus also generates new problems, many principal and technical questions have to be solved before it can enter into force. Moreover, the Public Prosecutor's Office is exploring new relationships with a number of external actors, but far in a very prudent way. To conclude, major reforms have also entered the field of the disposition of criminal cases outside of trial, by limiting the wide discretion of the prosecutors and by offering additional mechanisms such as transaction and mediation in penal matters.

Far from a historical or a retrospective exercise, the objective of our overview was to sketch the major challenges for the Public Prosecutor's Office in the years to come. Finally, two leading questions should retain our attention: is the 'spider' strong enough to control the web, and is it sufficiently equipped to restore the confidence of its environment? These questions bring us to the issues of effectiveness and legitimacy which were raised in the beginning. The discussions have provided us with a wealth of raw material, from which we can extract three major challenges.[50]

The first is the need internal policy-making and strategical thinking. In our view, it is high time to concentrate on the crucial question what constitute the core functions of the Public Prosecutor's Office. This is a task for all involved in the work of the Office, the Minister of Justice, the prosecutors-general, the district prosecutors, their substitutes, the supporting staff. The final objective of this exercise should be to produce a global vision for the criminal justice system of the future and a clear mission of the Public Prosecutor's Office itself. With the core functions established, it is crucial that sufficient attention also be paid to the policy on the disposition of cases outside of trial. The doctrinal discussions, as well as our empirical research, have clearly demonstrated that much work needs to be done in order to obtain a coherent and transparent global policy and specific policies on dismissal, on transaction, and on mediation in penal matters. It goes without saying that policy development is built on information development. Also here, much work lies ahead in producing adequate data on the functioning of the Public Prosecutor's Office and of the criminal justice system as a whole.

The second challenge lies in the external environment of the Public Prosecutor's Office. The modern idea of the criminal justice system is that of a chain or a network of actors, each operating in a specific field: the police, special inspection services, paralegal and social services, criminal courts, and increasingly, also local governments.

51. For a more extensive discussion, *see*: C. Fijnaut, D. Van Daele and S. Parmentier, *op. cit.*, pp. 264–286.

In this rapidly changing environment, it is crucial for the prosecution offices to develop real partnerships with each of these actors, in order to come to a clear and more coherent division of tasks. In our view, this is an equally important condition if they wish to take effectiveness seriously. The discussions have clearly indicated that much work lies ahead for the Public Prosecutor's Office to build long-lasting partnerships on the basis of respect and mutual understanding.

Underlying these two major challenges, the need for internal policy-making and for external partnerships, is a third one which is perhaps even more significant. In our view, the Public Prosecutor's Office needs to change, in the long run, from a rule-oriented system with strict hierarchical models to a goal-oriented system based on a performance model. If it is to play a meaningful role in the future, if it wishes to 'make a difference' in the criminal justice system, it will have to strengthen its technical capacity. This implies, of course, that more attention will have to be paid to human resources, material resources, information management, to an adequate infrastructure in general. These elements, however, will not suffice if, at the same time, the general 'culture' of the Public Prosecutor's Office is neglected. For a long time, this culture has been quite rigid, closed, allowing little participation, neither from the inside nor from the outside. A modern Office cannot escape the challenge of building a new culture, in which internal and external communication is valued, in which constructive involvement is seen as an asset, in which processes of change can be accepted and managed. This would bring the Public Prosecutor's Office on the road towards a learning organisation.

It is our view that each of these challenges are paramount and should be taken seriously. Not only to increase the effectiveness of the prosecution offices in dealing with new and complex forms of crime in the future. But also to increase their legitimacy in the eyes of the external environment, including the public at large, and, not least, in the eyes of its internal employees. The Public Prosecutor's Office has come a long way, from the desasperation of Sisyphus to the new architecture of Octopus, although Octopus itself is by no means a panacea to cure all illnesses. We are convinced that the totality of the challenges listed constitute the beginning of another long road, full of obstacles certainly, but nevertheless inevitable.