

The case law of the European court of human rights regarding the use of expert statements in criminal procedures

Abstract

In this paper I will describe the case-law of the European Court of Human Rights concerning the use of expert evidence in criminal procedures. Although the text of Article 6 of the European Convention on Human Rights (ECHR) doesn't say anything about the use of expert evidence, the Court¹ has developed, in the cases *Bönisch*² and *Brandstetter*,³ some rules regarding the use of expert evidence. On the basis of the right to a fair trial there must be an equal treatment between the expert for the prosecution and the expert called by the defendant. This rule, however, applies only if there are justified doubts concerning the neutrality of the expert for the prosecution.

Structure of the paper

Before I describe the *Bönisch* and *Brandstetter* cases I discuss the text of Article 6 ECHR and the right of a fair trial in general. After describing the cases *Bönisch* and *Brandstetter* I will end with some critical remarks. This leads to the following structure:

- Some general remarks about Article 6 ECHR
- *Bönisch* case
- *Brandstetter* case
- the main points of the cases *Bönisch* and *Brandstetter* summarized
- Critical remarks

Article 6 ECHR

The text of Article 6 does not explicitly mention norms for the use of expert statements. The Strasbourg case-law, however, developed norms on the basis of two rights which can be found in paragraph 1 and 3 of Article 6. In paragraph 1 we find the right to a fair trial and in paragraph 3 the defendant's right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Because of paragraph 1's vagueness, the right to a fair trial is difficult to understand. Based on the Strasbourg case-law, however, one can give more concrete form to this right. In the first place the purpose of the right to a fair trial is to protect the defendant against arbitrary sanctions. That means protection against sanctions unless the trial of the offense is regular. Second the case-law implies *how* the right to a fair trial protects the defendant against arbitrary sanctions. It presupposes that an adversarial trial is best equipped to protect the defendant, in the sense that he is able to defend himself against (material that supports) the accusation. Therefore the defendant must have defence procedural rights and must have in principle the same opportunity as the prosecutor to furnish material – and in the case of the defendant that means of course material against the accusation.

Several of the defence rights are mentioned in paragraph 3 of Article 6, e.g. the right to examine witnesses. If, however, the rights mentioned in Article 6 do not make the

¹ Where I speak in this paper about the Court, I mean the European Court of Human Rights.

² Decision of 6 May 1985, Publ. ECHR series A vol. 92

³ Decision of 28 August 1991 HRLJ 1991, p. 316.

procedure sufficiently adversarial or the parties' role in the trial sufficiently equal, the European Court is inclined to recognize rights which are not explicitly mentioned in that article. For example, in the Colozza-case,⁴ the Court recognized the right to be present during trial and in the Bönisch-case it recognized the right to examine experts under certain conditions, although those rights are not mentioned in Article 6. The Brandstetter case further developed the right to examine experts. I will now turn to the Bönisch and Brandstetter cases.

Bönisch

In the Bönisch-case the question before the Austrian courts was if meat, prepared by Bönisch, contained too much benzopyrene. There was an expert (the director of the Federal Food Control Institute, who also made the report on which the prosecution was based) who answered the question in the affirmative. According to the director Bönisch had contravened the Austrian Food Act. However, a person called by the defendant stated the opposite. That person was Mr Prändle and he was the director of the Institute for Meat Hygiene and Technology. Mr. Prändle was not appointed as an expert but solely as a witness. Therefore Bönisch claimed that Austrian law provided for unequal treatment as between the director of the Federal Food Institute and Mr Prändle. Bönisch claimed this unequal treatment breached Article 6 ECHR.

The decision of the Court

Initially the Court stated that appearances suggested that the director was more like a witness against the accused: 'It is easily understandable that doubts should arise, especially in the mind of an accused, as to the neutrality of an expert

when it was his report that in fact prompted the bringing on of a prosecution.' Because the director appeared to be a witness against the accused rather than a neutral expert, the Court stated that the principle of equality of arms – inherent in the concept of a fair trial – required equal treatment as between the deference accorded to the Director and the deference to persons who were or could be called, in whatever capacity, by the defence.

Next the Court came to the conclusion that there had been no equal treatment: 'In the first place, the director of the institute had been appointed as 'expert' by the regional court in accordance with Austrian law; by virtue of that law, he was thereby formally invested with the function of neutral and impartial auxiliary of the court. By reason of this, his statements must have carried greater weight than those of an 'expert witness' called, as in the first proceedings, by the accused, and yet his neutrality and impartiality were, in the particular circumstances, capable of appearing open to doubt. In addition, various circumstances illustrate the dominant role that the director enabled to play. In his capacity of 'expert' he could attend throughout the hearings, put questions to the accused and to witnesses with the leave of the court and comment on their evidence at the appropriate moment. The lack of equal treatment was particularly striking in the first proceedings, by reason of the difference between the respective positions of the court expert and the 'expert witness' of the defence. As a mere witness, Mr. Prändle was not allowed to appear before the regional court until being called to give evidence; when giving his evidence, he was examined by both the judge and the expert; thereafter he was relegated to the public gallery. The director of the institute, on the other hand, exercised powers available to him under Austrian law. Indeed, he directly examined Mr. Prändle and the accused.'

The Court added the defence had had little

⁴ Decision of 12 February 1985, Publ. ECHR series A vol. 89.

opportunity to obtain the appointment of a counter-expert: 'If the competent court has need of clarification in respect of the institute's opinion, it must first hear a member of the institute's staff; the court may not have recourse to another expert except in the contingencies referred to in Article 125 and 126 of the code of criminal procedure, none of which obtained in the present case.'

The Court came to the final conclusion that there had been a breach of Article 6 § 1.

The Brandstetter case

The defendant in the Brandstetter case complained about several procedural deficiencies, which according to him resulted each in a breach of Article 6 ECHR. In this paper I will only discuss his complaints about the use of expert evidence. These complaints related to two different prosecutions. In the first Mr Brandstetter was accused of selling adulterated wine and in the second one he was accused of tampering with evidence. I discuss the cases proceedings separately.

The expert on the quality of the wine

Mr Brandstetter was an Austrian wine merchant. In 1983 a Federal Inspector of Cellars visited Brandstetter's undertaking to carry out an inspection. He took three types of samples from two tanks of 1982 white wine. The tanks were sealed and officially seized. After having left two counter-samples with the applicant, the inspector sent the two official samples to the Federal Agricultural Institute to be examined. Each sample consisted of two bottles. In addition, he drew from each of the tanks a reserve sample, for use should a further analysis prove necessary.

Two months later the Agricultural Institute drew up a report containing the results of a chemical analysis of the samples, which revealed an abnormally low level of natural

extracts and mineral substances. It also set out an official wine quality control panel's conclusion. This panel had found that the wine in the samples had been diluted with water. The Agricultural Institute suspected Brandstetter of contravening the Austrian wine act in that he attempted to offer for sale to the public 'imitation wine' and adulterated wine.

The Agricultural Institute had informed the Haugsdorf district court of its suspicions, whereupon the district prosecutor instituted proceedings against Mr Brandstetter.

In order to prepare his defence, the applicant had the counter-samples analyzed in Vienna by Mr Niessner of the Federal Food Control and Research Institute. Mr Niessner reported that the level of natural extracts and substances was not below the required minimum. However, a quality control panel tasting of the samples confirmed that water had been added to at least one of them, but had been unable to establish with certainty whether this was so for the other.

At a first hearing Mr Brandstetter pleaded not guilty and requested the district court to take expert evidence with a view to establishing that his wine was not 'imitation wine' and had not been adulterated.

Accordingly, the district court instructed Mr Bandion of the Agricultural Institute to carry out an expert examination. Mr Bandion had not been involved in the first analysis of the official samples by the Agricultural Institute, or in the preparation of its report.

At the second hearing, the court took evidence from Mr Bandion. According to him, the difference between the results of that examination and the results obtained by Mr Niessner showed that a grave error had been committed in at least one of the analyses; he recommended that the reserve samples should be analysed in order to clarify the question. The court directed him to draw up a report on this matter.

Mr Brandstetter maintained that the difference in the findings could also be explained by a circumstance to which he had already drawn the attention of the police: that the inspector of cellars had used a dirty bucket to draw the samples and had poured them into bottles in which there had been a residue of water. The inspector had emptied the remaining bottles only after the applicant had protested. The applicant's wife and two sons, who were called as witnesses, confirmed his statements.

The inspector and his assistant, who were also heard as witnesses, claimed on the other hand that the bucket had been clean and that the liquid which remained in the bottles had been wine used to rinse them. The inspector had explained this to Mr Brandstetter when the latter had complained and, moreover had subsequently emptied the bottles in question.

The analysis of the reserve samples was carried out at the Agricultural Institute under the supervision of Mr Bandion. It resulted in similar conclusions to those concerning the first samples, but there was no tasting by a quality control.

In his report Mr Bandion stated that the new analysis had corroborated the first examination carried out by the Agricultural Institute and therefore raised serious doubts with regard to the examination effected by Mr Niessner of the Food Institute. The scientific findings corresponded with the conclusions of the quality control panels which had identified the addition of water in all the samples except one. As with the result of the tasting, they revealed the prohibited addition of water and sugar and a level of natural extracts and substances below that required by the wine ordinance. The applicant's products could not, however be classified as 'imitation wine'. Various statements by Mr Brandstetter and members of his family during the hearing were directly contrary to the results of the chemical analysis, in particular statements concerning the use of a dirty bucket by the inspector of the cellars.

In a third hearing the applicant's lawyer criticised Mr Bandion's opinion, arguing that the latter's close links with the Agricultural Institute deprived him of the necessary objectivity about the first analysis and could have led him to defend the results of that examination against those reported by Mr Niessner. In addition, he contended that the expert had exceeded his duties by expressing a view on questions of fact and of law instead of merely carrying out a chemical analysis. Consequently, the defence requested further investigative measures, namely the drawing of new samples from the two tanks which had been seized, the taking of evidence from several other experts, including Mr Niessner, and the consultation of the minutes of the quality control panel. The defence also alleged that the rules laid down for a tasting could not explain the differences between the two institutes' conclusions. The defense argued that Mr Bandion had merely expressed his view that those of the Food Institute were erroneous and that those of his own institute were correct.

That same day the district court convicted Mr Brandstetter of adulterating wine and fined him. It also ordered the forfeiture of the wine contained in the two tanks seized. The judgement relied, for the most part on, Mr Bandion's opinion. It cited long passages from that opinion which were in its view conclusive because they revealed a convincing, detailed precise and exhaustive examination of the differences in analysis of the two institutes. However, the court refused to rely on certain of the expert's statements which improperly dealt with questions of law and the assessment of evidence.

In addition, the district court rejected Brandstetter's request for further investigative measures. The court did not consider it to be useful in regard to the tasting procedure, because the results of that procedure did not constitute conclusive evidence. The drawing of new samples would in its view be superfluous, in particular as the wine, which in

the meantime had remained in the sealed tanks, could have changed in composition. The same was true of the request to hear new experts, because there were no doubts about the reliability of the Agricultural Institute's conclusions, which had in part been confirmed by those of the Food Institute, or as to Mr Bandion's objectivity.

Mr Brandstetter appealed. The appellate court affirmed. It noted that the applicant had not raised objections to the expert when he had first been appointed, but only on seeing his report. Mr Bandion's objectivity was not in doubt. He was especially experienced and conscientious and had in no way been involved in the analysis of the first samples, had criticised the conclusions not only of the Food Institute but also, in certain respects, those of his own institute, and had explained in detail the differences between the two reports. It considered the lower court's inclusion of extracts from the expert's opinion in its judgment proper. The court considered the expert's opinion conclusive, reasoning it was not necessary to seek new evidence, or to inspect the minutes of the quality control panel's meeting, the Food Institute's report contained a summary of the tasting procedure, which at most added little to the chemical analysis.

The European Courts' decision regarding the proceedings concerning the quality of the wine

Mr Brandstetter first complained that the Haugsdorf district court had breached of the principle of equality of arms by appointing as official expert Mr Bandion, a member of the staff of the Agricultural Institute which had reported the initial suspicions concerning him, and in refusing to hear any other expert, or to call Mr Niessner, the expert commissioned by the applicant, as a witness.

The Court examined the applicant's complaint under the general rule of paragraph 1, with due regard to the guarantees of paragraph 3.

First of all the Court noted that Mr Bandion was not the 'official' who either had carried out the analysis of the official samples or had drawn up the report thereon. Admittedly, the Court stated, the fact that Mr Bandion was a member of the staff of the Agricultural Institute which had set in motion the prosecution may have given rise to apprehensions on Mr Brandstetter's part. According to the Court such apprehensions may have certain importance but they are not decisive. What is decisive is whether the doubts raised by appearances are objectively justified.

The Court stated further:

'Such an objective justification is lacking here; in the Court's opinion, the fact that an expert is employed by the same institute or laboratory as the expert on whose opinion the indictment is based, does not in itself justify fears that he will be unable to act with proper neutrality. To hold otherwise would in many cases place unacceptable limits on the possibility for courts to obtain expert advice. The Court notes, moreover, that it does not appear from the file that the defence raised any objection, either at the first hearing when the district court appointed Mr Bandion, or at the second hearing when Mr Bandion made an oral statement and was asked to draw up a report; it was not until after Mr Bandion had filed his report, which was unfavourable to Mr Brandstetter, that the latter's lawyer criticized the expert for his close links with the Agricultural Institute.'

Then the Court compared this case with the Bönisch case:

'The mere fact that Mr Bandion belonged to the staff of the Agricultural Institute does not justify his being regarded - as was the case in the Bönisch case - as a witness for the prosecution. Nor does the file disclose other grounds for so considering him. It is true that to a certain extent Mr Bandion stepped outside the duties attaching to his function by dealing in his report with matters relating the

assessment of evidence, but this does not warrant the conclusion that the position which he occupied in the proceedings under review was that of a witness for the prosecution either.

The Court came to the following conclusions:

'Accordingly, the district court's refusal of the defence's request to appoint other experts cannot be seen as a breach of the principle of equality of arms. Nor can it be said that because of this refusal or the refusal to call Mr Niessner as a witness for the proceedings were unfair. The right to a fair trial does not require that a national court should appoint, at the request of the defence, further experts when the opinion of the court-appointed expert supports the prosecution case.'

The prosecution on the charge of tampering with the evidence

After his conviction in the wine case became final, Mr Brandstetter had intended to bring an action for damages against the Republic of Austria alleging its liability for the unacceptable procedural errors which had been made by the courts in the proceedings concerning the quality of the wine.

In order to ensure that the evidence was preserved, he requested that additional samples be taken from the sealed tanks. His request was dismissed by the Haugsdorf district court but on his appeal the Korneuburg regional court reversed.

The district court appointed as expert Mr Flack, who was a member of the staff of the Agricultural Institute's branch in Burgenland and who had not been involved in the proceedings concerning the quality of the wine. It instructed him to supervise, the drawing of new samples from the tanks and to analyze them.

In his report Mr Flack found differences between the results of his analysis of the new samples and the results of the analysis by the

Agricultural Institute of both the official samples. In his opinion these differences did not reflect alterations in the composition of the wine with the passing of time, or from measures to preserve the wine authorised by the court. Instead he believed they stemmed from the addition of substances in order to increase the natural extract content.

Mr Flack informed the district court of his conclusions two days before officially submitting his report. The court of its own accord instituted criminal proceedings against Mr Brandstetter on a charge of tampering with evidence.

The court appointed Mr Flack as expert and he submitted his report. He confirmed his earlier findings and noted that the composition of the new samples was similar to that of the counter-samples analysed by the Food Institute.

On the basis of this expert opinion, the public prosecutor's office sought Mr Brandstetter's conviction for tampering with evidence under Article 293 of the Criminal Code.

The accused contended that it was physically impossible for him to interfere with the counter-examples taken on 16 May 1983, because he had been absent from his business premises before they had been sent to the Food Institute. He stated that all the measures taken to preserve the wine in question had been carried out in the presence of, and had been monitored by, the inspector of cellars who had drawn the first samples.

Mr Brandstetter admitted that some of the bottles containing the counter-samples, which he had sent to the Regional Agricultural Chemical Research Institute at Graz, had been broken during transport. The bottleneck of one of them however, had remained intact and showed clearly that the seals had not been disturbed. He maintained that Mr Niessner, the expert who had analysed the counter-samples, could attest to this. He

asked that Mr Niessner be called as a witness in order to prove that the seals fixed by the federal inspector of cellars on the counter-samples had been undisturbed when these samples had been given to the Food Institute and that the wine Mr Niessner examined was identical to the wine examined by the Agricultural Institute. The Institute first findings would therefore not be correct and the quality of the wine at the time when the first samples were drawn would be identical to that of the wine Mr Flack analysed in the course of the proceedings for securing evidence. The defence further requested that Mr Niessner be appointed as a second expert in order to report on the quality of the wine he had analysed.

The court granted the first request, but refused the second. Accordingly, at the second hearing, Mr Niessner testified as a witness. He confirmed that the seals had been intact in so far as he had been able to judge at the time, but stated that the possibility of interference could not be completely ruled out because it was not the usual practice to carry out a detailed forensic examination. However, no questions were put to the witnesses about the applicant's wine, or about any other possible explanation for the above-mentioned differences.

The regional court found the applicant guilty and sentenced him to three months' imprisonment.

The court accepted Mr Flack's opinion that only the subsequent addition of substances could explain the significant differences in the analyses. It accepted Mr Flack's opinion in particular because that opinion was consistent with Mr Bandion's conclusions in the proceedings conducted under the Wine Act. In regard to the applicant's claim of physical impossibility the court referred to 'notorious methods' which consisted of replacing the contents of a sealed bottle by heating the container and carefully removing the seal and the cork by injecting substances with a syringe through the cork. The fact that one of the bottles had been broken might indeed

have been due to the failure of such attempted interference.

The court ruled that there was no need to appoint Mr Niessner as a second expert, because he had already submitted a report on the quality of the wine, which he had analysed as a private expert, and because Mr Bandion's report had already thoroughly discussed the results of Mr Niessner's analysis.

The Vienna court of appeal dismissed Mr Brandstetter's appeal. In its view the regional court had not disregarded the evidence submitted by the applicant, namely the broken bottleneck of one of the counter-samples, whose seal was intact; moreover the sample in question could not be used as evidence because it had not been analysed. It examined the results of the examination of the counter-samples by the Agricultural Institute and, relied on the opinion of Mr Flack, that this discrepancy could only reflect addition of substances to the counter-samples.

The regional court had also taken into account the identical conclusions which Mr Bandion had reached in the earlier proceedings, and Mr Niessner's testimony on the possibility of interfering with a sealed bottle. It had also described methods for carrying out such operations. The appellate court considered the conclusions to be sufficiently reasoned.

The European Court's decision regarding the proceedings concerning the charge of tampering with evidence

Mr Brandstetter argued that the Austrian courts had violated the principle of equality of arms in relation to expert evidence. He stated that the Haugsdorf district court had designated, as official expert, Mr Flack who had raised the initial suspicion against him and who, moreover, was on the staff of the Agricultural Institute, whose experts had been consulted in the previous proceedings.

Further, it had heard the expert commissioned by the applicant to analyse the counter-samples only as a witness, and thus not under the same conditions.

In order to determine whether the principle of equality of arms had been complied with in this case, the Court took into consideration both the expert's position throughout the proceedings and the manner in which he performed his functions.

The Court stated that, in substance, the criminal suspicion emanated from Mr Flack and that later he was appointed as official expert. Therefore Mr Brandstetter's apprehensions with regard to the neutrality and objectivity could be held justified. However the Court added:

'This does not mean that it was contrary to the Convention to examine Mr Flack at the hearing of 4 July 1985; however, under the principle of equality of arms persons who were or could be called, in whatever capacity, by the defence in order to refute the views professed by Mr Flack, should have been examined under the same conditions as he was.'

Although the Court stated that Mr Niessner was not heard under the same conditions as Mr Flack it came to the conclusion that there was no breach of the principle of equality of arms. It argued:

'The line taken by the defence implied that the results of Mr Niessner's analyses were only relevant if it could be proved that the counter-samples had not, and could not have been, tampered with. On the latter issue Mr Flack had not written or said anything, while the defence had been able to put all the questions it wished to the only witness it had called on this point. Since the court found that it had not been established that tampering with the counter-samples could be excluded, the ground for the request to appoint Mr Niessner as a second expert ceased to exist.' The court found that Brandstetter could have tampered with the counter-

samples, so Mr. Niessner's testimony was irrelevant to Mr Brandstetter's argument.

The main points of the cases Bönisch and Brandstetter summarized

Under the Brandstetter case the right to a fair trial does not require a national court to appoint further experts at the request of the defence, whenever the opinion of the court-appointed expert supports the prosecution case. However, the Court is inclined to apply Article 6 paragraph 3 under d analogically to the use of experts if appearances objectively suggest that the expert is more like a witness against the accused.

The Court has developed this analysis as follows:

- An expert can be regarded as a witness if doubts exist about to his neutrality.
- These doubts must be objectively justified; the defendant's apprehensions may have some importance but they are not decisive.
- The expert's role throughout the proceedings and the manner in which he performed his functions are especially decisive.
- Apprehensions about the neutrality and objectivity can be held to have been justified if the criminal suspicion emanates from the expert and the expert is appointed as official expert.

Whenever an expert can be considered as a witness for the prosecution the expert may still be heard during the trial, but only if persons who the defense does or can call, in whatever capacity, in order to refute the expert's views are examined under the same conditions as he is.

If persons called by the defendant are not examined under the same conditions, there is a breach of the principle of equality of arms. However there is no breach if the examination did not entirely take place under the same conditions, if the defendant's witness was, in fact, able to refute the views of the

expert on the main points with equal weapons. In other words even: if the defendant's witness, in comparison with the prosecution's expert was put at a disadvantage, there is no breach of the principle of equality of arms if the unequal treatment regarded only points which are not decisive in determining the defendant's guilt or innocence.

Some critical remarks

According to Article 6 paragraph 3 everyone charged with a criminal offence has the right to examine or have examined witnesses against him. In the Kostovski case the Court formulated the basic idea behind this right: 'Testimony or other declarations inculcating an accused may well be designedly untruthful or simply erroneous (...)'.⁵

One can say that the same idea essentially applies for declarations given by experts. Experts may obtain false results, for example, because they used the wrong method or applied the method incorrectly. Therefore the defendant must have the right to examine or have examined experts 'à charge'. That right fits within the concept of an adversarial procedure: the defendant must have the possibility to attack the material which supports the accusation. In most cases this right can only be vindicated if the defendant has recourse to another expert. Often, when the defendant has his 'own' expert, he will be able to discover the possibility of incorrect results; the defendant and his lawyer are seldom able to appraise the expert's methods. Another requirement for an effective adversary procedure, is that the defendant's expert called must have the same powers as the expert for the prosecution. That means, for example, that the expert 'à décharge' must be allowed to be

heard during the trial if the expert 'à charge' has had that status.

Nevertheless, the Court is not inclined to afford a defendant a 'full' right to examine or have examined experts again. The mere fact that an expert declaration supports the accusation does not give the defendant the right to have another expert appointed.

Under the Court's case-law, the defendant only has this right if the expert can be seen as a witness for the prosecution. The expert becomes a witness for the prosecution if doubts regarding his neutrality exist. In that case Article 6 paragraph 3 under d can be applied analogically.

This application of the right to examine or have examined experts for the prosecution is a bit curious. Expert's results can be erroneous even if the expert is neutral. Therefore it is necessary to examine not only experts who appear not to be neutral, but also experts who do appear to be neutral, just as is the case for witnesses. Like experts, witnesses can be neutral. But even then the defendant must have the opportunity to examine or have examined the witness against him, because, as the Court has stated: 'testimony or other declarations inculcating an accused may well be (...) erroneous'.

Another disadvantage of the Court's approach is its vagueness. Clarify is only likely to increase after numerous decisions. Then it will be possible to compare the facts of one case with another case and to predict the outcome. Currently one can only predict an outcome if a case is basically the same as one the Court has already decided. The Court's explicit criterion could not predict a particular outcome in the Brandstetter case. The criterion the Court uses would have been equally consistent with a decision that Brandstetter's doubts concerning the neutrality of Mr. Bandion and Mr. Flack who both worked at the institute which had set in motion the prosecution were justified. I think it is likely that colleagues may protect each other even if they have doubts concerning a

⁵ Decision of 20 November 1989, Publ. ECHR series A vol. 166 § 42.

method or the way a method is applied. It may be that the Court did not find that there were justified doubts, because it was difficult to find a qualified expert of another institute in Austria. Such a rationalization would not fit very well within the Court's case-law – the states are obliged to organize their systems so as to ensure compliance with the requirements of Article 6⁶ – but is also unconvincing in another way. There were qualified expert outsiders Austria.

The criterion used by the court does not fit well within the concept of an adversarial trial, and it is too vague. These disadvantages would not exist or, at least, would be ameliorated, if the Court fully recognized to examine or have examined experts.

The obvious issue is the reason for the Court's use of the criterion concerned. I think the reason for the choice is a relatively political one. The text of Article 6 ECHR does not mention a right to control or have controlled experts. Full affording defendants the right to examine experts would indeed fit better in an adversarial trial and contribute to legal certainty. On the other hand it would lead to longer and more expensive procedures. Therefore the Court could have been afraid of the reactions of the member states, caused by a full acknowledgment of that right, and chose a compromise: the defendant only has a (effective) right to control the expert for the prosecution if there are justified doubts about his neutrality.

References

Hartog, J.D. den, *Artikel 6 EVRM: Grenzen aan het streven de straf eerder op de daad te doen volgen*, Antwerpen/Apeldoorn 1992.

⁶ See e.g. De Cubber, decision of the Court of 26 October 1984, Publ. ECHR series A vol. 86.

