

Expert registers in criminal cases. Governance in criminal proceedings

J.A. Nijboer, B.F. Keulen, H.K. Elzinga, N.J.M. Kwakman

1 Introduction

In recent years, the Netherlands have seen an unprecedented series of serious miscarriages of justice. Lucia de Berk, a nurse, was sentenced to life imprisonment for seven murders and three attempts to murder.¹ After a review procedure she was acquitted for these facts.² In the ‘Puttense murdercase’, two men were jailed for ten years on a conviction for manslaughter and rape, and acquitted in a review procedure.³ And in another murder case (‘Schiedamse parkmoord’) the person who was sentenced to imprisonment for eighteen years on a conviction for manslaughter and rape, was only acquitted after a confession, more or less out of the blue, by the actual perpetrator. In all these cases expert witnesses were involved.⁴

Especially the miscarriage of justice in the ‘Schiedamse parkmoord’ case has had a major impact on law and practice of Dutch criminal procedure. Partly as a result of this case, the Dutch government decided to reform the regulation of experts and expert evidence in criminal procedures.⁵ A few years before, a major research project concerning criminal procedure: ‘Strafvordering 2001’ (Criminal Procedure 2001) had already paved the way for this reform. This research project, conducted by the criminal law departments of the universities of Tilburg and Groningen, had come up with a lot of proposals concerning the regulation of experts and expert evidence.⁶

The Expert Witness in Criminal Cases Act, which became law on 1 January 2010, has brought about many changes in current Dutch criminal procedure. One of the more substantial changes concerns the creation of a national public register of expert witnesses based on section 51k of the Dutch Code of Criminal Procedure (CCP). The present study relates directly to that register, which is referred to in

¹ Court of Appeal of The Hague 18 June 2004, LJN: AP2846 (www.rechtspraak.nl).

² Dutch Supreme Court 7 October 2008, LJN: BD4153; Court of Appeal of Arnhem 14 April 2010, LJN: BM0876.

³ Court of Appeal of Leeuwarden 24 April 2002, LJN: AE1877.

⁴ Dutch Supreme Court 25 January 2005, LJN: AS1872; Dutch Supreme Court 2 October 2007, LJN: BA5831.

⁵ Official Parliamentary Documents 2006/07, 31 116, nr. 3, p. 1; Wet deskundige in strafzaken, Stb. 2009, 33.

⁶ N.J.M. Kwakman, De deskundige in het strafproces, in: M.S. Groenhuijsen and G. Knigge (ed.), *Het onderzoek ter zitting: eerste interimrapport van het onderzoeksproject Strafvordering 2001*, Groningen: RuG, 2000.

common parlance as the register of expert witnesses and is officially called the Dutch Register of Court-Appointed Expert Witnesses (Nederlands Register Gerechtelijk Deskundigen; the NRGD).⁷ The creation of this register can be seen as an example of (good) governance in criminal proceedings. It reflects a public policy choice that wants to further public and private interests by improving the decision making process in criminal proceedings. It involves the interdependency and interaction of a great many actors. And it brings with it forms of regulation that have to be complied with to the end of improving transparency and reliability of judicial decision-making.

The Dutch Parliament was broadly supportive of the bill and the register of expert witnesses. However, there were concerns on a number of issues. One of these concerns was the issue of the unbounded credence judges might give expert witnesses on account of their being listed in the register of expert witnesses. There were also concerns about the completion of the register, about the knowledge of criminal procedure among registered expert witnesses and about the possibility of using foreign expert witnesses.

In the Upper House of the Dutch Parliament, attention was particularly drawn by a letter from the president of the KNAW (Royal Netherlands Academy of Arts and Sciences). The letter warned against the possibility that the register would primarily be a list of expert witnesses with unsatisfactory scientific knowledge. The KNAW expected that the register would probably lag behind the scientific state of art and would not constitute a faithful representation of the dynamic character of the scientific world. In the letter it was also argued that the names of scientific experts should completely be kept out of the register of expert witnesses.

During debates on the bill in the Upper House of Dutch Parliament, the Minister of Justice announced that, after some years of operation, there would be an evaluation of the efficacy of the register. The idea was that there would be a period of transition in which the register gradually would be filled with specific areas of expertise and with qualified experts in those fields. It was thought best to start with those areas that already were called in frequently and where it would be reasonable to believe that experts would contribute useful, objective and reliable information. That is to say, fields of expertise which had developed to such a level that any findings

⁷ <http://deskundigenregister.nl> (also in English).

based on it could be reviewed and substantiated on the basis of established norms. Initially these fields of expertise concerned DNA- analysis and interpretation, as well as Forensic Behavioural experts, and later the Handwriting Examination experts. At the end of the year 2010, the register was opened for registration of DNA-experts, Handwriting experts and Forensic Behavioural experts. And now, at the beginning of 2011, the first experts are indeed registered.

Is this register a good means to optimise the contribution of experts to the public interest of truth-finding in criminal procedure? As the Expert Witness in Criminal Cases Act has become law only recently, it is much too early for a final judgement on the efficacy of the register. We have, however, conducted an ex-ante evaluation of the new register, on behalf of the Dutch government.⁸ An ex-ante evaluation is meant to clarify the aims of the register of expert witnesses, but also to make clear how, over a number of years, insight can be gained as to whether and how those aims have been achieved. In this article, we will analyze which expectations and assumptions lay behind the creation of this expert register in criminal cases.⁹ And we will also give an overview of what insiders expect of the realization of these aims.

But before doing so, we will give an overview of the legal state of affairs concerning experts and expert registers in the Netherlands, Belgium, Germany, France and finally England/Wales. England/Wales is especially interesting, because it had an expert register that recently ceased to exist. The emphasis will be on the new Dutch legislation. The overview will not exclusively focus on the registers. To properly understand the function of registers of experts, it is preferable to have a broader overview of those areas of criminal procedure that involve experts.

And after discussing the results of our investigation, we will conclude by looking at the concept of expert registers from an international point of view. Can governance of expertise linked to a European expert register be an option to further the public interest of truth-finding in criminal procedures all over Europe?

2 Expert witnesses in the Netherlands

⁸ B.F. Keulen, H.K. Elzinga, N.J.M. Kwakman, J.A. Nijboer, *Het deskundigenregister in strafzaken*, BJu, Den Haag 2010.

⁹ Leeuw, F. L., *Reconstructing Program Theories: Methods Available and Problems to be Solved*. In: *American Journal of Evaluation* 2003; 24/1, p. 5-20; Pawson, Ray and Nick Tilley, *Realistic Evaluation*, London: Sage, 1997.

In the Dutch Code of Criminal Procedure, the starting point of the legal framework relating to experts in criminal cases was the framework for experts in preliminary judicial investigations. That framework was preserved in slightly altered form in 2010. But the examining judge now also has the option of initiating research by experts outside the ambit of preliminary judicial investigations. The Dutch Code of Criminal Procedure permits the examining judge to appoint one or more experts at the request of the suspect or on demand of the public prosecutor.¹⁰ These don't have to be registered experts.

The public prosecutor, however, may only appoint an expert who is listed in the register of experts.¹¹ The suspect can ask the prosecutor for an additional examination or give directions regarding the examination to be carried out. He may call on the examining judge if the prosecutor refuses to act accordingly. The implications of this change in respect of the options that were already offered prior to 2010, however, seem to be minor.¹² Of more significance for the suspect is the new section 51j(4) of the Dutch Code of Criminal Procedure. This section offers the examining judge the opportunity of deciding prior to the trial hearing that an expert examination carried out on the instructions of the defence should be considered equivalent (in terms of state funding) to an expert examination at the behest of the public prosecutor or the judge.

Not all research that has to be conducted in preliminary investigations and that requires specific knowledge has to be executed by an appointed expert. The police has kept the possibility to conduct specialist research as forensic investigation in the context of criminal investigation. According to instructions of the Board of Procurators General, public prosecutors will make ample use of this possibility.¹³

The legal basis for the register of experts can be found in a new Title in the Code of Criminal Procedure that is devoted entirely to experts.¹⁴ The explanatory memorandum clearly explains the aims of the register of experts. By compiling a register of experts, the public prosecutor and defence counsel are given the

¹⁰ Section 176 CCP.

¹¹ Sections 150-150c CCP.

¹² Section 36a CCP.

¹³ Aanwijzing technisch onderzoek/deskundigenonderzoek (2009A018), www.om.nl.

¹⁴ Title IIIC, Book I CCP.

opportunity to appoint expert witnesses who meet generally approved standards such as educational qualifications and other certificates, or a person's listing in public registers on the basis of similar objective standards (such as the Dutch register for independent health-care practitioners).¹⁵

The explanatory memorandum sets out that the focus is on those persons who are regularly called as experts due to the nature of their work. The register should not just be a guarantee of specialist knowledge, but also indicate an expert's ability to work in a forensic context. The reliability of a registered expert is also important. The explanatory memorandum gives an indication of the scope of the register of experts. Formal registration is considered to be illogical where the nature of the requisite knowledge cannot be defined, or where there is a lack of consensus between those involved with regard to quality standards. An example that the Minister of Justice repeats several times is the expert on antiques.¹⁶

In a later stage, the Minister of Justice indicates that the register also has a function that is directly linked to the report the expert draws up. Experts must put their clients in a position in which they can assess the report on its merits. In the Minister of Justice's opinion, this can entail the obligation of the expert to state that he takes a minority view in his field of expertise. The Minister plans to set out this and other professional requirements for experts in a Code of Conduct. A new Board of Registered Experts (College gerechtelijk deskundigen) will have the task to set standards to registered experts and decide on applications to be registered.¹⁷ Another requirement in terms of professional conduct relates to the responsibility of experts for third-party research, where the expert includes results of this third-party research in his report. And in the opinion of the Minister of Justice it is also necessary to clarify the expert's areas of responsibility in relation to the organization for which he works. Such an organization itself may not be registered; the register will be made up of individual experts alone. At the same time, at an international level there are norms being drawn up for forensic laboratories that are relevant for the standards to be set.¹⁸ This implies that, in certain cases, individuals may be registered as experts solely if they are working for an accredited institute.

¹⁵ Official Parliamentary Documents 2006/07, 31 116, nr. 3, p. 9.

¹⁶ Official Parliamentary Documents 2006/07, 31 116, nr. 3, p. 9, 10, 12.

¹⁷ Official Parliamentary Documents 2006/07, 31 116, nr. 6, p. 3-4.

¹⁸ Official Parliamentary Documents 2006/07, 31 116, nr. 6, p. 4.

Rules relating to the National Register of Experts (NRGD) and registered experts can also be found in the Register of Experts in Criminal Cases Decree and in the aforementioned Code of Conduct.¹⁹ Section 12 of the Decree covers registration. The first subsection states that an application for registration will be considered only if the application relates to a field of expertise which, it is reasonable to believe, would contribute useful, objective and reliable information and which, in the opinion of the Board of Registered Experts, has developed to such a level that any findings based on it can be reviewed and substantiated on the basis of established norms. Only if the application relates to such a field of expertise, the application will be reviewed against the requirements described in Section 12(2) a - i inclusive. Section 12(2) a and b require specialist knowledge and experience within the relevant field of expertise and of the law, as well as familiarity with the position and role of an expert witness. Many of the other requirements relate to the ability of the expert to communicate with his or her client.

In addition, the expert must be able to carry out his work independently, impartially, with due care and attention, professionally and with integrity (i). The Code of Conduct also relates to these requirements. Section 13(2)f demands that an applicant promises in writing to abide by the rules of the code of conduct for as long as he is listed in the register. The code of conduct also covers situations in which the expert has to work with third parties in the context of his report. If, in drafting his report, he enlists the help of third-party experts, he must inform the client of this. Any work performed by third parties must be documented in the report including the instructions given to them.

3 Expert witnesses in other European countries

In this paragraph, we will have a look at Belgium, Germany, France and England/Wales. Despite an apparent comparability of circumstances, the public policy with regard to expert registers in these countries is quite different.

¹⁹ Besluit register deskundige in strafzaken, Stb. 2009, 330; Gedragscode NRGD (<http://deskundigenregister.nl/>).

In Belgium, the public prosecutor and the examining judge have substantial discretion as to which expert is appointed.²⁰ The suspect, however, has no substantial input during criminal investigations where it concerns a potential expert examination. Only in the preliminary judicial investigation will the suspect and the victim (as a civil party) have the right to ask the investigating judge to appoint and instruct an expert.²¹ There are no legal standards relating to court-appointed experts in Belgium. The sole provision that allowed courts to draft lists of experts was recently abolished.²² Now there are only unofficial lists. Moreover, some authors state that experts appointed by the judge or public prosecutor are paid a pittance.²³ That could present a risk in situations in which wealthy suspects use highly-qualified expert witnesses. The present situation has been criticized by many authors.²⁴ A change of legislation, however, does not seem to be within reach.²⁵

In Germany, the law states that the court in principle has to choose an expert from the *öffentlich bestellte Sachverständigen*; experts accredited by a public-law body at state level, the *Kammern*. The *Kammern* maintain a register of such experts, whom they have appointed, so that finding a suitable (accredited) expert in a specific area need not be problematic for the court. The court may however, if circumstances dictate, depart from the principle that it has to choose from the pool of accredited experts registered with the *Kammern*.²⁶ In practice that happens very frequently. The public prosecutor may also retain experts in the preliminary judicial investigation. At the trial hearing, the defendant may request that an expert witness be allowed to furnish evidence. Such a request cannot be dismissed if the expert witness that the defendant

²⁰ Sections 43, 44 CCP. See on the expert witness in Belgium for instance F. Hutsebaut, *Het deskundigenonderzoek in strafzaken en het probleem van de tegenspraak naar Belgisch recht*, in: F. Hutsebaut en J.M. Reijntjes, *Deskundigen en tegenspraak in het Belgische en Nederlandse strafrecht (preadviezen voor de Nederlands-Vlaamse Vereniging voor Strafrecht van 12 oktober 2007 in Gent)*, Nijmegen: WLP 2007, p. 3-90.

²¹ Section 61quinquies CCP.

²² The former section 911 *Gerechtelijk Wetboek* (Code of Civil Procedure)..

²³ C. Dillen, *De psychiaters-deskundigen in strafzaken: de apen van justitie?*, in: W. Bruggeman and others. (eds.), *Van pionier naar onmisbaar. Over 30 jaar Panopticon*, Antwerpen/Apeldoorn: Maklu 2009, p. 202-207.

²⁴ See, f.i., W. van de Voorde, I. Goethals and M. Nieuwdorp (eds.), *Multidisciplinair forensisch onderzoek – juridische en wetenschappelijke aspecten*, Brussel: Politeia, 2003.

²⁵ Although the Grote Franchimont (a proposal for a major reform of Belgian criminal procedure) does contain provisions regarding registrations of experts, see Hutsebaut p. 84-86.

²⁶ Section 73 StPO (*Strafprozeßordnung*; Code of Criminal Procedure); see Löwe-Rosenberg, *Die Strafprozeßordnung und das Gerichtsverfassungsgesetz. Großkommentar*, Berlin: De Gruyter Recht, 25. Auflage, 2004, p. 38.

wishes to call is evidently more knowledgeable than the expert retained by the court.²⁷ The defendant may also challenge an expert on a number of grounds defined in law.²⁸

Anyone who believes himself to be an expert in a given field may have his ability tested. Before an expert can be accredited by a *Kammer*, he must go through a selection procedure. This procedure primarily covers his personal and professional ability to draft reports and tests whether the candidate has an above-average level of expertise.²⁹ Accreditation is typically for five years. Accredited experts are subject to regular screening by the *Kammer* for which they are registered. As long as they meet the criteria, their accreditation can be extended. The individual *Kammern* have detailed the criteria (i.e. special expertise and personal suitability) in their own Expert Regulation (*Sachverständigenordnung*). The most frequently applied criteria are: an above-average level of expertise in a specific field, the skills to draw up an expert report, and the requirements of impartiality and independence.

Not all expertise, however, is to be found among accredited experts; the German Federal Criminal Office (*Bundeskriminalamt*) and the various state criminal offices have a high level of expertise in specific fields, such as DNA analysis.

In Germany expert registrations are not linked to criminal procedure. Authorities that play a part in criminal proceedings do not play a role in the registration of experts. That is different in France. In France, rules regarding experts are enshrined in legislation regarding the preliminary judicial investigation.

The investigating judge is the key figure in the preliminary judicial investigation.³⁰ It is up to him to determine whether the appointment of an expert is required. The experts carry out their examination under the examining judge's aegis.³¹ Experts require the examining judge's permission for specific investigative acts. The judge also determines when the expert examination is closed. Adversarial argument in this phase is guaranteed. The parties have a ten-day period to supplement or amend the questions drafted by the examining judge. And they may (save in exceptional conditions such as expedited proceedings) demand that another expert be appointed in addition to the expert already appointed. During the investigation parties may exercise

²⁷ Section 244 StPO.

²⁸ Section 74 StPO. See Kleinknecht/Meyer-Goßner, *Strafprozeßordnung*, 43. Auflage, München: Verlag C.H. Beck, 1997, p. 221.

²⁹ Section 36 Gewerbeordnung.

³⁰ Sections 156-169 CPP (Code de Procédure Penale; Code of Criminal Procedure).

³¹ See B. Bouloc, *Procédure pénale*, Paris: Dalloz, 2008, p. 725.

some control on the course of events through the examining judge.³² Once the expert has presented his report, the examining judge must convene the parties and their counsel to advise them of the conclusions. The examining judge may initially ask the expert to draft a preliminary report, giving the parties the opportunity of responding to the preliminary report. Where necessary, the expert can be called to explain aspects of the report in greater detail. Another option is examination of the draft report by a party's expert witness. The expert can then draft the final report. Challenging the expert reports is thus largely a part of the preliminary judicial investigations rather than of the trial itself. This prevents time being wasted with discussion of the subject matter, most of which would be beyond the average lay member of the Cour d'Assises.

There is a register of experts held at the Court of Cassation; in addition, each Court of Appeal has a register of experts.³³ An expert may, in principle, be registered with the Court for a probationary period of two years. After this period, each expert is assessed on the basis of experience and knowledge of legal matters by the General Assembly of Magistrates. The expert is then formally registered for a term of five years on the basis of a complete application form and the substantiated opinion of a panel of seventeen judges and experts. For formal inclusion in the register of the Court of Cassation, experts must have been registered with a Court of Appeal for an unbroken period of at least three years. Inclusion in the register of the Court of Cassation is for a term of seven years. Certain standards have to be met by registered experts; these standards focus primarily on ability, independence, impartiality and mentality. For experts, registration is often essential: in principle only registered experts can be appointed by the courts. Only in very specific cases is there a possibility of a non-registered expert being appointed.³⁴

Expert witnesses in criminal proceedings can in England/Wales only be those who have 'sufficient specialist knowledge or experience'.³⁵ The courts have substantial discretion to decide whether this requirement is met. The suspect is allowed access to the results of all forensic tests carried out at the behest of the prosecutor, even if those

³² See T. Moussa, *Droit de l'expertise*, Paris: Dalloz, 2009-2010, p. 265.

³³ Loi no 71-498 du 29 juin 1971 relative aux experts judiciaires; Décret no 2004-1463 du décembre 2004 relatif aux experts judiciaires.

³⁴ See Bouloc, o.c., p. 720 and Moussa, o.c., p. 239.

³⁵ See T. Hodgkinson and M. James, *Expert Evidence: Law & Practice*, London: Sweet & Maxwell 2007, p. 34-39.

results are not used to build the case against him.³⁶ All evidentiary material collected is subsequently filtered for relevance. That means that the suspect does not, in general, see the evidence in its original state.³⁷ Counsel for the defence may appoint his own expert witness. If counsel for the defence wishes to appoint an expert witness with state funds, he must submit a request to a special committee (the Legal Aid Authority).

Under common law, expert witness reports are subject to a number of general criteria that relate first and foremost to independence and report structure.³⁸ Furthermore, the Home Secretary appointed an independent Forensic Science Regulator in 2008, whose task is to advise the government and the criminal justice system on standards.³⁹ They may be imposed on the provider (research institutes etc.) or the practitioner (the expert), and may also concern the method. The regulator is, in turn, advised by the Forensic Science Advisory Council (FSAC). Membership of the FSAC is drawn from a wide range of relevant associations and provides the regulator with a wealth of experience.

Until recently there was also the Council for the Registration of Forensic Practitioners.⁴⁰ But the Council and the register ceased to exist in 2009 as government funding ended and the Council was unable to pay its way. The standard for registration by the Council was 'safe, competent practice'. There was also a strict code of conduct. Registration was initially for a term of four years. Over time, the register listed over 1250 experts and covered an ever-growing range of disciplines.

4 Aims and expectations of the expert register

As part of the ex-ante evaluation of the register of expert witnesses, we interviewed six key figures from the criminal justice system in the Netherlands, the public prosecutor's office, the legal profession, forensic science (expertise on DNA), forensic psychology and the team behind the register.⁴¹ We spoke with these key

³⁶ See Hodgkinson & James, o.c., p. 133.

³⁷ See Hodgkinson & James, o.c., p. 126.

³⁸ See Hodgkinson & James, o.c., p. 186-187.

³⁹ <http://police.homeoffice.gov.uk/operational-policing/forensic-science-regulator/>.

⁴⁰ See for information CRFP's submission to the Forensic Science Regulator's Review of the optimal national approach to the registration of forensic practitioner's (to be found on <http://www.homeoffice.gov.uk/publications/>).

⁴¹ By interviewing these key figures, our intention was not so much to get a representative view of opinions, but rather to get a good representation of relevant issues.

respondents about their opinions and expectations relating to the register of expert witnesses, the normative and empirical basis for those opinions and expectations, and the way in which and under what set of circumstances the register of expert witnesses could make a contribution to the aims of the legislator.⁴²

A differentiation was made between aims relating to the register of expert witnesses into: *operational aims*, *product aims* and *system aims*. Operational aims concentrate on what is required for the register to work properly. For instance, whether the population of the register fulfils both quantitative and qualitative standards. Product aims are the aims set once the register is up and running; for instance the ‘access’ function of the register. After all the register aims to simplify the choice of a good expert witness. Finally, system aims are aims pursued by the criminal justice system of which the register of expert witnesses is a part. These system aims entail encouraging the right decisions and, in a wider sense, faith in the legal system.

In the analysis, there appeared to be significant differences on many issues between the views of what we will call for the sake of convenience the ‘lawyers’ and the ‘experts’. By lawyers we mean respondents with a legal professional background, who generally will act as clients of the register. By experts we mean respondents with a scientific background, who act as suppliers of specific expertise to the clients. Therefore, in the following we will present these diverging opinions under the labels of lawyers and experts.

4.1 Operational aims

The central operational aim of the register is merely to construct a register of accredited expert witnesses. As mentioned above operational aims concentrate on what is required for the register to work properly. This involves a quantitative and a qualitative dimension. The legislator is looking to achieve the qualitative operational aim in the first instance by restricting applications to those expert witnesses who relate to a ‘clearly-defined area of expertise’. The most important consideration in this regard appears to be that the standard of an expert witness can be guaranteed only if an area of expertise is so clearly defined that the applicant’s expertise can be

⁴² The interviews were held during the months December 2009 and January 2010.

ascertained objectively. That seems to be a consideration endorsed by most interviewees.

All respondents mentioned 'separating the wheat from the chaff' as a primary goal. But when discussing various fields of expertise, it appeared that the respondents found it difficult to define standards in general terms. Not surprising, the expectation of the respondents is that the register of expert witnesses will not specify substantially different requirements from those already in place for the occupational group concerned. Although they find it difficult to define this more closely, among colleagues it is usually known who meets quality standards, as appears from relevant experience and/or scientific publications. Sufficient knowledge of statistical inference techniques is often mentioned as an essential part of the vocational skills. Various interviewees believed that a precise demarcation of the field of expertise could contribute to maintaining standards in the field; it would give an understanding of the sort of questions an expert witness could answer on the basis of his expertise.

All interviewees stressed the importance of adequate forensic expertise and experience. On the side of the lawyers, expectations were that registered expert witnesses would have better knowledge of forensics than expert witnesses not appearing in the register. These respondents believed that forensic knowledge was of primary importance in the context of valuing and assessing the findings, and the way in which the expert witness structures his claims made in his report. On the side of the experts it is the specialist knowledge of forensics that is stressed; the most important factor is that the expert witness can deliver a lucid report to the client. Also, in this respect, sufficient forensic expertise and experience is thought to be of great importance by all respondents. For instance, an expert has to be aware of the fact that reporting to the court is different from participating in scientific debate. Regarding forensic behavioural reports, it is stated from both the side of experts as of the side of lawyers, conclusions should have a certain 'firmness'. In a forensic context, it usually is not possible to make a provisional diagnosis. To acquire sufficient forensic knowledge, it is necessary that experts report on a more than occasional basis to criminal courts.

The second operational aim is quantitative. Sufficient expert witnesses of the required calibre have to register. That is to say that there is a sufficient number of registered experts to allow in specific cases a professional discussion. At the same time, in

general, there should be enough capacity to satisfy the demand for forensic expertise. The Minister of Justice assumed that registration would be appealing to expert witnesses because that would give them the status of an accredited expert witness. This might be wishful thinking. The interviews reveal that willingness to register depends to a significant extent on two factors. The first of these is the involvement of major forensic research institutions. These institutions are expected to encourage registration because they consider it a 'hallmark'. The second factor concerns the judiciary. The register of expert witnesses can only function properly if the judiciary uses the registered expert witnesses frequently enough. In that context, it may be relevant to note that the law does not entail a strict obligation to make use of the services of the registered expert witnesses, although it does entail a duty to explain why another expert is appointed. Some respondents mention that renowned experts probably will not make the effort to register themselves because they are not dependent on it for a living. It is also mentioned that university experts will not register because they are called only infrequently. It is expected that most willing to register will be those who already deploy their expertise in the criminal justice system.

Possible problems with capacity worried some interviewees. The number of expert witnesses to be registered depends upon the area of expertise. Several respondents expected problems with registration particularly in the area of behavioural experts. Each year some 8000 reports are drawn up, a process requiring hundreds of behavioural expert witnesses (one estimate put the figure at 700). It was claimed that there was a shortage already, especially in some areas like youth psychiatry. Assessment capacity may be another bottleneck in the field of forensic behavioural expert witnesses. No significant problems were expected in relation to finding sufficient experts in the fields of DNA research and Handwriting. However, it is also expected that for assessment in these fields foreign experts will have to be called in.

Generally, the view that the register of expert witnesses should be limited to fields of expertise that are sufficiently well-established and precisely enough demarcated was widely endorsed. The scientific robustness of the field and enough 'critical mass' to be regarded as an independent scientific discipline were felt to be necessary conditions. In relation to the step-by-step introduction of the register, the overriding view, at least at the moment when the interviews were carried out, was that

uptake would be strong among DNA experts and Handwriting experts. In the view of the respondents, introducing the possibility to register will be going slower with regard to behavioural experts, probably caused by difficulties in defining sub-specializations under the umbrella term 'behavioural experts'. Potential future fields of expertise ripe for inclusion in the register could include specialists in the fields of pathology and forensic dentistry and, other than those, toxicologists, ballistics specialists and fingerprint experts.

4.2 Product aims

The primary product aim of the register of expert witnesses is access to the knowledge of expert witnesses. Respondents believed that this access function was particularly important. For the clients, the register will be successful if it makes it easier than in the past to obtain the services of an expert witness. Several respondents stated that this register actually does little to promote the product aim of improved access to specialist knowledge.

One reason for this is that especially those expert witnesses who are hardest to find, probably will not register because they are not very frequently called in criminal cases, and therefore will not take the effort to register. The question of what exactly is the expertise of an expert will be particularly relevant in extraordinary cases, for instance when the outcome of an investigation is surprising, when it concerns special crimes like infanticide or when specific expertise, such as animal DNA, is needed. Another reason brought forward was that assessment for registration will concentrate on rather general skills and on experts that are called frequently in ordinary cases.

Therefore the expectation is that the register will function best in those cases that already run rather smoothly and will not remedy the sort of cases that appeared to be problematic in the past. Experts remark that not every registered expert witness always is the right person to do the job. The register should make clear what exactly are the special qualities of an expert witness. This would add an extra value and could contribute to finding the right expert witness. Some respondents proposed that the register could serve as some sort of broker or agent of expertise, but the board of the register has made clear that the register is not intended to do so.

In terms of the product aims of the register, lawyers noted that the register would have to prove its worth in making it easier to find an expert witness in a

particular field than in the past. Finding an expert witness is already easy in run-of-the-mill cases; the real measure of success will be if the same can be said in more exceptional cases. Some respondents held high expectations of this ‘access function’ of the register. But it was also noticed that plenty of energy, time and resources had been pumped into the creation of a register of expert witnesses that was not expected to have a substantial effect on ease of use in finding the right expert witness.

The second product aim of the register of expert witnesses is to guarantee the quality of research and reporting. To that end, applicants must meet certain criteria in respect of knowledge, skills and experience. The interviews show that respondents expect it will be difficult to outline the quality requirements regarding the expert’s level of expertise in his field. The question is whether registration will have any impact on the quality of specialist knowledge. The criteria associated with registration suggest that law-makers expect more from criteria pertaining to communication between experts and lawyers. The interviews have revealed that the respondents also set great store on clear communication between expert witnesses and lawyers. Communication seems to be a source of concern in particular with regard to expert witnesses in landmark criminal cases who are retained only occasionally. These expert witnesses are not likely to appear in the register. What is more, communication is a two-way street. It is also necessary that lawyers improve their ability to communicate with expert witnesses.

4.3 System aims

The first system aim of the register is the rightness of decisions arrived at in the criminal justice system. The pursuit of rightness of decisions is especially important in the most serious criminal cases, which may have major implications on the life of convicts and/or victims. As mentioned before, it is expected that much information that can only be produced with the use of very specific expertise probably will not be provided by registered expert witnesses. Against this background it might not be realistic to expect a major contribution of the register in these serious cases.

Respondents listed the importance of improvements in the process of establishing the truth in the widest sense, i.e. not only where the question of proof is concerned. The register of expert witnesses could have a wider effect in this regard,

especially due to the interaction between required standards and qualifications. The thought is that anticipation on required standards, for instance during vocational training and education, will result in better qualified expert witnesses.

The second system aim of the register is faith in the criminal justice system. It is not only important that decisions are right; it is also important that the public at large has faith that justice has indeed been done. Does the register of expert witnesses make a contribution to increasing faith in the justice system? The aforementioned letter from the president of the KNAW shows that there were grave reservations against the register, but in the course of time these reservations may diminish.

4.4 Assumptions about how to bring about the desired results

Respondents were also asked for their input on ideas and expectations regarding the way in which the aims of the register could be achieved. Most respondents cited bridging the gap in communication between the legal profession and expert witnesses as mechanism for improvement. Better communication between legal professionals and expert witnesses is thought to play a central role as a means to achieve more distant systems aims, such as soundness of decisions and public faith in the legal system. Bridging this gap is viewed as one of the more significant aims of the register of expert witnesses. And, according to the respondents, improving communication between expert witnesses and the legal profession could be given a boost by imposing requirements regarding the level of knowledge of experts within a particular branch of forensic science. Quality assurance as provided by the register could thus help improve communication between lawyers and experts.

Experts state that the public prosecutor and the defence lawyer should formulate hypotheses and on the basis of these hypotheses should ask specific and precise (research-)questions. Lawyers express the hope that the public prosecutor, the examining judge and the defence will discuss the instruction for the expert witness, as well as possible hypotheses, at an early stage. In reality however, this seldom happens. In most cases there is no well defined research-problem, often the assignment is formulated in a very general or standard form, and the expert witness has to fill in the details himself. One of the interviewed experts, however, suggested that discussions surrounding the creation of the register of expert witnesses had already focused attention on closer cooperation on the instruction's wording.

Both lawyers and experts argued that improved communication also requires that legal professionals should become better informed in forensic sciences and above all in epistemology. According to experts, judges should be able to transfer the results of research into their own considerations and consequently incorporate this in the reasoning of the verdict. To this end, judges should enlarge their forensic expertise, and should know more about the possibilities and the risks of specific research methods, and about statistical inference. According to experts, every research involves a great many decisions, implicit or explicit, that have to be accounted for. This can be a very complicated task, especially when (the reports of) several experts from different disciplines are involved in one case.

Respondents agree that systems aims, such as the rightness of decisions and faith in the criminal justice system also depend on two other mechanisms: adversarial argument and judges taking their own responsibility. Adversarial argument, not only between lawyers, but also between experts is seen as a highly useful mechanism for finding the truth. This adversarial argument may concern technical aspects of a report or procedural aspects. Respondents find it important that expert witnesses have an obligation to explain the method used and to explain matters that may be controversial within their profession. Counter arguments should also be included in the report. This may serve an objectifying function. As the legal profession and expert witnesses usually do not share a frame of reference, relevant issues must be discussed in court. Some respondents express the hope that lively debate in court will be encouraged by more general developments which the establishment of the register of expert witnesses is part of.

A stimulus to adversarial argument should come from the parties involved in the process, especially from the defence. Respondents argued that the position of the defence is in principle strengthened by the right to contra-expertise and especially the fact that funding for this is enshrined in the new Act. After all, for the defence, representation of the client involves in most cases careful consideration of the financial aspects involved. The respondents however do not expect the number of expert witnesses appointed by the defence to rise rapidly in the near future. Defence counsel will only consider retaining expert witnesses when a report has been produced that may thwart the defence strategy.

According to respondents, the defence generally acts strategically. Some defence lawyers would indeed opt to be called in at an early stage in the case of forensic behavioural research, but on the other hand this involves certain risks because the results might not be favourable for the client. From the perspective of serving the clients interests best they prefer then to react on certain unfavourable points in an experts report. This strategic attitude may also influence the choice for a specific forensic behavioural expert, because some experts are seen as more favourable for the prosecutors point of view and others having a reputation as being more friendly to defence. Also in another respect, strategic considerations of defence lawyers are relevant, in particular in the field of detention under a hospital order, where many lawyers advise their clients not to cooperate in a forensic behavioural examination.

The respondents agree that the court should take its role and responsibility on expert witnesses. It is felt, however, there might be the risk that the register of expert witnesses also could be slowing down certain developments. For instance, there already was a growing awareness that judges have a responsibility to query the expert's opinion. The coming into operation of the register brings with it the risk that judges will rely too much on the fact that a expert witness is registered. Respondents from the legal profession noted that it is the judge's role and responsibility to facilitate a debate between experts, especially where there are different opinions.

Experts made the remark that judges ask too little questions when experts are using their own professional jargon. Judges should ask experts for their credentials: What is your expertise and experience? What did you publish? In which cases have you been called? This also means that judges should have a certain expertise to assess the experts expertise. It is the judges own responsibility after all to take a decision. To this end, judges should stimulate discussion between experts in the case of dissenting opinions. If the judge gets a full account of the points of agreement and disagreement and the reasons for different points of view, he may draw his own conclusion. Experts also state that the questions the judge has to answer, for instance the question about guilt, by definition are different from the questions the expert witness has to answer. Judges should stick to their role and be extremely careful not to elicit answers from experts that hold a legal judgement.

4.5 Contextual issues

The context in which the register operates has a significant bearing on how the register works, as the interviews revealed. This context encompasses of course many aspects, of which we can only discuss a few. One the most important issues in the view of the respondents is the distinction between ordinary, run-of-the-mill cases, that require established forensic expertise and exceptional cases that call in very specific experts, cases where one could speak of “science in progress”. Obviously, it also appeared that what constitutes an exceptional case is open to question.

Relating to the subject of the expert witnesses register, inclusion in the register appears to be primarily of interest for repeat players, expert witnesses who are called relatively regularly. The register probably will not include “one shotters”, who have very specific expertise, usually about a very limited field of expertise, who may be scientifically leading experts, but who are called only incidentally. Our respondents expect that the register of expert witnesses will not provide insight in the highly specialist fields of expertise or in the question who are the leading experts in the field.

On the contrary the expert witnesses register seems to be meant for ordinary cases in which general, common questions have to be answered. At the same time, our respondents also indicate that the need for help in finding an expert witness is felt most regarding specific experts who are considered as leading in their field and who have the needed specific expertise. So, where the register will generally contain “repeat players”, the respondents feel that there is more need for information about “one shotters”. But from the side of experts is it also noted that to be useful in court, and because they generally will be used for important legal decisions, forensic reports and conclusions need to have a certain firmness, which necessarily involves an element of conservatism. Furthermore, respondents also remarked that forensic expertise and experience is an essential part of the skills of expert witnesses in criminal cases. Repeat players may have gathered this forensic expertise and experience, but “one shotters” probably not. But at the same time certain questions can only be answered adequately by the scientific top expert. So, there seems to be a discrepancy between a scientific top expert and a forensic top expert. That poses a problem because in many cases one cannot have the best of both worlds. This

dilemma has played an important role in the discussions about miscarriages of justice and is also a central point in the aforementioned letter of the KNAW.

The finance and market situation constitutes a second important contextual issue. A number of respondents mentioned the role of market forces and the possible consequences of opening the system to these forces. On the one hand, it was felt that a measure of exposure to market forces could have a positive impact; it must be possible for experts and laboratories outside the prevailing pool to 'get a foot in the door'. On the other hand, there could be a free-market backlash as in England and Wales, where commercial forces had led to clients restricting the thoroughness of research to keep down costs. Market forces may also have a negative impact on expert witnesses' willingness to register as the 'best' experts do not feel the need to register because they will be called anyhow.

A third significant contextual element mentioned was whether the registration of individual expert witnesses was compatible with the reality of those expert witnesses working for a larger organisation. In the set up of the expert witnesses register, for pragmatic reasons, it was thought best to connect with the practice of existing organisations. But as only individual expert witnesses can register, it is unclear whether expert witnesses who work as part of a team, or who are more concerned with reporting rather than investigating, fit well into the register. For instance, expert witnesses in the field of DNA-research often work as part of a team and, to a certain extent, that also holds for behavioural expert witnesses. Experts firmly believe that this manner of working has specific benefits. Critical peer review and a multidisciplinary approach may filter out subjective opinions. In larger organisations there is also a practice of legal professionals screening reports before they are brought out. This screening especially considers the question whether scientific reports are comprehensible for lawyers. As mentioned before under the heading of communication, lawyers and expert witnesses may have different frames of reference, with different meanings for the same terms, for instance the concept of 'reliability'.

In technically advanced research a special infrastructure and accredited laboratories, may be needed. In other respects a certain critical mass may improve quality of research, because several experts from different disciplines may approach the same question from different angles. Experts do believe that this may lead to a better common solution and to a quality boost. Individual expert witnesses could in

principle also outsource certain research components, but as yet it is not clear whether and how this can be done in practice.

5. Discussion

Our research revealed a number of operational, product and system aims which more or less resemble key factors for good governance like efficiency and effectiveness, organisational capacity, reliability, predictability and the rule of law, participation, accountability, transparency and open information systems.

The central operational aim of an expert register is simply to construct a register of accredited experts. In the Netherlands, this operational aim is to be achieved by a process in which two steps can be distinguished. First, an area of expertise is defined. Only in these areas experts can apply for registration. The most important consideration in this regard appears to be that the standard of an expert can be guaranteed only if an area of expertise is so clearly defined that the applicant's expertise can be ascertained objectively. Applications are then reviewed against a number of terms. These terms cover knowledge and experience within the area of expertise to which the application relates, as well as integrity and professionalism. The study of systems in other countries revealed that the phase of defining individual areas of expertise seems to be less important in these countries. The application procedure connected with registration in these countries monitors more or less the same aspects to a greater or lesser extent: knowledge and experience, integrity and professionalism.⁴³

The Dutch legislator has vested the responsibility for both delineating the field of expertise and testing the applicants in the Board of Registered Experts (*College gerechtelijk deskundigen*). In other countries, this type of quality control is not always devolved to a separate institute. In Germany, this authority is vested, in practice, in the *Kammern*; in France, it lies with the courts. England and Wales stood alone in having a special council that monitored registration. The fact that in the Netherlands a separate board was set up may be traced to two factors. The first is that registration of experts in the Netherlands is not exclusively or primarily intended for the courts. The second factor is the method whereby the fields of expertise are first delineated in

⁴³ Although there are differences. In the Netherlands, for instance, only natural persons can be registered, in France also institutes.

consultation with experts. This task is better suited to an independent board; the method the Netherlands have chosen to construct a register appears diligent. But this method is also costly.

The second operational aim is that sufficient experts of the required calibre register. The Dutch Minister of Justice thinks that registration will be appealing to experts because it will give them the status of accredited expert. That, however, may mean jumping to conclusions. The situation in Belgium suggests that the willingness of experts of the right calibre to operate as a (registered) expert seems to be determined to a large extent by consideration of the related costs and benefits. In that context, it may be relevant to note that Dutch law does not entail an obligation to use the services of the registered experts. It only entails a duty to explain why an expert that is not registered is appointed. In Germany and France, the law contains such an obligation (albeit qualified) and in France registration indeed is important for being appointed as an expert.⁴⁴ The United Kingdom, where the register of experts is no longer in use, did not have such an obligation. The overview of the five countries involved therefore leads one to assume that a qualified obligation to use the services of registered experts promotes the chance of success of a register of experts.

The primary product aim of the register of experts is access to the knowledge of experts. There may be some tension between the operational aims and this product aim of the register. The central operational aim of the register is that sufficient experts of the required calibre register. That aim can be easily fulfilled for DNA research, for instance. But this knowledge is already easily accessible. Registration of these experts therefore does little to promote improved access to specialist knowledge. Of course the product aim is more important than the operational aim. Registration is useful in so far as access to knowledge of experts is improved.

The second product aim of the register of experts is to guarantee the quality of the product. To that end, applicants must meet certain criteria in respect of knowledge and experience. And registered experts have to subscribe to a Code of conduct. The question is whether registration will have any impact on the quality of specialist knowledge. The criteria associated with registration suggest that law-makers in the Netherlands expect more from criteria pertaining to communication between experts

⁴⁴ In Germany this obligation concerns experts registered by the Kammern; not (experts working at) the BKA and LKA.

and lawyers. However, communication seems to be a source of concern in particular with regard to experts who are retained only occasionally in landmark criminal cases. But these experts are not called upon in criminal cases very often. Therefore they are not likely to appear in the register. What is more, communication is a two-way street. Against this background, one wonders whether it is wise to put so much emphasis on a register of experts as the instrument to improve reporting by experts. As we have seen, England and Wales have in recent years chosen other methods to achieve this aim.

The first system aim of the register is the accuracy of decisions arrived at in the criminal justice system. Against the background of this system aim it stands to reason that, in the Netherlands, the Board of Registered Experts will consider carefully the situations in which registration can contribute towards making the right decisions. And another consideration can play a role. A miscarriage of justice in a murder case is not the same as a conviction of the wrong person for driving through a red light. Accordingly, the pursuit of accuracy is not of equal importance for all decisions. Therefore the register's contribution to the aims of the criminal justice system increases the more the focus shifts to experts who can help achieving at the right decision in the most serious criminal cases. That fact may also be important in relation to the registration of foreign experts. In light of the aims of the criminal justice system, the registration of foreign experts could, primarily, be valuable in fields of expertise that recurrently are expected to contribute to the right decision in the most serious criminal cases.

The second system aim of the register is faith in the criminal justice system. It is not only important that decisions are right; it is also important that the public at large has faith that justice has indeed been done. Can the register of experts contribute to the faith in the justice system? The experience in the Netherlands shows that this does not always have to be the case. While the Bill on experts was debated in Parliament, the president of the Royal Netherlands Academy of Arts and Sciences wrote a letter in which he expressed doubts about the expert register. Some members of the Academy apparently had grave reservations against the register, based on the idea (it seems) that the register would be too ambitious and more or less try to establish a scientific state of the art. Publicity based on such reservations can diminish confidence in the register.

6. Towards a European register of expert witnesses?

The last question that will be addressed in this article is whether governance of expertise linked to a European expert register be an option to further the public interest of truth-finding in criminal procedures all over Europe? For many fields of expertise, this question very probably has to be answered in the negative. At first glance, there seems to be no use for a European registration of, for example, psychiatrists. National requirements regarding psychiatric reports differ, there are psychiatrists in (almost) every European country, and a psychiatric report written in the national language is more easily understandable to the judges and the parties involved. In some fields of expertise the situation might be different.

This can be illustrated with the case of Lucia de Berk, the Dutch nurse who was convicted by the Court of Appeal in The Hague for several murders and attempts to murder. This conviction was heavily debated in the Netherlands. In 2008, Advocate General Knigge published a report in which he answered the question whether, in his opinion, a review procedure should be started.⁴⁵ The central question to be answered was whether baby X had indeed died of acute cardiac arrest, as the conviction for the other charges depended, in the reasoning of the Court of Appeal, on this conviction. Prof. Koren, a Canadian expert, had already given his opinion on this subject. He thought that the conviction was based on a false interpretation of medical data.

But he based his opinion on a highly incomplete set of facts, as Knigge discovered. Knigge decided to approach several outstanding experts from other countries. He was advised by the Nederlands Forensisch Instituut (NFI), the Gesellschaft für toxicologische und forensische Chemie (GTFCh), the International Association of Forensic Toxicologists (TIAFT), and the Society of Forensic Toxicologists (SOFT). Based on their recommendations he approached prof. dr. J. Tytgat (Belgium), prof. dr. R. Aderjan (Germany), prof. Ph.D. T. Rohrig (United States) and dr. V. Cirimele, registered expert in France, next to a number of Dutch experts. Some of these Dutch experts had given their opinion already at the trial hearing of the Court of Appeal in the Hague. Based on the answers supplied by all experts, Knigge finally concludes that the death of baby X was most probably not caused by cardiac arrest, but by natural causes. This case shows clearly how much

⁴⁵<http://www.rechtspraak.nl/Gerechten/HogeRaad/Over+de+Hoge+Raad/Publicaties/Rapport+naar+aanleiding+van+het+verzoek+van+het+College+van+procureurs-generaal+gedaan+op+grond+van.htm>

effort is needed to find the right experts in other countries. A European expert register, especially designed for such complex cases, could reduce these efforts to a great extent. The example also shows that there are cases in which experts from other countries could play an important role.

Does EU-law allow for such a register to be installed? One can hesitate as far as the provisions of Chapter 4 of the Treaty on the functioning of the European Union are concerned.⁴⁶ Art. 82 par. 1 states that judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83. Art. 82 par. 2 states that to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, directives can be adopted which concern the mutual admissibility of evidence (a) and under specific circumstances, directives regarding other aspects of criminal procedure (d). Mutual admissibility of evidence is not the issue when it comes to an expert register.⁴⁷ And is a European expert register an element of (national) criminal procedure, the regulation of which is necessary to facilitate mutual recognition of judgments?

A legal basis may also be found in the provisions of Chapter 5, on police cooperation. Art. 87 par 1 states that the Union shall establish police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences. For these purposes there may be measures established concerning the collection, storage, processing, analysis and exchange of relevant information (par. 2). A European expert register could be such a measure.⁴⁸

⁴⁶ Consolidated Version of the Treaty on the functioning of the European Union, OJ 30.03.2010, C 83/47; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF>.

⁴⁷ Although it would have the same background as some (proposed) instruments based on this provision: to make knowledge available in other Member States more easily accessible. See for example the Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, and the Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council of ... regarding the European Investigation Order in criminal matters, 2010/C 165/02.

⁴⁸ Compare the Council Framework Decision 2009/905/JHA of 30 November 2009 on Accreditation of forensic service providers carrying out laboratory activities, OJ 9.12.2009, L 322/14, which was based on the predecessor of Article 87: Article 30 of the Treaty on European Union.

There already is a European Network of Forensic Science Institutes.⁴⁹ Perhaps the ENFSI could be of use in setting up an easily accessible European register. One can for instance think of a register of medical experts.

How should a European expert register be constructed? That depends to a large extent on the aims such a register would have to serve. We have seen before that a product aim of an expert register can be to guarantee the quality of the product of the expert (report or statement). In the Netherlands, this quality is linked with communication between experts and lawyers; rules related to registration try to improve the level of understanding between lawyers and experts. Communication between experts and lawyers from different countries can be even more difficult. But can these difficulties be met by measures connected with registration on a European level? It would also be a possibility to leave the aspect of communication aside and focus in the context of a European expert register only on improving the access to knowledge of experts in other European countries.

The primary product aim of each register of experts is to improve access to the knowledge of experts. A European expert register can be a good means to achieve this aim. But the aim cannot be to make all knowledge in other European countries available. Registration is only worth the trouble where the profits exceed the costs.. Perhaps interviews with judges in a selection of European countries can give a good impression of which kind of knowledge a European expert register should focus on from this point of view. Organizations of experts could also play an important role. They could help to answer the question whether a specific field of expertise is sufficiently covered on the national level.

The actual construction of a European register of accredited experts on selected fields of expertise would require a careful approach. The operational aim that sufficient experts of the required calibre are registered has to be achieved. To achieve this aim, benefits have to exceed the costs. The consideration of costs and benefits to the individual expert would probably not be very easy: every European country has a different regime on (paying) experts. Can one assume that registration in a European expert register nevertheless will be appealing to experts, for instance because it will have status? Outstanding medical experts might just as well find it not very attractive

⁴⁹ See www.enfsi.eu.

to be registered at all because working as an expert detracts them from their scientific or medical work. If this would be the case, one should think of ways to encounter these difficulties.

So everything is far from clear cut. But it is worthwhile investigating the pro's and con's of a European expert register, in our view. In the case of Lucia de Berk, faith in the criminal justice system of the Netherlands was at stake. That Knigge approached some experts in other European countries, added to the trust people had in the way the case was handled and, to some extent, restored that faith. If a European expert register can make a significant contribution to that aim in all European countries, it might be worth the trouble.