

Summary

The Expert Witness in Criminal Cases Act, which became law on 1 January 2010, has brought about many changes in current criminal procedure. One of the more substantial changes concerns the creation of a national public register of expert witnesses as defined under section 51k of the Dutch Code of Criminal Procedure. This study relates directly to that register, which is referred to in common parlance as the register of expert witnesses and is officially called the Dutch Register of Expert Witnesses (*Nederlands Register Gerechtig Deskundigen*; the NRGD).

During debate on the bill in the Senate of the Dutch Parliament, the Minister of Justice announced that there would be an evaluation of the efficacy of the register. The present study, the result of which is an 'ex-ante' evaluation, ties in with that evaluation. In essence, an ex-ante evaluation prepares the way for a later process evaluation and final evaluation, in this case relating to the NRGD. The aim of the ex-ante evaluation is to clarify the aims of the NRGD. The ex-ante evaluation must also make clear how, over a number of years, insight can be gained as to whether those aims have been achieved. In an evaluation programme, it is not merely sufficient to ascertain *whether* a specific method works; researchers also want to understand *why* that is the case, what the active mechanism is. In addition, the whole context must be mapped, rather than just the mechanism itself: an active mechanism will not necessarily lead to an equally good result in all circumstances.

To properly understand the function of the NRGD, it is preferable to have a broad overview of those areas of criminal procedure (and any changes to it) that involve expert witnesses. For that reason, chapter 2 starts by portraying that wider context.

The starting point of the legal framework relating to expert witnesses in criminal cases is still the framework for expert witnesses in preliminary judicial investigation. That framework has, in 2010, been preserved in slightly altered form. But the examining judge now also has the option of initiating research by experts outside the ambit of preliminary judicial investigations. Art. 176 of the Dutch Code of Criminal Procedure permits the examining judge to appoint one or more expert witnesses at the request of the suspect or on demand of the public prosecutor. The public prosecutor may appoint an expert witness who is listed in the NRGD if this is in the interests of the investigation. The suspect is, in principle, notified of this appointment by the public prosecutor. The suspect must then be given the opportunity to ask for an additional examination or to give directions regarding the examination to be carried out, and be informed that he may call on the examining judge. The implications of this change in respect of the options already offered by the so-called *mini-instructie* (mini preliminary inquiry), however, seem to be minor. Of more significance for the suspect is the new section 51j(4) of the Dutch Code of Criminal Procedure, which offers the examining judge the opportunity of deciding prior to the hearing that an expert examination carried out on the instructions of the defence team should be considered equivalent (in terms of state funding) to an expert examination at the behest of the public prosecutor or the judge. Authority for appointing registered expert witnesses may in some cases fall to the assistant public prosecutor. The Minister of Justice however has chosen not to do so but to leave the matter to the Board of Procurators General. The relevant instructions have since been drafted.

The legal framework relating to expert witnesses has also changed in that a large number of provisions is now included in title IIIC of the Dutch Code of Criminal Procedure (The Expert Witness). A battery of rules and regulations have been transferred to this new part of the code, and a number of those have been amended. One example of this is that since 1 January 2010, expert witnesses are required to provide evidence fully, faithfully and to the best of their ability. The expert witness must swear that he shall make statements truthfully and in good conscience. As the oath now states that the expert witness must declare truthfully, the oath as a witness is considered superfluous by the legislator. A registered

expert witness no longer automatically has to take the oath, as was the case with the former permanent court-appointed expert witnesses (*vaste gerechtelijke deskundige*).

The legal basis for the NRGD can be found in the new Title IIIC. Chapter 3 concentrates on how this legal basis came into being, and details the thoughts of the Minister of Justice and Members of Parliament regarding the NRGD.

The legal basis for the NRGD can be deduced from the opinion of the Council of State. It had advised not just mentioning a register of expert witnesses in the explanatory memorandum, but specifying in the bill that there is a national register and what an expert witness has to do to be included in this register or to be removed from it. The bill initially also entailed the concept of the permanent court-appointed expert witness. That was subsequently removed from a memorandum of amendment; the test whether persons applying to be registered/permanent experts meet quality standards could better be left entirely in the province of the Board of Registered Expert Witnesses (*College gerechtelijk deskundigen*), in the opinion of the Minister of Justice.

The explanatory memorandum clearly explains the aims of the NRGD. By compiling a register of expert witnesses, the public prosecutor and defence counsel are given the opportunity to appoint expert witnesses who meet generally approved standards. Such a guarantee of standards covers qualifications that can be objectively assessed, 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 BIG register for independent health-care practitioners). The explanatory memorandum makes clear that the focus is on those persons who are regularly called as an expert witness due to the nature of their work. The register should not just be a guarantee of specialist knowledge, but also a guarantee of an expert witness's ability to work in a forensic context. In relation to permanent court-appointed expert witnesses, the explanatory memorandum mentioned that the reliability of the expert witness was also important. Furthermore, the explanatory memorandum gives an indication of the scope of the NRGD. Formal registration would be illogical where the nature of the requisite knowledge could not be defined, or where there was a lack of consensus between those involved with regard to quality standards.

In the memorandum accompanying the report, the 'seal of quality' offered by the register in a general sense is defined in greater detail. It is made clear that the register is assumed to have a function more directly linked to the report the expert draws up. Expert witnesses 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 could also entail the expert to express that he holds a minority opinion. The Minister wants to set out this and other professional requirements demanded of expert witnesses in a code of conduct. Another requirement in terms of professional behaviour relates to the responsibility of expert witnesses for third-party research, where he includes results of the same in his report. In this context, the Minister also feels it necessary to clarify the expert witness's areas of responsibility in relation to the organization for which he works. It is also made clear that such an organization itself may not be registered; the register will be made up of individual expert witnesses alone. At the same time, the Minister of Justice points out (in relation to the standards to be set) that at an international level there are norms being drawn up for forensic laboratories. This implies that, in certain cases, individuals may be registered as expert witnesses solely if and when they are working for an accredited institute.

During the debate on the bill, it became evident that the Dutch House of Representatives was broadly supportive of the bill and the NRGD. 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 NRGD. There were also concerns about the compilation of the register, about the knowledge of criminal procedure among registered expert witnesses and about the possibility of using foreign expert witnesses.

In the Senate 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 blinkered scientific knowledge. The KNAW expected that such a register would not constitute a faithful representation of the (by definition) dynamic character of the scientific world. The letter argued that the names of scientific experts should completely be kept out of the NRGD. The Minister of Justice responded by reiterating his explanation of the system. Attention was also focused on the fact that registered expert witnesses would only take the oath when being questioned by a judge, and the relationship between the NRGD and other registers.

Legislation relating to the NRGD and registered expert witnesses can, to a greater or lesser extent, be found in the Register of Expert Witnesses in Criminal Cases Decree (*Besluit register deskundige in strafzaken*) and the code of conduct (*gedragscode*). In addition, as intimated above, instructions from the Board of Procurators General have an important role to play in how the register works in future. This 'lower' legislation is discussed in chapter 4.

In the first sections, the NRGD in Criminal Cases Decree contains provisions on the composition and duties of the Board of Registered Expert Witnesses and the way in which it works. 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 Board's opinion, has developed to a level such that any findings based on it can be reviewed and substantiated on the basis of established norms. 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 concern specialist knowledge and experience within the relevant field of expertise and of the law, and familiarity with the position and role of an expert witness. Many of the requirements relate to the ability of the expert witness to communicate with his client. For instance, he must be able to furnish the client with an understanding as to whether and if so to what extent the question is clearly formulated and open to question (c). He must also be able to convey his thoughts on the issue at hand both in writing and orally and also convey any other relevant aspect of his expertise using persuasive argumentation in a way which can be tested and understood by the client (g).

In addition, the expert witness 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 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 witness has to work with third parties in the context of his report. Then, too, he must come to an assessment based on his expertise, supply information and report on the findings independently. 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.

The instructions of the Board of Procurators General (*Aanwijzing technisch onderzoek/deskundigenonderzoek*) make clear that the public prosecutor's office has made ample use of the opportunity of positioning specialist research as forensic investigation to be set up in the context of criminal investigation conducted by the police (and not as research to be conducted by expert witnesses).

In the context of this study, six key figures from the criminal justice system, the public prosecutor's office, the legal profession, forensic science (expertise on DNA), forensic behavioural sciences and the team behind the register have been interviewed on the basis of various themes using open questions and follow-up questions. We spoke with them about their opinions and expectations relating to the NRGD, the normative and empirical basis for those opinions and expectations, and the way in which and under what set of circumstances

the NRGD could make a contribution to the aims of the register. Chapter 5 covers this part of the study.

In the analysis of the interviews, a differentiation was made between the various sorts of aims relating to the NRGD: *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: what is the aim of the register? One example is the 'access' function of the register: the register aims to simplify the choice of a good expert witness. Finally, system aims are aims pursued by the criminal justice system that the NRGD is part of. These aims entail encouraging accurate decisions and, in a wider sense, faith in the legal system.

As far as the *operational* aims are concerned, all respondents mentioned 'separating the wheat from the chaff' as an aim. But when discussing various fields of expertise, it appeared that the respondents found it difficult to define standards in general terms. The expectation is that the NRGD will not specify substantially different requirements than those already in place for the occupational group concerned. 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. From the perspective of the expert witnesses, it was also pointed out that a multidisciplinary approach would have the effect of pushing up standards.

All interviewees stressed the importance of adequate forensic expertise and experience. On the side of the clients, 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 expert witness 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.

The number of expert witnesses to be registered was filtered according to area of expertise. Several respondents expected to see problems arising particularly in the area of behavioural experts. Each year some 8000 reports are drawn up, a process requiring hundreds of behavioural experts (one estimate put the figure at 700). It was claimed that there was a shortage already. No significant problems were expected in relation to finding sufficient experts in the fields of DNA research and graphology. Possible problems with capacity worried some interviewees. This, it was thought, might detract from client satisfaction with the register and thus adversely affect perceptions of it.

It is expected that most willing to register will be those who already deploy their expertise in the criminal justice system. The opinions of the respondents on willingness to register are divided. A positive attitude on the part of the organization for which the expert witness works was seen as contributing towards registration. Another salient factor was whether the judge would solely want to make use of registered expert witnesses.

As a general rule, the fact that the NRGD would be limited to fields of expertise that were 'sufficiently well-established' was widely endorsed. In relation to the step-by-step introduction of the register, the overriding view when the interviews were carried out was that uptake would be strong among graphologists and DNA experts. Introducing the possibility to register is going slower with regard to behavioural experts. There was a view that this might be caused by difficulties in defining sub-specializations within the umbrella term 'behavioural specialists'. Potential future groups 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 (dactyloscopists).

In terms of the *product aims* of the register, clients 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 expected

the 'access function' of the register to bear fruit. 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. The criterion for success, it was claimed, would be the frequency with which parties would use the register. Various interviewees specified ease of use as a significant aim of the NRGD.

Closing the mental gap between legal practitioners and expert witnesses (including behavioural specialists) was specified as a criminal justice *system aim* of the register. Respondents also listed the importance of improvements in the process of establishing the truth in the widest sense (i.e. not only where the question of evidence is concerned). The NRGD could have a ripple effect in this regard, especially due to the interaction between required standards and qualifications.

The *context* in which the register operates has a significant bearing on how the register works, as the interviews revealed. An important element of that context for all respondents was the difference between run-of-the-mill cases and exceptional cases, although what constitutes an exceptional case is open to question, it appeared. Inclusion in the register appears to be primarily of interest to experts who are called relatively regularly. The budget for expert witnesses is also an important contextual issue. A number of respondents mentioned 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 the UK, where commercial forces had led to clients restricting the scope of their terms of reference to keep down costs. The instructions of the Board of Procurators General are the third significant contextual element. Several respondents feel that it has been made too easy for the police to disregard standards regarding expert evidence.

Another 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 organization. It is unclear, according to certain respondents, whether expert witnesses who work as part of a team, or who are more concerned with reporting rather than investigating, fit in the register. Expert witnesses in the field of DNA research often work as part of a team and that is also true, to a certain extent, of behavioural specialists. Respondents with a specialist background believed that this manner of working has specific benefits. Critical peer review and a multidisciplinary approach may filter out subjective opinions.

Respondents were also asked for their input on ideas and expectations regarding the way in which the register could be used to help achieve system aims. For instance, what are the *active mechanisms*? In the majority of the interviews, respondents cited the gap in communications between the legal profession and expert witnesses. Bridging this gap is viewed as one of the more significant aims of the NRGD. And 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. However, both respondents with expertise in the legal field and experts from other fields argued that improved communication also requires that the legal profession should become better versed in forensic science. Respondents with a legal background hope that the public prosecutor, the examining judge and the defence will discuss the instruction for the expert witness as well as possible hypotheses. One respondent from the field of expert witnesses suggested that the discussion surrounding the creation of the NRGD had already focused attention on closer cooperation on the instruction's wording.

Adversarial argument between experts and lawyers is a useful mechanism for establishing the truth. This adversarial argument can 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. As the legal profession and expert witnesses do not share a frame of reference, relevant issues must be discussed in

court. Some respondents hope that lively debate in court will be encouraged. Respondents argued that the position of the defence is in principle strengthened by the right to contra-expertise and the fact that funding for this is enshrined in the new Act. However, one respondent noted that the new provisions may give defence lawyers less room than Supreme Court precedent currently does. For the defence, representation of the client involves careful consideration of the financial aspects involved. The respondents do not expect the number of experts appointed by the defence to rise rapidly in the near future. Defence counsel will only consider retaining experts when a report has been produced that may thwart the defence strategy.

The respondents agree that the court should not offload its role and responsibility on expert witnesses. The NRGD could be an instrument for slowing down certain developments. For instance, there was already a growing awareness that judges have a responsibility to query the expert's opinion. The register brings with it the risk that judges will rely too much on the fact that the 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, where there are contradictory opinions.

Other countries, too, are facing the question to which extent registration of expert witnesses and the concomitant quality assurance systems are useful. Chapters 6 – 9 comprise a study of the situation in Belgium, Germany, France and the UK respectively. Three important aspects on which the contribution of expert witnesses towards establishing the truth rest, are the role and responsibility of the judge, adversarial argument between experts and lawyers and quality assurance in relation to expert witnesses retained in criminal proceedings.

In Belgium, the public prosecutor and the examining judge have substantial discretion as to which expert witness is appointed. In relation to adversarial argument, the suspect has no substantial input during criminal investigations where it concerns a potential expert examination. In the preliminary judicial investigation the suspect and the victim (as a civil party) have the right, in addition to the public prosecutor, to ask the examining judge to appoint and instruct an expert witness. When an expert witness is appointed during the trial itself, the importance of adversarial argument is, in practice, highlighted by ECtHR decisions. The judge decides the conditions of adversarial argument on a case-by-case basis. There are no legal standards relating to court-appointed experts in Belgium. The sole article that allowed courts to draft lists of expert witnesses was recently scrapped. Now there are only unofficial lists. Moreover, some legal literature states that expert witnesses appointed by the judge or public prosecutor are paid a pittance. That could present a risk in situations in which wealthy suspects use highly-qualified expert witnesses.

In Germany, the discretionary power of the court is limited. In principle, the system allows for *öffentlich bestellte Sachverständigen*; expert witnesses 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, if circumstances dictate, depart from the principle that it has to choose from the pool of accredited expert witnesses registered with the *Kammern*. In practice that happens very frequently. The public prosecutor may also retain expert witnesses in the preliminary judicial investigation. At the 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 wishes to call is evidently more knowledgeable than the expert witness retained by the court. The defendant may also challenge an expert witness on a number of grounds defined in law.

The accreditation of an expert witness is a vote of confidence. Anyone who believes himself to be an expert in a given field may have his ability tested. Before an expert witness can be accredited by a *Kammer*, he must go through a type of 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. Accreditation is in principle for five years. Accredited expert witnesses 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 Witness Order (*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 expert witnesses; 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 France, rules regarding expert witnesses are enshrined in legislation regarding preliminary judicial investigation. The responsibility and the role of the examining judge are significant. It is up to him to determine whether the appointment of an expert is required. The expert witnesses carry out their examination under the examining judge's aegis. Expert witnesses require the examining judge's permission for specific investigative acts. This 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 another expert witness being appointed in addition to the expert witness already appointed. During the investigation parties may exercise a modicum of control on the course of events through the examining judge. Once the expert witness 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 witness to draft a preliminary report. That gives the parties the opportunity of responding to the preliminary report. Where necessary, the expert witness can be called to explain aspects of the report in greater detail. Another option is examination of the draft report by the other party's expert. The expert witness can then draft the final report. Challenging the expert witness reports is thus largely part of preliminary judicial investigations rather than the trial itself. This prevents time being wasted with all sorts of in-depth discussion of the subject matter, most of which would be beyond the average jury member.

The judge (or examining judge, where appropriate) is not, in principle, limited to a list of officially-registered expert witnesses. There is a national register held at the Court of Cassation; in addition, each Court of Appeal has a register of expert witnesses. An expert witness may, in principle, be registered with the Court for a probationary period of two years. After this period, each expert witness is assessed on the basis of experience and knowledge of legal matters by the General Assembly of Magistrates. The expert witness 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 expert witnesses. For formal inclusion in the *national* register, expert witnesses must have been registered with a Court of Appeal for an unbroken period of at least three years. Inclusion in the national register is for a term of seven years. Certain standards have to be met by registered expert witnesses; they focus primarily on ability, independence, impartiality and mentality. For expert witnesses, registration is often essential: in principle only registered expert witnesses can be appointed by the courts. Only in very specific cases is there a possibility of a non-registered expert witness being appointed.

In England and Wales the legal system is based on the assumption that adversarial confrontation between the parties is the best chance of getting to the heart of the matter. In principle, all evidence has to be presented at the trial. Expert witnesses in the criminal justice system are limited to those who have 'sufficient specialist knowledge or experience'. The courts have substantial discretionary freedom 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 results are not used to build the case against him. 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. Counsel for the defence may appoint his own expert witness. Should counsel for the defence wish to appoint an expert witness with

state funds, he must first submit a request to a special committee (the Legal Aid Authority). If it consents to the request, it may also set a threshold.

Under common law, expert witness reports are subject to a number of general criteria that relate first and foremost to independence and report structure. 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. They may be imposed on the provider (research institutes etc.) or the practitioner (the expert witness), 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 skills and experience to call upon. Until recently, there was the Council for the Registration of Forensic Practitioners, but that register ceased to exist in 2009 as the Council was unable to pay its way. The standard for registration 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 expert witnesses and covered an ever-growing range of disciplines.

In the last two chapters, the plan on which the NRGD is based is evaluated on the basis of the findings in the earlier chapters (chapter 10), and the information that has to be gathered (in the fullness of time) to be able to assess whether the NRGD is actually working is collated (chapter 11).

The ex-ante evaluation expands on the difference between operational aims, product aims and system aims. The central operational aim of the register is merely to construct a register of accredited expert witnesses. The legislator is looking to achieve this in the first instance by restricting applications to those which 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 ascertained objectively. That seems to be a consideration endorsed by most interviewees. This phase of defining individual areas of expertise is less important in the legislation of the other countries studied. Applications are then reviewed against a number of terms. These terms cover knowledge and experience within the area of expertise and legal field to which the application relates, as well as integrity and professionalism. The study of systems in other countries revealed that the 'gold standard' of registration monitors these aspects to a greater or lesser extent everywhere.

Responsibility for both delineating and testing the field of expertise of applicants is vested in the Board of Registered Expert Witnesses (*College gerechtelijk deskundigen*). In other countries, this type of quality control is not always devolved to a separate board. In Germany, this authority is vested, in practice, in the *Kammern*; in France, it lies with the courts. The UK stood alone in having a special board that monitors registration. The Council for the Registration of Forensic Practitioners has, however, ceased to exist. The fact that in the Netherlands a separate board was set up can apparently be traced to two factors. The first of those is that registration of expert witnesses in the Netherlands is not exclusively or primarily intended for the bench. The second factor is the method outlined, whereby the fields of expertise are first delineated in consultation with expert witnesses. This method is better suited to an independent board. It can be deduced from the interviews that the method chosen has a measure of support.

The second operational aim is that sufficient expert witnesses of the required calibre register. The Minister of Justice thinks that registration will be appealing to expert witnesses because that would give them the status of accredited expert witness. That may be jumping to conclusions. The situation in Belgium has shown that the willingness of expert witnesses of the right calibre to register seems to be determined to a large extent by consideration of the related costs and benefits. The interviews reveal that willingness to register depends to a significant extent on two factors. The first of these is the involvement of major institutions. These institutions are expected to encourage registration because they consider it a 'hallmark'. The second factor concerns the bench. The NRGD can only function properly if

the bench uses the registered expert witnesses frequently enough. In that context, it may be relevant to note that the law does not entail an obligation to use the services of the registered expert witnesses (although it does entail a duty to explain why another expert is appointed). In Germany and France, there is such an obligation (albeit qualified). The UK, where the register of expert witnesses is no longer in use, did not have such an obligation. The comparative study leads one to assume that a qualified obligation to use the services of registered expert witnesses promotes the chance of success of a register of expert witnesses.

The primary product aim of the NRGD is access to the knowledge of expert witnesses. Respondents believed that this access function was particularly important. For them, the register will be successful if it makes it easier than in the past to obtain the services of a specialist. There may be some tension between the operational aims and the product aims of the register. The central operational aim of the register is that sufficient expert witnesses of the required calibre register. That aim can be easily fulfilled for DNA research, for instance. However, this register actually does little to promote improved access to specialist knowledge. Against this background, the choices made in the 'step-by-step' approach to registration will be important to the success of the register.

The second product aim of the NRGD is to guarantee the quality of the product. To that end, applicants must meet certain criteria in respect of knowledge 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 by clear communication between expert witnesses and lawyers. However, communication seems to be a source of concern in particular with regard to expert witnesses who are retained only occasionally in landmark criminal cases. These expert witnesses 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 the NRGD as the instrument to improve reporting by expert witnesses.

The first system aim of the register is the accuracy of decisions arrived at in the criminal justice system. Much information that can only be produced with the use of specific expertise cannot be provided by registered expert witnesses. Against the background of this system aim it stands to reason that the Board of Registered Expert Witnesses will consider the situations in which registration can contribute towards making the right decisions. The pursuit of accuracy is not of equal importance for all decisions. The register's contribution to the aims of the criminal justice system increases the more the focus shifts to the most serious criminal cases. That fact may be important in relation to the step-by-step approach, and in decisions regarding foreign expert witnesses. In light of the aims of the criminal justice system, the registration of foreign expert witnesses 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. Does the NRGD have a contribution to make in increasing faith in the justice system? The letter that the president of the KNAW sent to the Minister of Justice in 2008 does not suggest that; it shows that there are grave reservations against the register. Developments since then may have mitigated these reservations to some extent.

What information is needed to be able to assess whether the NRGD is working properly? In anticipation of the planned evaluation of the NRGD, an attempt is made to answer this question (in chapter 11).

Where the operational aims are concerned, whether the register has been filled with suitable accredited expert witnesses will follow from the level of satisfaction with the standard of expert witnesses in terms of their forensic knowledge and their ability to communicate effectively. The level of satisfaction can be ascertained by a study focusing on

the opinions of (primarily) judges, public prosecutors, lawyers and possibly even fellow expert witnesses. Perhaps the number of cases in which an applicant's registration or re-registration is refused, or in which an expert witness is struck from the list may also be an indication of whether the register is working properly. An indication as to whether the register contains enough expert witnesses is that the pool of expert witnesses is so wide that clients have enough choice, also with regard to contra-expertise. Whether the pool of expert witnesses is large enough could possibly be ascertained by carrying out a study focusing on the opinions of legal practitioners and possible fellow expert witnesses. In addition, the number of cases in which non-registered expert witnesses are called could provide an indication. The allure of the register for expert witnesses is evinced by the expert witnesses' *willingness to register*. Especially if there are indications that the willingness to register leaves much to be desired, it may be advisable to ask the expert witnesses the reasons why they either are or are not registered in the context of the evaluation.

In respect of the product aims, the evaluation must give clarity on changes relative to the previous situation in order to provide an insight into the benefits of the NRGD. This is also the thrust of the interviews. The first indication of access to expert witnesses and expertise via the register is the frequency with which it is used. That frequency may be determined, for instance, by examining criminal files at random. However, information provided by registered expert witnesses may also be useful. Changes in the level of satisfaction surrounding access (relative to the previous situation) may be identified by asking respondents what their impression in this respect is. One of the first indications of the product's quality could be found in the level of user satisfaction. That level of satisfaction could also be established in a study among judges, public prosecutors and lawyers. Here, too, an important issue is whether the level of satisfaction has gone up compared to the previous situation. It may also be worth considering examination of differences in standards compared with the situation before the register was introduced in another way. A panel of judges, public prosecutors, lawyers and expert witnesses could be asked to assess expert reports randomly. The views of the panel may be an indication of the effectiveness of communication between expert witnesses and lawyers.

The influence of the NRGD on system aims is hard to gauge. We believe it in order to ask a few questions to judges, public prosecutors, lawyers and expert witnesses on the register's effects on system aims as perceived by them in the context of the evaluation. It also stands to reason to ask questions that relate to the possible side effects of the NRGD at system level. Furthermore, it may be useful to consider studying the impact of the NRGD on faith in the criminal justice system on a specific issue. Faith in the criminal justice system has, in part, been influenced in recent years by opinions voiced by expert witnesses called by judges about the workings of the criminal justice system. Against that background, it may be logical to interview expert witnesses specifically on the effects that the NRGD and how it works has or has had on their faith in the criminal justice system.

One final issue is whether the evaluation should ultimately be limited merely to the NRGD. The comparative study has revealed that the contribution of expert witnesses to the respective system aims, the accuracy of decisions and faith in the criminal justice system also depend on two other mechanisms: adversarial argument and the judge's own responsibility. The interviews and the study of other countries also revealed that the way a register works largely depends on the context and numerous other conditions. Against this background, it is conceivable that the client will, over time, opt to expand the evaluation to one that addresses the contribution of expert witnesses to the system aims in general.