

The Danish Report¹

regarding

Expert evidence in criminal procedure

Introduction to the final report	3
The initial report	5
<u>1. Introduction</u>	5
<u>2. Two models for the use of expert statements in criminal procedure</u>	7
<u>3. General rules regarding experts in Danish criminal procedure</u>	9
<u>Appointment and instruction of experts</u>	9
<u>The defence and the expert's right of access to documents</u>	18
<u>Finance</u>	22
<u>Submission of expert evidence in court and the weighing of evidence</u>	25
<u>4. Short overview with examples of rules regarding expert authorities</u>	38

¹ The Task Force Report from Denmark represents the views of the Danish Task Force and may not represent the views of the Law Society of England and Wales.

The Secretariat

<u>5. Summary and questions to actors from the justice sector</u>	42
Mutual legal assistance	44
Summary of consultations with actors from the justice sector	46
<u>The police (rigspolitiet)</u>	46
<u>The public prosecutor on financial crime (statsadvokaten for særlig økonomisk kriminalitet)</u>	46
<u>Director of public prosecutions (rigsadvokaten)</u>	47
<u>The association of defence lawyers</u>	48
<u>The Criminal Law Committee of the Danish Bar and Law Society</u>	49
Recommendations	51
Conclusion	52

The Secretariat

Introduction to the final report

This report is the Danish contribution to the AGIS project regarding experts in criminal procedure that is financed by the EU Commission.

The report consists of the initial report which was written in accordance with the Law Society of England & Wales's introductory report guidelines, version 1.4. regarding the AGIS project, a chapter on mutual legal assistance, the results of consultations with the justice sector actors, and some recommendations.

The report does not suggest initiatives of regulation, nor good expert practice. The result of the final report is a few recommendations of concrete actions of further engagement of defence lawyers and possibly the wider legal society in the topic.

During the drafting of the initial report the impression of the Task Force was that the Danish system would most likely live up to the principles of equality of arms. There is a high estimation of the Danish system in the justice sector including a belief that the system lives up to the requirements for a fair trial. This is also reflected in the section of consultations.

During the phase of the consultations and drafting of the final report however, the Task Force became aware that especially within the financial field expert evidence may sometimes seem less impartial than it ought to. A new recognition of issues with respect to expert evidence is dawning among some defence lawyers, and, perhaps, a new tendency towards the use of expert evidence, which may require further study and dialogue.

In any case the topic needs to be the focus of more attention in Denmark than it has previously been. Defence lawyers have a particular role of responsibility to chal-

The Secretariat

lenge expert evidence given the free evaluation of evidence. Therefore training of defence lawyers has been pointed to as an important measure which can be undertaken by the profession itself.

The Secretariat

The initial report

1. Introduction

This initial report is the first Danish contribution to the AGIS project regarding experts in criminal procedure that is financed by the EU Commission.

The AGIS project has, among other things, the aim of illustrating rules and practices regarding experts in the criminal procedure in England & Wales, Slovakia, Italy, Denmark and Finland.

The report aims to answer the questions that are stated in the Law Society of England & Wales's introductory report guidelines, version 1.4. regarding the AGIS project. The construction of section 2 below therefore takes a point of departure in these questions.

The report further has the objective of forming a basis for a survey among experts and professionals regarding the use of experts in Danish criminal procedure.

In the end this initial report shall result in a final report that has the objective of identifying opportunities for improvements or best practice for the use of experts in the Danish criminal procedure.

In order to be able to write the report within the frameworks of the project it has been necessary to select focus. Focus has been selected on the basis of the fundamental concept that the expert element in the criminal procedure shall be quality assured in two different ways.

In the first place there will be a quality assurance in connection with the individual expert's subject area. That is to say that there will be an assurance that the expert possesses the necessary professional knowledge and that the actual expert examina-

The Secretariat

tion is undertaken in conformity with current standards within the specific profession. This quality control will often take the form of comparing the expert's qualifications and procedure etc., against profession-specific standards codified in rules or by best practice within the individual subject area.

Secondly there will be a quality assurance – or, rather, a quality verification – in the criminal procedure system where, on the basis of general principles in the administration of justice, one examines the quality of the expert input with a view to determining whether the expert input can be employed at all (that is to say, submitted) in the criminal case and, in the case in question, what weight will be accorded to the expert input in determining the case. Employed in such verification are the general principles with regard to, for example, competence and professionalism, and the testing that takes place within the criminal procedure's principles regarding, in particular, contradiction and free evidence weighing.

This report is aimed at the quality assurance that is not profession specific, but that takes place in respect of the general criminal procedure rules pertaining to submission, examination and weighing of evidence, including expert statements etc. That is to say that the report, within its limited area, ultimately concerns itself with the guarantees of a just trial that will ensure that the Danish administration of law regarding the employment of experts in the criminal procedure, is in conformity with Article 6 of The European Human Rights Convention.

The overview of the most important Danish rules and practices regarding experts in the criminal procedure is provided with regard to an examination of the general rules relating to these, followed by a short examination of special rules governing selected groups of experts in the criminal procedure.

The examination is first and foremost aimed at the written statements that are drawn up by the experts and which may come to be submitted in court, possibly with the

The Secretariat

addition of witness examination of the expert. This is due to the fact that this form of expert assistance is dominant in the Danish criminal procedure.

Some of the questions that are shown in the report guidelines are not dealt with in any particularly great detail, as they have no great significance or may only be answered with difficulty with regard to Danish law. On the other hand some other questions have been included of a principal nature that the use of experts in the Danish criminal procedure has given rise to.

The report has been drawn up by the legal consultant Mads Bundgaard Larsen from The Danish Bar and Law Society.

Upon initiating the project, meetings have been held between the Law Society of England & Wales and a Danish project group consisting of various professional actors within the use of expert evidence in Denmark.

The questions that this present report gives rise to will, together with this present report, be sent to experts within the Danish administration of justice with a view to these experts' answers to the questions, together with their other comments regarding the report, being able to form the basis for submitting a final report about these selected aspects of the employment of experts in the Danish administration of criminal justice.

2. Two models for the use of expert statements in criminal procedure

In relation to possible future initiatives regarding mutual exchange and, by no means least, recognition of expert statements in the criminal procedure, it is worth noting that the various legal systems in the EU appear, broadly speaking, to be able to be built up on two different models for the use of experts.

The Secretariat

In model one there are very detailed rules regarding the first phase in the expert information of the case. That is to say detailed rules about, in particular, who may be appointed as an expert, how the expert is to be instructed and how the quality of the expert assessment is checked within the expert's own subject. In return for this intensive control of the expert information of the case before the court's hearing of it, the court will be able to rely on the expert assessment to a greater extent, compared with model two, as described below. In any event the court will, to a greater extent, be able to assume that the obtaining of the statement and its drawing up have taken place under satisfactory conditions from the perspective of legal security.

In model two there are not particularly detailed rules about the first phase in the expert information about the case. This means that a lot more can be included during the case under the designation expert evidence. On the other hand, under this model the court will, to a far greater extent, be able to censor the expert information during the actual trial on the basis of procedure from the parties to the case, with regard to – for example – the expert's impartiality or qualifications or the instruction of the expert.

Rules governing mutual acknowledgement of expert statements in the criminal procedure must be structured with great consideration being given to these two different models. A worrying situation in respect of legal confidence may thus arise if one takes expert evidence from one country where the actual gathering of it is not carefully regulated, and cause it to be dealt with by a court in a country where the court, either because of the country's own rules and practices or because of rules relating to mutual recognition, does not undertake any intensive check of the conditions governing the obtaining of the statement.

The legal situation in Denmark is, broadly speaking, that of model two above. There is no special regulating of appointment, instruction and quality control of experts in the investigation phase, but there is a general leave to bring disputes regarding such

The Secretariat

questions before the court. Whereas relatively much may thus be submitted in the hearing under the designation of expert evidence, it is up to the court to undertake a thorough check of all aspects of the expert opinion and its bringing about, against the background of the prosecution and defence's information about the case, with regard to determining its exact meaning in the specific case in question.

3. General rules regarding experts in Danish criminal procedure

Appointment and instruction of experts

Experts may be brought into a criminal case both before and after the time when the police or the prosecution authorities bring a charge. As a rule the expert will become involved in the investigation before a charge is brought, because the expert's statement does not only have the purpose of being used as evidence in an eventual trial, but also constitutes part of the prosecution's decision basis with regard to whether any charge is to be brought in the case at all.

The practical principal rule is that it is the police or the prosecution authorities (which are not clearly separated in Denmark), who take a decision concerning the obtaining of expert assistance and who subsequently appoint and instruct the expert. As examined in greater detail below this practical principal rule is modified by the defence's opportunity to influence the investigation on the basis of the principle of equality (equality of arms).

When, as a principal rule, it is the police that make the decision regarding expert assistance, this is because the police have a duty to initiate an investigation when there is a reasonable assumption that a criminal act, that is prosecutable by the authorities, has been committed, cf. § 742, section 2 of The Administration of Justice Act.

The Secretariat

The investigation is designed to make clear whether the conditions for imposing criminal liability or other criminal law legal consequences are present, and to provide information for use in deciding the case as well as prepare the handling of the case before the court, cf. The Administration of Justice Act's § 743.

The duty of the police to investigate includes the duty to bring in expert assistance to the extent that this is necessary in order for the police to be able to fulfil the declared objective of the investigation.

The police and the prosecuting authorities are subjected to a duty, both during the investigation as well as later on in the case, to be objective cf. The Administration of Justice Act's § 96, section 2. The police investigation and, during it, their use of expert assistance, thus does only have the objective of supporting a possible hypothesis, that a specific person is guilty. The police are obliged, in the investigation and regarding all decisions concerning expert assistance, to also inform about aspects of the case that could indicate a suspect's innocence or otherwise militate in the suspect's favour.

The decision by the police to bring in expert assistance in the investigation can, as stated, occur at a time when no charge has yet been brought and the police have no obligation to consult either the court or any defence counsel prior to the police decision that expert assistance is to be ordered. There is, however, one significant exception to this point of departure. Under this a suspect can only be mentally examined at the order of the court, unless the suspect is at liberty and expressly consents to the examination, cf. The Administration of Justice Act's § 809.

As far as the question of which expert authority, institution or person is to assist the police during the investigation is concerned, it should first be noted that there are no legally binding general rules regarding who the police may appoint as an expert. Nor

The Secretariat

are there any general rules relating to the accreditation or similar of experts to be used for the police investigation.

As a point of departure the police are thus able to obtain expert assessments or statements from any authority or public or private institution or association, that possesses the necessary expert knowledge, and that is not rendered legally incapable due to a conflict of interests in the case in question.

The police shall, if possible, choose an expert who carries out an official duty. In this way the police ensure themselves that the expert's statement – everything else being equal – will be able to be submitted in court in any criminal case, cf. The Administration of Justice Act's § 871, section 2, no. 5.

That the expert discharges a public duty is understood to mean that the expert is employed in the public sector, or that he works against the background of an official practising certificate, e.g. as a chartered accountant. One may therefore say that the general quality control regarding the actual circle of possible experts consists of the quality control that forms the basis for public employment within the respective expert's duty. Should the police, for example, on the basis of the need for expertise within a very special field appoint an expert who does not discharge any public duty, the court may still exceptionally permit the submission of the expert's statement, cf. below in section 2.5, regarding The Administration of Justice Act's § 871, section 3.

When the police choose an expert this will, in practice, be done against the background of legislation regarding experts in special areas combined with instructions from the superior prosecuting authority (Chief Public Prosecutor) and practice. These sources do not always provide an unambiguous answer to whom is to be used as an expert and the police have no obligation to consult the court or any defence counsel regarding this question.

The Secretariat

A brief overview of some of the experts who, in practice, assist the police, is to be found below in section 3.

It is up to the police to which extent any disciplinary sanctions or suspicions of offences committed by the expert within his field are to have any significance for the appointment of the expert. There is thus no general regulating of this in respect of legislation. But if an expert, on the grounds of offences, loses his public appointment before the submitting of the statement, it becomes more difficult to submit the statement in court and it will influence the court's evaluation of the statement's evidential value if the expert, at any time prior to the handing down of a judgment, is condemned for or – according to the circumstances – accused of offences, cf. below in section 2.5 on the weighing of evidence.

The specific person who, as an expert, is to prepare the statement, must not have any personal interest in the content of the statement or the outcome of the case. This qualification requirement seldom gives rise to significant questions in practice. The question of the expert's qualification has, to a higher degree in Danish court practice, related to whether an expert authority, as a result of a supervisory obligation in the area or other close cooperation with the police in respect of the specific case, has been so closely associated with the police during the investigation that the expert statement should not be submitted to the court. The latter question concerns the equality of arms principle and is therefore dealt with below in section 2.5 under the examination of some of the Supreme Court cases where the defence, on the grounds of the close cooperation between the police and the expert, has protested against the submission of an expert statement.

The instruction of the expert is undertaken by the police or the prosecuting authority against the background of their duty to undertake an objective investigation of the case. The court is not involved in the instruction unless the defence counsel or the

The Secretariat

prosecution request this in order to resolve a disagreement between the defence and the prosecution, cf. below regarding the equality of arms principle.

There is no obligation for the police or the prosecution authority to involve any defence counsel in the instruction of the expert but, by doing so, the police can avoid the case being subsequently delayed because the defence requires supplementary questions to be answered by the expert.

The police instruction of the expert can otherwise proceed in a relatively informal manner and the instruction may also be amended at any time as the investigation progresses and possibly changes its focus. It follows from this that the police can constantly hold meetings with the expert in order to instruct him and a defence counsel cannot demand participation in these meetings nor will he, in practice, be offered participation. As an example of this, mention can be made of The Supreme Court's order stated in UfR 1997, page 676 H, and that is also discussed below in section 2.5. In this case the defence protested against the submission of audit reports obtained by the police. The defence based its protest on, among other things, the audit company having first issued a draft of the report to the police and the police, against the background of this draft, had held a meeting with the audit company without minutes of this meeting being kept. After the meeting the police decided that the audit company should extend its examination. Against this background, amongst other things, the defence argued that the cooperation between the police and the audit company had been of such a nature that this precluded the audit company from acting as an expert in the case, but the defence did not have this protest upheld.

The prosecution authority has, as stated, a duty to investigate and this task cannot be handed over by the prosecution authority to others, cf. The Administration of Justice Act's § 742. This rule means that the instruction of experts by the police shall be sufficiently precise whereby the situation is that the expert merely assists with infor-

The Secretariat

mation regarding technical matters in respect of the investigation that continues to be undertaken by the police.

The role of the defence in relation to appointment and instruction of experts during the investigation is based on the equality of arms principle.

The equality of arms principle means, in the first place, that the defence may at any given time during the investigation request the court to make a decision concerning the obtaining of an expert statement or whether supplementary questions are to be put to an expert cf. The Administration of Justice Act's § 746, section 1. In practice, the defence will, in most cases, direct such a request directly at the police or the prosecution authority in the first instance to see if agreement can be reached concerning the expert statement without the court's intervention. The question will thus only be brought before the court in the event of disagreement. The prosecution authority will often bring the matter before the court on its own initiative if the prosecution authority does not wish to respond to a request from the defence.

If the defence brings a request regarding expert information concerning the case before the court, the court shall, as a point of departure, only assume a position regarding the disagreement between the defence and the prosecution. If, for example, there is only disagreement regarding whether an expert statement should be obtained concerning a specific theme or not, the court will only assume a position regarding whether the expert statement shall be obtained. The court will thus not give greater attention to the question of who is to be appointed as an expert or how the expert is to be instructed, if there is no disagreement on this between the defence and prosecution. Ultimately, however, the court is able to make a decision concerning expert information relating to the case even if neither the prosecution authority nor the defence have requested this. This is due to the fact that, in criminal cases, the court has a duty to seek the truth independently of the prosecution and defence's information concerning the case.

The Secretariat

If the court takes a decision concerning the obtaining of an expert statement – from either a specific authority or with specific questions – it will still be the prosecution authority that appoints the experts and instructs him.

When the court takes a decision concerning the defence's request for expert information concerning the case, this is made on the basis of necessity and appropriateness of the expert statement in question. The defence and the prosecution authority are not on an equal footing in this respect since the court, with regard to the police investigation, including expert information concerning the case, upon the defence's request, only decides upon the legality of the police investigation and not its appropriateness or necessity, cf. The Administration of Justice Act's § 746, section 1.

In more complicated cases the prosecution authority or – in the event of disagreement – the court may make a decision that expert assistance shall be made available to the defence, possibly within a certain monetary limit. Such a decision is based on the equality of arms principle and is not statutory. The question regarding such expert assistance for the defence is most often relevant in complicated cases concerning financial criminality. An example of another type of case is The Supreme Court's order stated in UfR 1985, page 312/2, where The Supreme Court decided that a forensic medicine expert should be made available to the defence in a murder case.

A decision concerning expert assistance for the defence does not have, as its primary purpose, the defence instructing the expert with regard to the provision of an expert statement that can be submitted in court. The purpose is expert assistance for the defence that enables the defence to pose supplementary questions to the primary expert in the case or in order to contest the validity of the statement from the primary expert, possibly upon examination of the expert assisting the defence. The primary expert in the case will continue to be instructed by the prosecution authority with the

The Secretariat

opportunity for the court to decide disputes between the defence and prosecution concerning the instruction.

Over and above the ability to request the court to make decisions concerning expert information concerning the case, the equality of arms principle means that the defence, as a point of departure, is itself able to make contact with experts with a view to gaining information concerning the case. The ability of the defence to make direct contact with experts is, however, limited in the first place by the fact that the defence may not hand over the documents that the defence has received from the police, without the consent of the police, to others cf. below in section 2.3 concerning right of access to documents. Secondly, there is a rule applying to the defence's personal contact with experts that the defence may not thereby counteract the clearing up of the case.

The above stated restrictions to the defence's approaches to experts means, together with the prosecution authority's duty to investigate on an objective basis, that defence counsel only rarely make direct approaches to experts outside of the court and the prosecution authority, in practice.

As an example of a defence counsel's personal contact with experts, mention may be made of the Eastern Division of the Danish High Court's order stated in UfR 1999, page 556. In this case, the defence had made an approach to a doctor who had previously made a statement in the case and had asked the doctor to answer two supplementary questions. The police and the district court complained about this to the defence with reference to the fact that it is the police that prepares and undertakes the investigation. The High Court stated, on the other hand, that there are no rules that preclude a defence counsel directing an approach to a public authority provided that the defence does not thereby counteract the clearing up of the case. In the specific case, the High Court found that the defence had not counteracted to clearing up of the case. The High Court placed weight upon the fact that the doctor had already

The Secretariat

provided a statement in the case and that the supplementary statement could not counteract the investigation of the case and that the defence advised the police at the same time as to his approach to the doctor.

There are no general rules regarding quality control of the specific statement that an expert prepares with regard to information concerning a criminal case.

The quality control thus comprises, first of all, the professional standards that apply within the duty in which the expert operates.

In the second place the quality control comprises the defence's access to contradiction.

Before the main proceedings the defence's access to contradiction on this point consists, in practice, in requesting the court to decide that further questions may be put to an expert or that another expert statement may be obtained. The defence's right to request (further) expert information pertaining to the case before the main proceedings is supported by The Administration of Justice Act's § 837, that states that the prosecution authority shall, at the same time as the submission of the written statement of the charges to the court or as soon as possible thereafter, submit any expert statements and a list of the experts, among other things, that are required to be examined during the main proceedings.

During the main proceedings the defence's contradiction may consist of claiming that the expert statement may not be submitted, or it can consist of questioning the correctness of the statement including questioning the expert as a witness or through the summoning and examination of other expert witnesses.

The Secretariat

Finally, as the third stage of the quality control, mention is made of the court's independent duty to put necessary questions to the expert's statement if neither the prosecution nor defence have asked these questions.

The above examination has taken a point of departure in the practical treatment of criminal cases where the expert statement as given is obtained by the police during the investigation – as a point of departure without the obligation to consult the court or any defence counsel.

If one did not take a point of departure in practice but in The Administration of Justice Act's provisions, one might believe that the expert information regarding criminal cases is made against the background of The Administration of Justice Act's chapter 19 regarding expert testimony. According to the rules governing expert testimony it is the court which, having heard the prosecution and defence, appoints an impartial expert and instructs him. These rules are common to both civil cases and criminal cases but are, in practice, employed only very rarely in criminal cases. The reason is probably that the rules governing expert testimony in chapter 19 only relate to pending criminal cases and the prosecution authority often has, as stated, a need for expert information concerning the case a long time before the case finally comes before the court. Added to this is the fact that The Administration of Justice Act's chapter 19 has as its main intention the situation that the expert shall inspect a specific, physical object. In contrast with this, the expert in a criminal case will often have the task of providing an expert assessment or mapping out of a sequence of events that has occurred.

The defence and the expert's right of access to documents

The defence's right of access to documents in the expert information pertaining to the case takes a point of departure in the equality of arms principle.

The Secretariat

It follows from The Administration of Justice Act's § 729 a, section 3, that the defence is able to acquaint itself with the material that the police have provided for use in the case to which the charge relates, and that the defence shall have copies of the material provided to the extent that it can be copied without disadvantage, cf. The Administration of Justice Act's § 729 a, section 3. Regarding this provision the Supreme Court has stated that, according to the travaux préparatoires to the provision compared with The European Human Rights Convention's Article 6, the defence's access to right of access to documents concerns all material that is of importance to the case irrespective of whether it has been provided for use in the case concerned, cf. for example The Supreme Court's order in UfR 2007, page 727.

The provision covers all evidence material in the case including, for example, a written instruction for an expert and the expert's written enquiries to the police, including the final report.

The defence's right of access to documents in the police's correspondence with experts was, in legal practice, considerably extended from 1980 to 1998 to the benefit of the equality of arms principle. In The Supreme Court's order stated in UfR 1980, page 205/1, the defence had requested right of access to documents in an exchange of letters and discussions between the police and some chartered accountants regarding the initiation, preparation and execution of audits. The Supreme Court rejected the defence's request for right of access to documents with reference to some specifically enumerated provisions in The Administration of Justice Act did not give the defence a right to this. The same result in The Supreme Court's order stated in UfR 1980, page 77.

The Supreme Court altered this practice in the order stated in UfR 1999, page 47. The defence counsel in the latter case (lawyers Jørgen Lange, Hans Abildstrøm and Lars Henriksen) has given the following review of the order in UfR 1999 B page 122 ff.:

The Secretariat

“In connection with the proceedings in a lengthy case covering charges of fraud, fraud against creditors, breach of trust, tax evasion and breach of provisions in corporate legislation, the defence counsel were, on one occasion, aware of the existence of material comprising the prosecution authority’s correspondence with and auditor.

The defence requested, with reference to The Administration of Justice Act’s §745, section 1[now § 729 a, section 3, edited], to have access to the content of a specific ring-binder with correspondence with the auditor in question, all material that the prosecution authority including The Assistant Public Prosecutor for Special Financial Criminality, the local public prosecutor and the local chief constable’s office, had received from the auditor concerned, as well as all material that the authorities concerned had drawn up and sent to the auditor in question. In making the application the defence stated the principles discussed above from memorandum 622, 1971, the travaux préparatoires to the provision as well as the theory stated above.

The prosecution authority claimed that the request related to documents that did not constitute evidence material in the case and also that the material had been gathered to be used in assessments of various problems. The prosecution authority stated that one had a right to defend one’s decision processes. It was stated in conclusion that the auditor was not employed in the current case but was hired by the Assistant Public Prosecutor for Special Financial Criminality with regard to the public prosecution’s internal considerations.

The district court laid down, initially, that restraint should be displayed with regard to interpreting the rule in The Administration of Justice Act’s §745, section 1[now § 729 a, section 3, edited], restrictively, and referred to the nature of the case including the extent of the punishment that the prosecution authority may be expected to call for in respect of the accused in the specific case. The district court noted hereafter that the defence’s request did not relate to the prosecution authority’s internal material but to written material received by the prosecution authority or sent by the prosecution authority to the auditor who had assisted the prosecution authority during the investigation of the case. The district court noted, at the same time, that some notes that constituted part of the material typically bore headings that contained the name of one of the accused, whereby the notes related to the case in question

The Secretariat

by their content. The district court found, at the same time, that it was of no significance to which part of the prosecution authority the notes were addressed, in that the notes must be regarded as “provided by the police for use in the present case”.

The district court hereafter gave the defence access to the material received from the auditor concerned, including a report, draft of a report, notes, minutes of meetings and other correspondence as well as material drawn up for the auditor concerned, including task formulations, notes, correspondence and minutes or reports of meetings.

The district court’s judgement was appealed by the prosecution authorities by the Eastern Division of the Danish High Court, which briefly characterised the material covered by the request as being internal, since the material had only been for the use of the prosecution authority’s early and provisional considerations concerning investigation etc., which is why release pursuant to The Administration of Justice Act’s §745[now § 729 a, section 3, edited] could not take place.

With the consent of the Appeals Permission Board the defence brought the case before The Supreme Court which, through an order of 8 October 1998, upheld the district court’s order with reference to the district court’s premises.”

Regarding the time of the defence’s right of access to documents, reference is made to the Assistant Public Prosecutor’s notification no. 7/2005 regarding the defence’s general access to right of access to documents under The Administration of Justice Act’s § 729 a, section 3. It is seen from this that a request from the defence to have copies of reports and copies of other annexes that are provided for use in the case, sent to him as they are prepared, should generally be agreed to. If the defence has not requested to have material sent on an ongoing basis, there will often be a cause to send copies of the material to the defence on an ongoing basis in those cases where the accused is on remand. If the accused is not on remand and the defence has not requested to be kept advised about material on an ongoing basis, the material will be sent to the defence on an ongoing basis only in exceptional cases. But the defence

The Secretariat

may himself, at any given time, decide to avail himself of the right to right of access to documents.

The defence may well show the material to the accused and, as far as the final expert statement is concerned, the defence may well give a copy to the accused. The accused's right of access to documents may, however, under special circumstances, e.g. out of regard for state security, be restricted by the police until the accused has made a statement during the main proceedings cf. The Administration of Justice Act's § 729 a, section 4. But such a restriction has no effect on the defence's right of access to documents.

Finance

As stated above it is, in practice, the police who are responsible for the expert information concerning the case. It is therefore the police who appoint the expert and pay him if it is a matter of an expert who is to be paid.

The public authorities and institutions that provide expert statements at the request of the police or the court shall not normally receive payment for these. Either it is seen from the terms of reference relating to their work that they are required to provide expert statements for the use of other public authorities, free of charge, or there is no legal basis for them to claim such payment.

It is up to the police and the prosecution authority as part of their general prioritising of resources to determine how much money is to be used on expert information concerning the individual case.

In practice, for example, it is audit reports in cases concerning financial criminality on which the police use money in order to obtain these from private audit companies.

The Secretariat

As stated, it follows from the equality of arms principle that the defence may, at any given time, request the court to decide whether an expert statement is to be obtained in the case or whether further questions are to be put to an expert, cf. The Administration of Justice Act's § 746, section 1. In such a case, the court will assume the position regarding the defence's request on the basis of assessments of the necessity and appropriateness of the expert investigation that the defence has requested. Herein lies a certain ability for the court to weigh up the extent – and thereby the expense – of a requested expert investigations against the extent and importance of the case. But the court's decision will be primarily based on considerations regarding whether the expert involvement is necessary and appropriate in order to adequately inform about the case, and the financial question will therefore be subordinate for the court which, under all circumstances, will not, in practice, impose any monetary limitations on an expert investigation that the court otherwise believes should be carried out.

When it comes to the question of expert assistance for the defence it is seen from the interim report 1454/2004 regarding the treatment of major criminal cases concerning financial criminality etc., page 112, that:

“(to) day the situation is that the prosecution authority will normally be assisted by experts, the defence will itself often have some experience in respect of the problems and will otherwise be able to consult with the accused, as well as it not being unusual in major financial cases for the court to approve the defence having a certain amount available for audit-related assistance. In reality it is often only the court that does not have an expert to discuss the problems and assessments with.”

In line with this statement the Western Division of the Danish High Court has stated in an order published in *Tidsskrift for skatte og afgiftsret* 1990, page 501, in a tax-related criminal case, that it is always assumed in practice that an appointed defence counsel, possibly following the court's prior approval, may obtain the expert assis-

The Secretariat

tance that is necessary for a defensible execution of the defence counsel's assignment. Against this background the High Court allowed the defence payment for expenses relating to auditor assistance.

As a second example of the court having granted expert assistance to the defence within a certain monetary framework, mention may be made of the Supreme Court's order published in UfR 1980, page 77. In this case a charge was brought of falsification of documents and fraud etc. and the case was based, amongst other things, on audit reports obtained by the police as well as examination of the expert auditors in question. As part of the handling of the case the court gave the defence permission for payment of outlay of up to DKK 130 000 to cover audit-related assistance from the defence.

It is not certain that Danish defence counsel will generally declare themselves to be in agreement that – as stated in the above quoted order from the Western Division of the Danish High Court – they, in practice, are able to obtain the expert assistance that is necessary for a defensible execution of the assignment.

If the accused is found guilty he shall, as a point of departure, compensate the public purse for the expenses that have been incurred in dealing with the case, cf. The Administration of Justice Act's § 1008, section 1. The court may, however, limit the cost liability if, for example, it will be clearly disproportionate to the guilt and conditions of the accused, cf. The Administration of Justice Act's § 1008, section 4.

In practice the judgment's conclusion will only state that the accused shall pay the costs of the case. But it is not normally seen from the judgment how large an amount the accused is to pay for the expert assistance that has been employed in the case. In these cases it is the police who, following the judgment, determine the amount and claim it from the accused. The police determine the amount either against the background of the account they receive from the expert, for example an auditor, or

The Secretariat

against the background of general rates drawn up by the Ministry of Justice. It is thus seen from The Administration of Justice Act's § 1008, section 1, that the Minister of Justice can lay down rates to be used for settlement of the amount that the accused is to pay to cover the expenses of expert assistance regarding treatment of the case. As an example of how these rules operate, mention can be made of the Eastern Division of the Danish High Court's judgment published in UfR 2004, page 686:

In this case the accused was sentenced to imprisonment for 1 year and 3 months for some sexual crimes and ordered to pay the costs of the case. In this connection, the police claimed from the convicted person the sum of DKK 215 601.98, of which DKK 122 459 comprised payment for forensic medicine investigations. The convicted person claimed that this cost should be paid by the public sector and stated that there was no documentation supporting the extent of the amount or that all the investigations had been necessary. The convicted person alternatively claimed that the costs were clearly disproportionate to his guilt and conditions, cf. The Administration of Justice Act's UfR 1008, section 4, item 2. The court found that there was sufficient documentation to show that an overall outlay by the police of DKK 122 459 for the undertaking of forensic medicine investigations at Retsmedicinsk Institut, had been made. The High Court ruled that the examinations of the convicted person and the injured party had been relevant to the investigation and that the expenses were not clearly disproportionate to the convicted person's guilt and conditions, cf. The Administration of Justice Act's § 1008, section 4, item 2. The High Court therefore upheld the District Court's decision whereby the convicted person was to pay the full costs for the forensic medicine investigations.

Submission of expert evidence in court and the weighing of evidence

As seen from the examination referred to above, the equality of arms principle in relation to expert information regarding the case is not generally upheld by procedural rules that automatically ensure the right of the defence to influence the actual

The Secretariat

gathering of the expert statement. This means that the first opportunity the defence has of responding to the expert statement occurs, as a rule, during the main hearing.

In this section some of the Supreme Court's decisions in cases where the defence has claimed that the expert statement obtained by the police could not be submitted in court, are presented.

In many cases the defence's objection against the expert statement has related to the statement being one-sided because the expert is closely associated with the police through the investigation.

The judicial framework for these discussions concerning submission in court is formed by The Administration of Justice Act's § 871. It follows from this provision that, as a point of departure, it is possible to submit and read out expert statements during a criminal case if the expert statements are issued pursuant to an official duty, cf. The Administration of Justice Act's § 871, section 2, no. 5. That they are issued pursuant to a public duty means that they are issued by a public authority or institution or a person working under official authorisation or appointment. Expert statements issued by persons not engaged in an official duty may only be submitted and read out in court if the court exceptionally gives permission for this, cf. The Administration of Justice Act's § 871, section 3.

The Supreme Court's order stated in UfR 1997, page 676, is illustrative of the questions of principle that the expert information concerning the case in relation to the equality of arms principle has given rise to in Denmark:

This case concerned fraud etc. and the prosecution authority had recruited expert assistance during the investigation in the form of a private audit company. The experts were chartered accountants and thus acted pursuant to an official duty. The

The Secretariat

defence claimed that the expert statements could not be submitted in court. For the Supreme Court the defence's arguments in support of this claim were as follows:

“[the defence] has stated, in principle, that audit reports drawn up for use by the prosecution authority during the investigation of a criminal case are not generally covered by The Administration of Justice Act's § 877, section 2, no. 5, but by § 877, section 3. In support of this they have claimed that the use of audit reports as evidence is in breach of article 6 in the European Human Rights Convention in that a kind of reverse burden of proof is introduced. The Administration of Justice Act's § 877, section 2, no. 5, shall be interpreted restrictively and cannot be employed for each statement issued pursuant to an official duty. Instead the rules governing expert evidence should have been employed, cf. The Administration of Justice Act's § 823.

The defence has alternatively claimed that in any event the audit reports in this case cannot be regarded as evidence that is covered by The Administration of Justice Act's § 877, section 2, no. 5. In support of this they have stated that the reports are drawn up by an audit company that is unilaterally engaged by the prosecution authority and that the defence has not had the requisite access to right of access to documents and contradiction while the work was in progress. The auditors have participated in the investigation and the preparation of the case in such a manner than doubt may be raised regarding their qualification. Presumptions have been worked into the audit reports that are taken as a basis for the investigation but that come under the court's free assessment of evidence and it is not shown with sufficient clarity in the reports the extent to which the audit companies' assessments are based upon such presumptions. The defence has thereupon referred, for example, to the fact that the final reports conclusions and presumptions completed on 12 February and 8 August 1996 have been altered in relation to the drafts of working notes of 15 September and 28 October 1992. In this respect a settlement method has been employed other than the stock exchange quotation upon the evaluation of a shareholding that has decisive influence upon T1's solvency. In the auditor's working draft of 26 September 1994 evidence assessments have been made, including an understanding that A, in which T1 was the principal shareholder, provided misleading information to the stock exchange, and that he knew this. Since the final assessments do not for the main part, differ from the submitted working draft, it is rendered probable that the

The Secretariat

final audit reports are wholly or partly based on the presumptions concerning T1's knowledge mentioned in the working drafts, without this being shown. In the final reports the auditors have made interpretations, e.g. of bank agreements. Notwithstanding that this interpretation in the example is directly seen from the report, the auditors have gone beyond the purely expert statement."

On the other hand, the prosecution authority claimed that:

"(...) the audit reports have been drawn up by an independent audit company and must be regarded as statements issued pursuant to an official duty, cf. The Chartered Accountant's Act §§ 1 and 8. The auditors work under criminal liability under the auditor legislation and The Penal Code's §§ 155-157. A draft report was forwarded in the spring of 1995 to, among others, T1's then-defence counsel with a view to comments, but the defence counsel wished at that time to await final report. The audit reports form one of many pieces of evidence in the case and the defence is entitled to examine the auditor and to present its own witnesses. As part of its assessment of evidence the court must assume a position concerning which weight is to be accorded the reports. The use of audit reports as evidence is acknowledged by fixed practice, cf. e.g. The Supreme Court's judgement in Ugeskrift for Retsvæsen 1980, page 77, and in this case the usual procedure has been followed with regard to the generating of the reports.

It is not in breach of the European Human Rights Convention's art. 6 to document the reports, as the documentation is supplemented by the other presentation of evidence, besides which the defence is entitled to present its own witnesses and to examine witnesses. There are no circumstances that can mean that the signing chartered accountants are not legally disabled due to a conflict of interest. The audit company has not assisted with the drawing up of charges in the case. In certain cases the audit company has been consulted and has provided expert assistance of an accounting nature. The audit company has not taken part in examinations of witnesses or the accused apart from an in court examination of the French tax authorities that the defence were advised of but did not wish to participate in. Examinations of witnesses and accused were not included in the documentation material for the audit reports. In the reports there are only expert assessments of accounting materials etc., illus-

The Secretariat

trated by described premises. The defence has not stated specific conditions in the final audit reports from which it may be rendered probable that there are presumptions built in that are not shown by the reports. The referred to drafts of working notes were drawn up at an early stage of the process and were not completed. It is natural that a change to the assessment of solvency is made in the final audit reports in accordance with the ongoing provision of costs materials. The auditors have accounted for why they find the stock exchange rate to be unusable as an expression of the value of the shares in A. The final reports deal with the liquidity which was not included in the original working notes.”

The Supreme Court gave permission for the submission and reading out of the audit reports with the following comments:

“(i)t has been a fixed practice for many years for audit reports that are drawn up by independent auditors at the request of the prosecution authority, during proceedings, can be used as evidence in accordance with The Administration of Justice Act’s § 877, section 2, no. 5, cf. e.g. the Supreme Court’s order in Ugeskrift for Retsvæsen 1980, page 77, and memorandum no. 1066/1986 concerning the combating of financial criminality p. 279-81. In accordance with normal procedures, T1’s normal defence counsels had had an opportunity to comment on the draft audit reports before these assumed their final form. During the proceedings the defence is entitled to examine the auditors in question and to ask for other experts to be summoned. As stated by the High Court the court must thereafter adopt a position regarding the value of the evidence against the background of all the evidence and the defence’s objections to the audit reports. No circumstances are reported that can lead to this practice being regarded as questionable or it being in breach of article 6 in the European Human Rights Convention.

There is no basis for assuming that justified doubt can be raised concerning the qualification of the auditors concerned. The situation that – e.g. on the grounds of more extensive material – there is a difference between some drafts of working notes and the final audit reports, cannot lead to the submission of these being refused. To the extent that such differences may be regarded as relevant, they can be included as submission of evidence and procedure during proceedings and in the court’s assessment of evidence. The Supreme Court further finds it to

The Secretariat

be not shown that the reports are based on presumptions that are not shown by them and are of such nature that they cannot be employed as means of evidence.”

As can be seen the Supreme Court does not find that the practice is in breach of Article 6 in the European Human Rights Convention. The Supreme Court supports this conclusion on three statutory rules concerning the defence’s rights and the task of the court. The Supreme Court thus refers to (1) the defence’s statutory right to contradiction during the main proceedings in the form of the right to (cross) examine the auditors concerned, and the Supreme Court similarly refers to (2) the defence’s similarly statutory right to require other experts (witnesses) to be summoned to give statements during the case. Finally, with regard to the statutory rules, the Supreme Court refers to, (3) the fact that the court must assume a position concerning the evidence value of the expert statements against the background of all the evidence and the defence’s objections to the expert statements. The latter fundamental concerning the court’s free assessment of evidence is seen from The Administration of Justice Act’s § 880, 2nd item.

In addition to the statutory rules concerning contradiction and free assessment of evidence stated above, the Supreme Court further refers to the fact that the practice that the Supreme Court finds lawful, is characterised by a “normal process”, according to which the defence has been able to comment on the draft audit reports before these assumed their final form.

In extension of this Supreme Court order, one could raise the question whether not all the elements that mean that the use of the expert statement are not found to be questionable, including being in breach of Article 6, should be statutory with regard to ensuring official knowledge and security for observance.

The Supreme Court’s order in UfR 2003, page 392, deals with the same subject, but with the difference, for example, that the prosecution authority has had expert assis-

The Secretariat

tance from the Danish Inland Revenue, whose reports the prosecution authority wished to submit and read out during the main proceedings, in addition to assistance from an audit company. The defence protested and claimed, amongst other things, that the audit reports in the case had been drawn up with the aim of reporting the accused's VAT evasion etc. The defence further claimed that staff at the Danish Inland Revenue are not sufficiently independent of the police and prosecution authority and that, as a consequence of their involvement in the investigation, they cannot be regarded as experts. In response to these objections, the Supreme Court stated the following:

“The tax authorities’ audit reports and auditor statements may, according to established practice, be read out in court wholly or as extracts as part of the submission of evidence in the same way as other statements obtained by the police. Such use of the statements as evidence – possibly supplemented by examination of those who have drawn up the document in question – is, as a point of departure, covered by the provision in The Administration of Justice Act’s §877, section 2, no. 5, cf. § 928, section 3.

During the proceedings the defence were able to examine Flemming Christensen from Told & Skat Maribo and chartered accountant Kenneth Hofman from KPMG, and the defence have had funds made available for expert assistance for the accused.

The Supreme Court therefore finds that there is not basis for refusing documentation from Told & Skat Maribo and the audit company KPMG's reports and statements in their entirety. The Supreme Court further finds that no information has emerged that can justify the prosecution authority being prevented from examining Flemming Christensen from Told & Skat Maribo and chartered accountant Kenneth Hofman from KPMG.

The Supreme Court therefore upholds the prosecution authority's claim.”

One can again see that the Supreme Court, as part of the assessment of the conformity between the practice of expert information concerning the case and the equality of arms principle, places weight on an element that is not statutory. In the specific case this element was that the defence had had funds made available for expert assistance.

The Secretariat

One could again raise the question therefore of whether the equality of arms principle should be protected by statutory rules rather than practice – out of regard to ensuring uniform observance and knowledge. In connection with this question it shall be stated that a broadly structured expert committee (including lawyer representation) under the Ministry of Justice issued the memorandum no. 1066 in 1986 concerning the combating of financial criminality which, amongst other things, contained the following considerations concerning expert assistance in such case, cf. the memorandum's page 289 ff.:

“In major accounting cases it is usual for the police to engage auditing assistance during the investigation. In some cases this occurs at a very early juncture, i.e. before searching, appointment of defence counsel etc. The auditing related assistance can typically be divided into 2 functions in that there is, on the one hand, a matter of general assistance to the police (answering of questions that arise in connection with the actual investigation process), and on the other hand, concerning specifications and assessments for use upon the case being dealt with in court (audit reports).

The question of the extent to which the court and the defence shall be involved in connection with the choice of auditor and formulation of audit themes, has been regularly raised.

According to the information available to the committee the existing system must be regarded as functional and it does not appear appropriate to involve the court at a time when charges have not yet been brought nor has a defence counsel been appointed. In addition, there is the fact that the work is carried out by independent chartered accountants under the normal criminal liability e.g. under the Auditor Act and e.g. The Penal Code's § 155 and § 157.

To choose a new auditor at a later point in time when one auditor has already familiarised himself with the case, will be resource-intensive both financially and in terms of time and should therefore be limited to cases where there are grounds for doubting that the audit work hitherto carried out has been done so satisfactorily.

The Secretariat

With regard to the question of whether the court/or defence should be involved in the formulation of the audit theme, the committee does not find that an obligation to this end should be laid down. It would be practically inconceivable that the police and prosecution authority should be debarred from having the points illuminated that are considered necessary for the question of charges. Under the current rules the defence may, of course, request that further points are included and any rejection may be brought before the court, cf. The Administration of Justice Act's § 746, section 1.

According to the committee's information the general practice at present is that the defence may, if required, have an amount granted for audit-related assistance upon the defence's examination of the present audit reports and for the formulation of any questions from the defence. It is the committee's opinion that this practice provides a satisfactory solution, including cost-related respects."

The question that this report lead up to could, against the background of the above stated considerations from 1986, hereafter be modified whereby one could examine, whether the described practice concerning access to expert assistance for defence counsel is currently generally extensive and employed, whether it covers the use of experts in all general aspects or whether it specifically aims at audit-related assistance, and whether this normal practice, together with the statutory rules concerning particularly the defence's contradiction and the court's free assessment of evidence, together constitute a satisfactory guarantee in terms of legal security, for a fair legal proceeding with particular reference to the equality of arms principle.

As is shown above the Supreme Court has, in many cases, assumed a position regarding whether the prosecution authority's close cooperation with the expert without the same degree of cooperation with the defence gives rise to reservations in regard to the equality of arms principle. This question of observance of the equality of arms question touches upon, in certain cases, the question of the expert's possible legal disability in the case due to a conflict of interest. In one of the Supreme

The Secretariat

Court's orders regarding principle in this area, one may thus see that the Supreme Court, in its decision regarding the question of such legal disability on the part of the expert, primarily places weight on the same factors as upon taking a position regarding whether the equality of arms principle is observed:

In the case published in UfR 1997, page 675, a joint stock company was accused of breaching the Working Environment Act by having set up an oil fire at a construction site without countering or removing the pollution from it.

The prosecution authority wished to submit a memorandum drawn up by an inspecting chemist at the Danish Working Environment Authority and to examine the chemist in question as an expert witness (The Working Environment Authority is a public authority that has, among other things, the task of supervising observance of the Working Environment Act).

The defence protested against the prosecution authority's requests and stated in that connection, in particular, that the memorandum that the prosecution wished to submit, originated from an employee in the authority that had asked for the charge to be brought. The defence further referred to, among other things, the fact that it states in the travaux préparatoires to the Administration of Justice Act's § 877, section 2, no. 5 (now § 871, section 2, no. 5, regarding statements issued pursuant to an official duty, edited) that it is a narrow exception rule that does not cover statements from the actual authority that has been responsible for the investigation of the case. The district court stated in its conclusion, the following:

“After what the prosecution authority has stated it is found to be of importance for the case that the requested submission of evidence is allowed. The court thereupon finds that the submission and employment of the memorandum drawn up by the inspecting chemist at the Working Environment Authority, Carsten Bonsing, is pursuant to The Administration of Justice Act's § 877, section 2, no. 5, or its analogy and finds no basis for considering Carsten

The Secretariat

Bonsing as being legally disabled as a witness. Accordingly, and since the defence's objections will be able to be considered upon the court's assessment of the evidence value of the memorandum and the witness statement, the prosecution's request regarding the submission of evidence is upheld."

The High Court upheld the district court's order in accordance with the grounds, and the Supreme Court stated the following:

" Submission and documentation of the discussed memorandum drawn up by an inspecting chemist at The Working Environment Authority, Carsten Bonsing, and the examination of him as an expert witness will not prevent Hoffmann & Sønner A/S from obtaining statements from other experts and/or from examining other experts as witnesses. With this observation and otherwise for the reasons stated by the district court, the Supreme Court upholds the order."

The order shows that the situation whereby a public authority has the task of monitoring the observance of a given area of law, does not in itself prevent the authority in question from appearing as an expert in a criminal case relating to the area. As stated the order further shows that the courts, in respect of this question, also place a lot of weight on the defence's access to contradiction during the main proceedings combined with the court's free assessment of evidence, cf. the Administration of Justice Act's § 880, 2. item. Stated popularly one has a relatively broad ability to submit evidence that is based on a confidence that the prosecution authority, the defence and the judge in the case in question, can introduce factors such as, for example, a close cooperation with the prosecution authority, in their illustration and determination, respectively, of the case, cf. above in section 1 regarding the various ways on which quality control of expert statements can be based.

The circumstance whereby the court's free assessment of evidence is essential in the quality control of expert statements has, in particular, manifested itself in the way the courts have refused the submission of expert statements in cases where the expert

The Secretariat

statements have encroached upon the court's area and has expressed itself regarding matters that are the subject of the court's assessment of evidence. The Supreme Court's order published in UfR 2000, page 627 is an example of this:

In this case the prosecution authority in a case regarding the breach of the Animal Protection Act, wished to submit two statements from the Veterinary Health Council. The Veterinary Health Council is set up under the Ministry of Food, Agriculture and Fisheries and has, for example, the task of issuing statements concerning veterinary matters at the request of a public authority or by parties in criminal cases and civil cases, under which such questions arise. The defence protested against the submission of the statements in question with reference to, e.g. the fact that these contained statements concerning matters that came under the court's assessment, including the question of guilt.

The Supreme Court's judges were not agreed with regard to whether the statements could be submitted. A majority consisting of three judges decided – as did the High Court – that the statements could not be submitted, and stated the following:

“The police can obtain a statement from The Veterinary Health Council regarding veterinary matters, cf. § 3 in the Act on Veterinary Practices etc. The Council can, in this respect, express itself regarding whether behaviour that is described in detail in questions to the Council, involves an indefensible treatment of animals or possibly an abuse of worse indefensible treatment, cf. The Animal Protection Act's § 1, § 28, section 1, and § 29, section 1. Such statements from the Council are covered by the Administration of Justice Act's § 877, section 2, no. 5 and may therefore be used as evidence. This applies even if the statement is unilaterally obtained by the police before the bringing of charges, in that the accused has the right to put supplementary questions to the Council or to obtain statements from other experts.

In the present case the Council has, however – because of the manner in which the case is brought and the questions are posed – not merely expressed itself regarding veterinary matters, but also on matters that will be the subject of the court's assessment of evidence. The

The Secretariat

Council has thereby expressed itself regarding the taking of a position as to whether the accused has been in breach of the Animal Protection Act. With reference to this and to the Council's special position, we vote in favour of upholding the High Court's order."

The minority of two judges voted in favour of the statements being able to be submitted, as was the case in the district court. These two judges stated the following:

"In our opinion the content of The Veterinary Health Council's statements in the present case is not of such a nature that the prosecution authority is, for this reason, prevented from documenting the statements pursuant to the Administration of Justice Act's § 877, section 2, no. 5. We hereupon place weight on it not being able to be regarded as unjustified for the prosecution authority to obtain statements from The Veterinary Health Council regarding whether certain forms of treatment or conditions involve, in the Council's opinion, an indefensible treatment of animals, cf. the Act's § 28, section 1, 2nd item, and § 29, section 1. We further give weight to the fact that The Veterinary Health Council has, in its statements, reported the relevant circumstances that the Council has taken as a basis in respect of the individual assessments, and that the accused is not prevented from contesting either the correctness of this factual basis or the correctness of the actual assessment and, in this connection, has the right to pose supplementary questions to the Council and/or obtain statements from other experts in veterinary matters. In our opinion it cannot, either, be regarded as being unjustified that the prosecution authority did not, in connection with the first submission of the matter to The Veterinary Health Council, formulate specific questions to the Council.

With these observations and otherwise on the grounds that are stated by the district court, we vote in favour of upholding the district court's order."

In addition to illustrating an important limit to the content of the expert statements, this order may also give the impression of how much weight is placed in Danish law on the defence's right to contradiction and the court to free weighing of evidence in return for a very liberal practice for the actual submission of expert statements. The above order is thus an expression of a limit where two judges against three voted in favour of permitting the submission of the expert report on the grounds of the right to place question-marks against this in the court, while three judges, stated popularly,

The Secretariat

found that the limit had been exceeded regarding to how high a degree one can rely on contradiction and the free weighing of evidence counteracting an expert statement's general defects. In this connection it should be noted that the Supreme Court's majority, in its decision, placed weight on The Veterinary Health Council's special position, whereby this is presumably intended to mean the situation whereby the Council is the senior expert instance in its field. The Supreme Court's majority has thus not only placed weight on the content of the expert statement but also, presumably, on the fact that the expert statement could not be repaired upon the obtaining of a statement from an authority with at least the same weight as the Veterinary Council.

4. Short overview with examples of rules regarding expert authorities

As stated above in section 2.2 there are no statutory general rules regarding who the police may appoint as experts. Nor are there any general rules regarding accreditation or similar of experts for use in connection with police investigations.

As a point of departure the police may thus obtain expert assessments or statements from any authority or public or private institution or association, that possess the necessary case-related know-how and that are not legally disabled due to a conflict of interest in respect of the case in question.

As similarly stated the police will, if possible, select an expert who carries out an official duty. In this way the police ensure themselves that the expert's statement – everything else being equal – will be able to be submitted in court, cf. The Administration of Justice Act's § 871, section 2, no. 5.

Against the above background a compilation of whom the police employ as experts would comprise a long list of, in particular, all the public authorities that operate within the various professional sectors that criminal cases can cover. Such a list

The Secretariat

would not add anything to the above introduction to the use of experts in Danish criminal procedure but, in the following, for the sake of providing an overview, a short introduction to who the police obtain statements from is presented, followed by examples from specific professional sectors.

The short introduction is copied from Professor, lic.jur. Jørn Vestergaard's article "Several types of negligence – regarding good practice and expert evidence," as a contribution to the celebratory volume prepared for Nils Jareborg and published by Iustus Förlag in 2002. On page 3 of this volume it states that

"In criminal cases the obtaining of statements from particularly expert sources, first and foremost from medical and veterinary instances, the National Commission of the Danish Police's technical departments, vehicle inspectors in transport cases, as well as major public and private specialist laboratories. In major financial cases auditor statements are obtained. Statements are also often obtained from public agencies, including with regard to the question of derivation of rights. Mention shall also be made of statements from private interest organisations' legal opinion committees, e.g. those of the chartered accountants' associations. (...) There is also a special law regarding medical inspection of bodies, post-mortem examinations etc."

Jørn Vestergaard states, in particular, regarding cases of deprivation of rights, that:

"(T)he prosecution authority has a certain practice for obtaining statements from e.g. the Road Safety and Transport Agency in cases concerning the carriage of goods, the Forest and Nature Agency in environmental cases, the Game Administration in hunting law cases, the Civil Aviation Administration in cases against pilots, The Companies and Commerce Agency in cases against auditors, The Danish Maritime Authority in cases dealing with maritime inquiries, medical officers and the National Board of Health as well as, possibly, the Legal Council of Doctors in cases against health personnel, circuit veterinary surgeons and The Veterinary Health Council in cases concerning animal protection, as well as the Danish Veterinary Service in cases against veterinary surgeons, The Environmental Protection Agency in pollution cases, cf. The Assistant Public Prosecutor's notification no. 9, 1998, the

The Secretariat

Consumers' Ombudsman in cases concerning good marketing practices or chain letters/pyramid selling, municipal executive councils/the taxi authority in cases concerning the driving of taxis, cf. The Assistant Public Prosecutor's notification no. 6, 1990."

As examples of special regulation of an institution that provides expert statements for use with criminal cases, mention may be made of the regulation of The Legal Council of Doctors, cf. Act no. 60 of 25 March 1961, in which the following is, among other things, laid down regarding the activity of The Legal Council of Doctors:

"§ 1 The task of The Legal Council of Doctors is to provide medical scientific and pharmaceutical opinions to the public authorities in cases regarding individual person's legal position. The Minister of Justice may determine further rules regarding which authorities may request the council to provide opinions, and in which cases this may occur.

§ 2. The council consists of up to 12 doctors. It works in two departments of which one deals with forensic psychiatry and the other with all other forensic medicine matters.

Section 2. The members are appointed by the King. The Minister of Justice appoints a chairman and 2 deputy chairmen from among them, one for each department.

Section 3. The Minister of Justice appoints a number of experts from among which the council may summon one or more to participate in the handling of a case.

Section 4. Should the handling of a case require special case knowledge that the council's members and the experts referred to in section 3 do not possess to a sufficient extent, then the council may summon other experts to take part in the handling of the case.

Section 5. Appointment of members and the experts referred to in section 3, takes place for 6 years. When circumstances justify it, the appointment may, however, be made for a shorter number of years.

As a further example of a special subject-specific institution for the provision of expert statement, mention may be made of The Veterinary Health Council that, together with the Danish Veterinary and Food Administration, provides expert state-

The Secretariat

ments concerning veterinary-related matters in accordance with ministerial order no. 120 of 28 February 2005, which states that:

”§ 1. The parties in criminal cases and public authorities may submit specific veterinary-related questions to the Veterinary and Food Administration for comment.

Section 2. The parties in criminal cases may, in cases involving a principle may submit the matter directly to The Veterinary Health Council.

Section 3. In civil cases the court authority may, by order of the court, put specific veterinary-related questions to The Veterinary Health Council. The Administration of Justice Act’s general rules regarding expert opinion are correspondingly applicable, except that The Council’s members cannot provide testimony in connection with the statement.

§ 2. The Veterinary and Food Administration can submit specific veterinary-related questions to The Veterinary Health Council, cf. § 1, if the administration does not believe that it possesses the necessary expertise, if the administration considers the questions of a nature that involves matters of principle, or they concern the exercising of authority by the Ministry of Family and Consumer Affairs. The Council subsequently provides statements regarding specific veterinary-related matters to the requesting party in the case.

Section 2. If The Council finds that a case submitted to the Veterinary and Food Administration is of a nature involving principles, then this is reported to the Veterinary and Food Administration which thereafter submits the case to The Council.

§ 3. The final determination of whether the cases dealt with in §1, Section 2, and § 2, Section 1, involve principles, is made by The Veterinary Health Council. The Council notifies the parties to the criminal cases and The Veterinary and Food Administration, respectively, should the council find that a submitted case is not of a character involving principle.

§ 4. Should The Veterinary and Food Administration or The Veterinary Health Council not consider that the written material affords an adequate basis for a statement in the case, then whoever is involved in the case may be requested to provide further information.

The Secretariat

Section 2. If the supplementary information stated in Section cannot be obtained or, in a civil case, is not required to be provided, the posed questions will be answered on the existing basis if this is possible.

§ 5. The statements shall be accompanied by grounds.

Section 2. The grounds shall, if necessary, contain a brief account of the information relating to the case's factual circumstances that are accorded significant importance for the statement. To the extent that the statement relies upon an opinion, the grounds shall state the principal consideration that has been the determining factor for the exercising of an opinion.

Section 3. If the assessment of conditions in the case's documents, that are of significant importance for the statement, give rise to doubt, then this shall be explained in the grounds.

§ 6. Statements in civil cases are sent to the court.

Section 2. Statements in criminal cases are sent to the requesting party.

Section 3. Statements drawn up by the Veterinary and Food Administration are simultaneously sent to The Council.

§ 7. The Veterinary Health Council issues an annual report. The Veterinary and Food Administration's statements are included. For this purpose the administration forwards résumés, statements and decisions in the cases."

5. Summary and questions to actors from the justice sector

This section contains a short summary of the report which was sent to justice sector actors for consultation, as well as a statement of the questions that the report and the AGIS project gave particular occasion to request the justice actors to respond to. In addition to the questions stated below the professional actors of the judicial system were asked to consider commenting otherwise on the subjects that are touched upon in the report.

The questions raised below are based on the point of departure that the use of expert statements in criminal cases should be regulated by rules that secure the interests of

The Secretariat

both society and the accused as well as any victim, in a fair trial and a correct determination of the criminal case.

As is seen from the report the requisite quality control of expert statements in Denmark is, for the most part, based on The Administration of Justice Act's general rules concerning, in particular, the objectivity of the prosecution authority, the equality of arms principle, the defence's right to contradiction and the court's free weighing of evidence. There are not, however, statutory rules that are particularly aimed at securing the quality of expert statements by, for example, by making the defence or the court's withdrawal in the appointment and instruction of experts obligatory, or by giving the defence a right to expert assistance in particularly complicated cases.

The absolute overall question must, against this background, be whether this model - with a broad ability to obtain and submit expert evidence in return for a broad ability for the court to censure evidence against, in particular, the background of the defence's objections - is, in practice, suited to securing a fair trial and a correct determination of the criminal case. Or if it would be better with statutory, general rules, that particularly aim at quality assuring expert statements, particularly upon obligatory withdrawal of the defence and the court at an earlier juncture.

As part of the answering of the above questions one may touch upon the question of whether the current practice of expert information concerning the case should be departed from in favour of employing The Administration of Justice Act's chapter 19 regarding expert opinion which, as stated, is not used in practice in criminal cases.

As part of the answer the professional players in the judicial system should further state whether the normal practice for the expert information concerning the case at present means that the defence has expert assistance placed at its disposal and/or is involved in the expert information concerning the case, to an adequate extent with regard to the fulfilment of the equality of arms principle.

The Secretariat

All those with an interest in the employment of experts in the Danish criminal procedure may, to advantage – among many other good presentations – read a (further) short introduction to the subject and the thereto associated questions in the above-mentioned article “Several types of negligence – regarding good practice and expert evidence,” by Professor, lic.jur. Jørn Vestergaard in the “Celebratory volume prepared for Nils Jareborg and published by Iustus Förlag in 2002.”

Mutual legal assistance

The basis for mutual legal assistance in Denmark is the convention on Mutual Assistance in Criminal Matters from 1959. There is no national legislation implementing the convention. The official channel for mutual assistance is the Ministry of Justice, which receives the request for assistance, and sends it to the appropriate police authority. After this, communication often happens directly between the relevant executing authorities. Co-operation with other Scandinavian countries often follows this model.

It is the impression of the Task Force that the Danish Authorities rarely obtains expert evidence abroad for use in criminal cases. This may be because they often wish to use their own forensic experts and medical statements.

The Task Force has been informed that the Danish Police widely uses technical statements from other European countries with a special expertise in documents, dna, computers and internet crime. These approaches are relatively uncomplicated as they often happen directly from one police authority to another. In these cases the Danish police and prosecution decide which authority abroad can best assist in the case.

The Secretariat

As far as it is considered necessary during the court proceedings a technical or other expert can be called to give explanation during the criminal case, but this is not likely to happen very often.

Upon requests to the Danish police from other European countries, there have been several cases where the Danish police has gathered evidence on their behalf, and in so far as they are known to the Danish police, make an effort to respect the evidentiary rules of the requesting party.

In some very recent cases in relation to terrorism, experts have been called from abroad by the prosecution or by the defence. These persons have often given written statements ahead of the case, for instance about a specific grouping or a conflict somewhere in the world in order for the defence and the prosecution to be able to prepare their questions for the court proceedings.

The Ministry of Justice has explained that Denmark accepts requests of mutual assistance in the Scandinavian languages (Danish, Swedish, Norwegian, Finnish, Icelandic), as well as German, French and English. If requests are received in those languages Denmark will cover the costs of translation, if necessary. Requests in other languages are expected to be translated at the cost of the requesting country.

The Secretariat

Summary of consultations with actors from the justice sector

The police (rigspolitiet)

The police are of the opinion that the report fully covers the problem in question. They believe that the defence in criminal cases enjoys the same rights as the prosecution with respect to the expert assistance which is made available for the defence.

It is the impression of the police criminal technical centre that where the prosecution is present, the defence has the same opportunities and uses it, which is typical in reconstructions with expert witnesses, for an example forensics or fire experts.

The public prosecutor on financial crime (statsadvokaten for særlig økonomisk kriminalitet)

According to practice audit reports and audit themes are normally sent to the defence and the suspect at an early stage, which gives the opportunity for the wishes of the defence to be included.

This practice assures that the supplementing questions and wishes of the defence can be taken into account and brought before the court at an early stage. The efficiency of the arrangement presupposes that the defence is able to specify its supplementing wishes from researching the case and through talks with the suspect at this early stage.

The development in practice where the defence lawyer is already involved from the drawing up of the audit theme should be included in the report. Likewise the report from the law preparing committee (report 1066/1986) should be included, which gives the defence lawyer an opportunity to demand expert opinions (syn og skøn) of estimates, if it would be relevant.

The Secretariat

The prosecutor on financial crime believes that the current involvement of the defence is sufficient, but will be interested in a dialogue if the Danish Bar and Law Society receives information about defence lawyers who are being refused the assistance of experts to the necessary extent.

In order to ensure the quality of the expert evidence, it is not as much a question of who formulates the questions and selects a suitable expert, but rather a question of a critical evaluation of the quality of the final expert statement.

The prosecutor on financial crime believes that the current practice is both adequate in order to ensure that all the facts of the case are put forward, and to ensure that no evidence is used in court without a critical evaluation.

Director of public prosecutions (rigsadvokaten)

According to the administration of justice act the police plan and carry out investigations and the court rules on disputes about the legality of the different steps of the investigation. As a result thereof it is the police and the prosecution who decide to gather expert evidence, including pointing out and instructing the relevant expert. However, this often happens in cooperation with the defence lawyer. The prosecution is subject to the principle of objectivity, and this should ensure an impartial and professional evaluation of the need for and the implementation of the gathering of expert evidence.

The case law presented in the report shows that the Supreme Court has had the opportunity to evaluate the position of the defence in relation to expert evidence. This shows that the interests of the defence have been taken into consideration. The Supreme Court undertakes an evaluation of the process as a whole in order to decide whether it lives up to the requirements of a right to a fair trial. The case law shows that the Supreme Court has undertaken such an evaluation and found that the rights

The Secretariat

of the defence were not set aside. The evaluation must be one of the actual circumstances not only one of formal rules.

The Danish model adequately secures the right to a fair trial, and it would not change the actual opportunities of the defence if the right of access to expert evidence were put into statutory form.

The association of defence lawyers

In order to live up to the principle of the equality of arms the defence lawyers should always be given an opportunity to obtain the necessary expert evidence in order to facilitate the execution of the duties of a defence lawyer. This includes access to experts and expert witnesses used by the prosecution, but also the possibility of including the payment of the expert as legal costs. The defendant/indicted person, who may have special expertise, should also be provided with a copy of the expert evidence.

There will always be a risk that a closer dialogue between the requesting party and the expert may influence the content of the expert evidence.

With respect to financial crime there are a number of rulings which establish the right of the defence to obtain a “second opinion.” This right is also referred to in the travaux préparatoires of financial crime legislation. This principle should apply within all areas of expert assistance, as well as securing the defence and the defendant the opportunity of getting access to expert assistance if they so wish.

It is neither considered practical nor desirable to abolish the wide access to obtain and introduce expert evidence and replace these with formalised rules of expert appointment.

The Secretariat

The Criminal Law Committee of the Danish Bar and Law Society

It may in practice be difficult to receive funding for obtaining expert opinions, and there have been examples of cases where the expert would have been disqualified on the grounds of a conflict of interest by the ethical rules that apply for lawyers, had he or she been a lawyer.

In financial cases the defence lawyers and defendants may some times feel that the auditor is acting in the interests of the prosecution due to the often close cooperation with the prosecution. However, many defence lawyers also experience that the audit reports are impartial, and it is acknowledged that auditors are acting in accordance with their own ethical rules. In some cases a risk of self incrimination may arise, as the auditor also works for the prosecution. It may appear unfair to the accused when the same auditor is used throughout a case, at all instances.

There is a need for clearly establishing which assistance the defence is entitled to receive throughout the case. The Criminal Law Committee will continue the dialogue with the appropriate justice sector actors.

There are examples in practice where access to expert evidence at the early stages of financial cases is not always easy, and the process of consultation has revealed that the courts do not always seem to scrutinise the expert evidence as thoroughly as the Danish system requires due to the lack of formal regulation. This system requires an active role of the defence lawyer in questioning the expert evidence, the expert and the circumstances in which the evidence has come about. The Criminal Law Committee is of the opinion that Danish defence lawyers can be more active to this effect and has thus defined a need for training and for raising the awareness of defence lawyers on this matter, with the purpose of improving the protection of the rights of the client.

The Secretariat

The topic may also be included in dialogues with other legal sector actors, and in a project on best practice for defence lawyers, which is currently in the making.

The Secretariat

Recommendations

The discussions in the Task Force and consultations with the justice sector actors leads to the conclusion that more focus should be put on issues regarding the use of expert evidence in practice. The process of making the report has revealed that there are issues that will need further research, dialogue, and training of defence lawyers. The recommendations are:

- Further research of the use of expert evidence in practice in court proceedings.
- Incorporation into the best practice of defence lawyers project in order to define what best practice of a defence lawyer is with respect to challenging of expert evidence in court proceedings.
- Training of defence lawyers with the purpose of making them aware of their role in seeking respect for the principle of equality of arms through challenging expert evidence, and of difficulties and challenges they may face in doing so.
- A continuous dialogue with the legal sector actors in particular between defence lawyers, the prosecution and court system.

The Secretariat

Conclusion

Most actors requested, defence lawyers and police/prosecution alike are satisfied with the current system and support the broad possibility to produce expert evidence in the courts. It is generally believed that the system lives up to the equality of arms principle.

However, the prosecution and police tend to be more satisfied with the current practice than defence lawyers. In particular with respect to the investigation of financial crime it has been observed that the use of auditors may present some challenges. It can pose challenges of appearance of justice to the accused when auditors are used throughout a trial at all instances, or the risk of self incrimination for the accused if there is only access to the auditor of the prosecution.

The process of writing the report has revealed issues which will need to be addressed in the future through further study, dialogue and training among defence lawyers, and possibly in the wider legal society.