



Violation of the principle of equality of arms in court proceedings: Test-Achats had objectively justified reasons for doubts as to the neutrality of a court-appointed expert

In today's **Chamber judgment**¹ in the case of [Test-Achats v. Belgium](#) (application no. 77039/12) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 (right to a fair hearing) of the European Convention on Human Rights with regard to the principle of equality of arms, and

no violation of Article 6 with regard to the adversarial principle.

In this case, the applicant association, Test-Achats, challenged the neutrality of the expert who had been appointed by the Brussels Court of Appeal in the context of a civil action brought by it against an insurance company, in which Test-Achats sought the cessation of practices that it considered discriminatory having regard to the insured persons' ages.

In particulier, Test-Achats submitted that while its case was pending before the court of appeal, a partnership was concluded in 2009 between the opposing party and a university institute chaired by the court-appointed expert. Test-Achats alleged that there had been a breach of the principle of equality of arms and of the adversarial principle and, in consequence, of its right to a fair hearing in the proceedings, which culminated in the dismissal of its action by the court of appeal.

The Court considered that the existence of this partnership could necessarily have prompted objectively justified misgivings on the applicant association's part as to the fairness of the expert-report process and, in consequence, of the judicial proceedings as a whole. Having regard to the nature of the ties between the expert and Test-Achats' opponent in the proceedings, the decisive impact of the expert report on those proceedings and the dismissal of Test-Achats' request that the report be excluded, the Court held that the proceedings had not complied with the principle of equality of arms.

With regard to the adversarial principle, the Court noted that the court of appeal had considered that certain questions posed by Test-Achats had been unrelated to the task entrusted to the expert or had been irrelevant. The Court saw no strong reason which would require it to substitute its view for that of the domestic courts on this point.

Principal facts

The applicant association, Test-Achats, is an association registered in Belgium. Its aim, as stated in its articles of association, is to defend and represent the interests of consumers and to safeguard human rights in general, and to combat all forms of discrimination.

In 2004 Test-Achats brought a civil action against an insurance company, seeking that it abandon practices which the applicant association considered discriminatory against certain insured persons

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

on account of their age. In 2005 the President of the Brussels Commercial Court granted its claim. The insurance company lodged an appeal.

In 2006 the Brussels Court of Appeal ordered an additional expert report and appointed an expert, who submitted his final report in 2008. During the proceedings Test-Achats challenged the neutrality of the court-appointed expert. In particular, it argued that while its case had been pending before the court of appeal a partnership had been concluded in 2009 between the opposing party and a university institute chaired by that same expert. It requested that the expert report submitted by him on 10 April 2008 be excluded from the proceedings.

In 2010 the court of appeal set aside the lower court's order and dismissed Test-Achats' claim, finding that there had been an objective and reasonable justification for the difference in treatment by the insurance company. In reaching its decision, the court of appeal relied, in particular, on the additional expert report submitted by the expert whose neutrality was contested by Test-Achats. The court of appeal also found that the expert had replied in substance to those questions posed by the parties which were related to the task he had been asked to carry out.

In 2012 the Court of Cassation dismissed two appeals on points of law submitted by Test-Achats.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair hearing), Test-Achats alleged that there had been a violation of the principle of equality of arms and of the adversarial principle, referring to its doubts, which it considered objectively justified, as to the neutrality of the expert appointed by the court of appeal. It also considered that the expert had not answered certain questions that it had submitted to him during the expert-report process.

The application was lodged with the European Court of Human Rights on 27 November 2012.

Judgment was given by a Chamber of seven judges, composed as follows:

Arnfinn **Bårdsen** (Norway), *President*,
 Egidijus **Kūris** (Lithuania),
 Saadet **Yüksel** (Türkiye),
 Lorraine **Schembri Orland** (Malta),
 Andreas **Zünd** (Switzerland),
 Diana **Sârcu** (the Republic of Moldova) and,
 Stefaan **Smis** (Belgium), *ad hoc Judge*,

and also Dorothee **von Arnim**, *Deputy Section Registrar*.

Decision of the Court

Article 6 (right to a fair hearing / principle of equality of arms)

The Court considered that the existence of this partnership could necessarily have prompted objectively justified misgivings on Test-Achats' part as to the fairness of the expert-report process and, in consequence, of the judicial proceedings as a whole. This was particularly true given that, in setting aside the first-instance court's decision, the court of appeal had based its findings decisively on the contested expert report, although the applicant association had explicitly requested that it be excluded. In this connection, the Court noted that Test-Achats had had an opportunity to criticise the content and form of the expert report before the court of appeal. However, having regard to the nature of the ties between the expert and Test-Achats' opponent in the proceedings, the decisive impact of the expert report on those proceedings and the dismissal of Test-Achats' request that the report be excluded, the above considerations were sufficient for the Court to find that the

proceedings had not complied with the principle of equality of arms. It followed that there had been a violation of Article 6 § 1 of the Convention.

Article 6 (right to a fair hearing / adversarial principle)

Test-Achats submitted that the expert had not answered certain questions raised by it. On this point, the court of appeal had noted that the expert had replied that some of the questions asked by Test-Achats were unrelated to the task entrusted to him or had not been relevant.

The Court noted that the questions had been sent to the expert, who had provided an explanation for why he did not consider it appropriate to reply to them. The Court reiterated that Article 6 § 1 did not oblige courts to give a detailed answer to every argument raised. This was particularly so with regard to experts, who were not directly concerned by that provision. Additionally, the Court noted that Test-Achats had had an opportunity to criticise the content and form of the expert report before the court of appeal. That court had established that the parties' arguments were addressed in the expert's report in so far as they were related to the task entrusted to him. It noted that this reasoning had then been validated by the Court of Cassation. The Court saw no strong reason which would require it to substitute its view for that of the domestic courts on this point. Those considerations were sufficient for the Court to conclude that there had been no violation of Article 6 § 1 of the Convention with regard to the adversarial principle.

Just satisfaction (Article 41)

The Court held that Belgium was to pay the applicant association 4,000 euros (EUR) in respect of non-pecuniary damage and EUR 4,000 in respect of costs and expenses.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.