

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**Civil Judicial Expertise in
the EU:
Analysis of EU Legislation
and Recommendations**

In-depth analysis for the JURI Committee





DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

Civil Judicial Expertise in the EU:
Analysis of EU Legislation and
Recommendations

IN-DEPTH ANALYSIS

Abstract

Upon request by the JURI Committee, this study provides an analysis of existing EU legislation applicable to judicial expertise for the purpose of assessing whether cross-border expertise in the EU is hampered or restricted, and whether steps could be taken to facilitate it and to further develop a genuine European area of civil justice. It concludes that, while existing EU law is largely satisfactory, there are still major issues, and that EU action would be necessary to address them.

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LIST OF ABBREVIATIONS

- Cass.** *Cour de cassation* (francophone supreme court in civil matters)
- Civ. 1ère** First Civil Chamber of the *Cour de cassation*
- Clunet** Journal du droit international
- CJEU** Court of Justice of the European Union
- ECR** European Court Reports
- ECHR** European Court of Human Rights
- IPRax** Praxis des Internationalen Privat- und Verfahrensrechts
- Rev.Crit.DIP** Revue Critique de droit international privé

EXECUTIVE SUMMARY

Background

In cross-border disputes, the activity of court appointed experts raises a number of specific issues.

- The court willing to appoint an expert must determine whether it has jurisdiction to do so. This assessment includes, as the case may be, taking into account the fact that another court might already have appointed an expert in parallel proceedings.
- Court appointed experts being involved in the delivery of justice, it has traditionally been considered that they may not carry investigation outside of the jurisdiction of the appointing court without infringing the sovereignty of the foreign state.
- Certain Member States have established quality insurance schemes such as judicial lists of experts. As such schemes might vary among the different Member States, or only exist in certain Member States, they could in effect limit resorting experts established outside of the jurisdiction of the appointing court or, more perniciously, limit the trust of the appointing court in experts established in other Member States and subject to different quality insurance schemes.
- Once an expert report has been delivered in proceedings in one Member State, the issue arises as to whether the court of another Member State could, and would, rely on it, or whether it would have to, or would prefer appointing another expert for conducting similar investigations.

Aim

The purpose of this Analysis is to assess whether, in the European Union, these issues are addressed in a way consistent with the existence of a genuine European area of civil justice.

Main Conclusions

- Existing EU law is largely satisfactory in the way it addresses:
 - the jurisdiction of the courts of the Member States to appoint judicial experts in cross-border issues;
 - the power of experts to carry out investigations outside of the jurisdiction of the appointing court;
 - the elimination of restrictions hampering the activity of judicial experts in other Member States on the basis of the European freedom to provide services.
- However, there is a general lack of knowledge about the rules and practices followed in other Member States, which might generate distrust. As a result, the courts of the Member States (at least in the bigger ones) hesitate to appoint judicial experts established in other Member States, and to rely on expert reports issued in the context of foreign proceedings. Promoting European principles/guidelines on judicial expertise and establishing a European list of experts committing to follow such principles/guidelines might be an efficient answer to the problem.

- More worrying is the potential existence of radical differences in the laws of the Member States with respect to the conception of fairness to the litigants in expert proceedings. EU action would be necessary to resolve this problem either by clarifying the extent of the differences and eliminating misunderstandings or, if the differences are indeed fundamental, by approximating the laws of the Member States on this point.

GENERAL INFORMATION

KEY FINDINGS

- In principle, the jurisdiction to appoint judicial experts lies with the court having jurisdiction to decide the merits of the case. Exceptionally, the court of the place where the investigation of the expert would be carried out also has jurisdiction to appoint an expert if this investigation would safeguard a factual or legal situation (infra, 2).
- As the European law of jurisdiction tolerates the existence of parallel proceedings in case of related actions, it should also tolerate parallel expert proceedings in related actions. In contrast, parallel expert proceedings initiated before the court having jurisdiction to decide the merits of the dispute and the court of the place where the expert would carry its investigations should be avoided (infra, 2).
- Under the Evidence Regulation, a court of a Member State may appoint a judicial expert to conduct investigation outside of its jurisdiction after submitting a request to that effect to an authority of the other Member State. The *ProRail* decision of the CJEU allows the courts of the Member State to bypass the Evidence Regulation and to appoint judicial experts who may operate on the territory of other Member States without submitting any prior request. It has crafted an exception, however, for expert investigations affecting the power of the Member State where they will take place: submitting a request under the Evidence Regulation is mandatory (infra, 3).
- While the law of most Member States would allow a court to rely on an expert report delivered in the context of foreign proceedings, it seems that this rarely happens. Differences in the conception of the fundamental procedural rights of the parties have led courts to reject expert reports issued in other Member States for lack of procedural fairness (infra, 4).
- Judicial experts are protected by the European freedom to provide services, which has been used effectively to suppress certain indirect restrictions to its operation. It should now be used to suppress certain judicial practices favouring the appointment of judicial experts established within the jurisdiction of the appointing court (infra, 5).

1. INTRODUCTION

Courts need and rely on experts to assess issues of facts that they cannot resolve without assistance. Examples include determining the cause of the explosion of a machine in a factory, or assessing the extent of the damage suffered by the victim of a car accident. Courts also rely on experts to ascertain the content of foreign law. Courts rely on experts to translate documents drafted in a foreign language.

The purpose of this Analysis is to assess whether recourse to experts in cross-border disputes raises particular difficulties. More specifically, it is to assess whether cross-border expertise in the EU is hampered or restricted, and whether steps could be taken to facilitate it and to further develop a genuine European area of civil justice.

The rules governing the use of experts in civil litigation vary a great deal in the laws of the different Member States. The most fundamental difference, including for private international law purposes, is between Member States where experts are hired by the parties, and Member States where they are appointed by the court. In the United Kingdom, experts are typically hired by the parties. They are not appointed by the court and thus cannot be perceived as acting on its behalf. Each expert acts in his own private capacity, and offers assistance to the court, by answering questions put to him by the lawyers of the parties. He is essentially a (expert) witness. The adversarial process (i.e. cross-examination of each expert by the lawyers on the other side) will then allow the court to assess the reliability and competence of a given expert and decide whether to rely on his opinion. In France, by contrast, experts are typically appointed by the court, which entrusts them with the task of determining certain issues of fact that it defines. Court appointed experts, therefore, can legitimately be perceived as acting on the behalf of the court and being involved in an exercise of public authority. In many other Member States belonging to the Civil Law tradition (Germany, Luxembourg), courts regularly appoint judicial experts, but there are also Member States belonging to the same tradition where experts are not so often appointed by courts (I understand that the Netherlands is one of them).

In cross-border disputes, the intervention of experts has traditionally raised a number of issues. Virtually all of them arise out of the appointment of the expert by a court. Judicial appointment gives rise to the issue of the jurisdiction of courts to appoint experts (*infra*, 2). It confers on the expert a grain of public authority which has traditionally prevented him from carrying out investigations outside of the jurisdiction of the appointing court (*infra*, 3). It creates the issue of the value of the expert report in proceedings other than those of the appointing court (*infra*, 4). Finally, expert selection is typically governed by a complex regulatory regime in Member States where experts are appointed by courts, for the purpose of ensuring the skills and qualities of experts. These regulatory regimes potentially create restrictions to the freedom of experts established in other Member States to be appointed. By contrast, in the United Kingdom, there is no similar regulatory regime. It will be for the lawyers to demonstrate, and for the court to assess in each case, whether a given expert has the right skills and qualities (*infra*, 5).

The focus of this Analysis will therefore be on court appointed experts. As courts appoint regularly experts in some Member States only, I will essentially rely on sources originating from those Member States, and more specifically from Germany, France and Belgium. In Member States where courts never appoint, or do not appoint regularly experts, there are no cases addressing issues relating to cross-border expertise, and no academic writing, which confirms that few issues arise, if any.

2. JURISDICTION TO APPOINT JUDICIAL EXPERTS

KEY FINDINGS

- In principle, the jurisdiction to appoint judicial experts lies with the court having jurisdiction to decide the merits of the case.
- Exceptionally, the court of the place where the investigation of the expert would be carried out also has jurisdiction to appoint an expert if this investigation would safeguard a factual or legal situation.
- The European law of jurisdiction tolerates the existence of parallel proceedings in case of related actions. A necessary consequence is that it should also tolerate parallel expert proceedings in related actions.
- Parallel expert proceedings initiated before the court having jurisdiction to decide the merits of the dispute and the court of the place where the expert would carry its investigations should be avoided.

2.1. The Respective Scopes of the Evidence Regulation and of EU Legislation on Jurisdiction

EU legislation regulating the jurisdiction of the courts of the Member States¹ is silent on judicial expertise. For more than 30 years,² however, it seemed clear that judicial expertise fell within its scope of application, and so ruled many courts of the Member States,³ including the French Supreme Court for civil matters (*Cour de cassation*).⁴

The adoption of an EU Regulation on the taking of evidence abroad (hereinafter the 'Evidence Regulation')⁵ in 2001, which clearly applies to judicial expertise,⁶ raised the issue of the determination of the respective scopes of EU legislation on jurisdiction and of the Evidence Regulation. In 2005, the CJEU delivered a ruling in the *St Paul Dairy* case which suggested that an application to hear a witness before the proceedings on the substance are initiated might not fall within the scope of EU legislation on jurisdiction, as it would

¹ The jurisdiction of the courts of Member States is governed by a number of EU Regulations which each covers a specific field. The most important one is Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ 20.12. 2012, L 351/1) [hereinafter 'Brussels Ibis Regulation']. Other fields are covered by Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ L338, 23.12.2003, p.1) [hereinafter 'Brussels IIbis Regulation'], Regulation (CE) No 4/2009 of 18 December 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters relating to Maintenance Obligations (OJ L7, 10.01.2009 p.1) [hereinafter 'Maintenance Regulation'], Regulation (EU) No 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ 27.07. 2012, L 201/107) [hereinafter 'Succession Regulation'].

² The first legislation adopted in the field was the Brussels Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 27 September 1968, which was replaced Regulation 44/2000, also known as the Brussels I Regulation.

³ In Belgium, see Magnus/Mankowski/Pertegas Sender, *Brussels I Regulation* (2nd Ed. 2012), Sellier, Munich, Art. 31 note 39, citing Trib. Hasselt, TBH 1997, 324, with note Pertegas Sender.

⁴ Cass. Civ. 1^{ère}, 11 December 2001, Case no 00-18.547, *Rev. Crit. DIP* 2002, p. 317, with note Muir Watt; *Clunet* 2003, p. 152 with note A. Huet.

⁵ Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

⁶ See Article 17(3) and Recital 16 of the Preamble to the Regulation.

sidestep the application of the Evidence Regulation.⁷ The ruling gave rise to various interpretations,⁸ but a number of scholars in Europe concluded that judicial expertise was to be considered as falling outside the scope of EU legislation on jurisdiction,⁹ and governed instead by the Evidence Regulation, at least to the extent that the latter applied.¹⁰

In two recent judgments,¹¹ the CJEU has clarified the meaning of its *St Paul Dairy* judgment, by ruling that the use of the Evidence Regulation is not mandatory, and that the parties are free to seek evidence abroad on other legal grounds. One of the two judgments was specifically concerned with judicial expertise.¹² In particular, the CJEU ruled that its *St Paul Dairy* judgment was to be understood, and distinguished, in the light of the facts which gave rise to the judgment. It should thus be understood as limited to cases where the applicant sought evidence from a court which did not have jurisdiction on the merits,¹³ and where the evidence was located within the jurisdiction of the requested court.¹⁴

The CJEU has now largely eliminated the doubts that its *St Paul Dairy* decision had generated. The existence of the Evidence Regulation does not exclude the application of other legal regimes, in particular where a court of a Member State having jurisdiction on the merits is requested to appoint a judicial expert for the purpose of directly taking evidence in another Member State.¹⁵ In any case, the issue of the meaning of the *St Paul Dairy* case was simply ignored in many Member States, where courts always applied the EU legislation on jurisdiction for the purpose of determining whether they had the power to appoint judicial experts.

2.2. The Application of EU Legislation on Jurisdiction

2.2.1. Jurisdiction to Appoint Judicial Experts under EU Legislation

In many Member States, there never was any doubt that judicial expertise fell within the scope of EU legislation on jurisdiction, and that it was governed by its general rules. This position has now gained support from the clarification of the CJEU on the scope of the Evidence Regulation.¹⁶

The fundamental rule under EU legislation on jurisdiction is that courts having jurisdiction to decide a dispute on the merits pursuant to applicable EU legislation also have jurisdiction to appoint a judicial expert for the purpose of assisting them in the resolution of the said dispute.¹⁷ While the CJEU has not specifically confirmed it in the context of the EU legislation on jurisdiction, it has implicitly endorsed this position in one of its two recent judgments on the Evidence Regulation.¹⁸

⁷ See Case C-104/03 *St Paul Dairy Industries* [2005] ECR I- 03481.

⁸ See below 2.2.1 for other interpretations of this case.

⁹ See, e.g., A. Stadler, in Musielak, *Zivilprozessordnung*, 10th ed 2013, Beck, Munich, EuGVO Art. 31, no. 2; P. Gottwald, in *Münchener Kommentar, Zivilprozessordnung*, Vol. 3, 2013, Beck, Munich, EuGVO Art. 31, no. 5; J. von Hein, in Rauscher, *Europäisches Zivilprozess- und Kollisionsrecht*, vol. 2, 4th ed. 2015, Otto Schmidt, Cologne, EG-BewVO, Art 1, no. 51.

¹⁰ See P. Gottwald, in *Münchener Kommentar, Zivilprozessordnung*, Vol. 3, 2013, Beck, Munich, EuGVO Art. 31, no. 5: the Evidence Regulation only applies to cross-border evidence. Application for taking evidence within the jurisdiction of the court of a Member State must be governed by EU legislation on jurisdiction.

¹¹ Case C-332/11, *ProRail BV v Xpedys NV*, [2013] ECR I-0000 513; Case C-170/11, *Lippens v Kortekaas*, [2012] ECR I-0000.

¹² Case C-332/11, *ProRail BV v Xpedys NV*, [2013] ECR I-0000 513.

¹³ *Lippens v Kortekaas*, paragraph 36.

¹⁴ *ProRail BV v Xpedys NV*, paragraph 53.

¹⁵ *Id.*

¹⁶ See above, 2.1.

¹⁷ See, e.g., H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe*, 4th ed. 2010, LGDJ, Paris, para. 308-1 ; E. Pataut, *Rev. Crit. DIP* 2005, p. 749; M. Nioche, *La décision provisoire en droit international privé européen*, 2012, p. 33.

¹⁸ Case C-170/11, *Lippens v Kortekaas*, paragraph 36: the CJEU ruled that the *St Paul Dairy* case should be distinguished on the ground that, in *Lippens*, the requested court had jurisdiction on the merits of the case.

An issue which remains debated is whether courts which do not have jurisdiction on the merits may still appoint a judicial expert for the sole purpose of operating locally. The issue arises in the context of the application of the provision contained in all EU instruments on jurisdiction for granting Provisional, including Protective Measures.¹⁹ Pursuant to this provision, courts which do not have jurisdiction on the merits may still grant Provisional, including Protective measures. The CJEU has ruled that the goal of this provision is to allow local courts to grant local provisional and protective measures²⁰ to “avoid causing loss to the parties as a result of the long delays inherent in any international proceedings”.²¹ Furthermore, the Court has stressed the risk that this provision be used to circumvent other jurisdictional rules.²² The Court has thus limited its scope in two respects. First, it should only apply to genuine Provisional, including Protective measures, which the Court has defined as measures which “are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case”.²³ Secondly, it should only apply to measures purporting to operate within the jurisdiction of the court ordering them.²⁴

It is debated whether the appointment of a judicial expert is to be considered as a Provisional, including Protective Measure in the meaning of this provision, and thus fall within its scope. Certain scholars²⁵ have interpreted the *St Paul Dairy* ruling²⁶ of the CJEU as excluding judicial expertise from the scope of Provisional, including Protective Measures. This view was endorsed by the court of appeal of Munich in a ruling of 2014.²⁷

The *St Paul Dairy* case was concerned with an application to hear a witness before the proceedings on the substance are initiated, with the aim of enabling the applicant to decide whether to bring a case. The CJEU held that such a measure did not belong to Provisional, including Protective Measures in the meaning of the applicable EU legislation, as its aim was not to preserve a factual or legal situation, but rather to decide whether to start proceedings.²⁸ Many European scholars have concluded that the characterization of judicial expertise as a Provisional, including Protective Measure would depend on its actual aim in the relevant proceedings.²⁹ Where the appointment of a judicial expert would aim at preserving a factual or legal situation, it would fall within the scope of the Provisional, including Protective Measures. In other cases, it would not. This analysis distinguishing on the basis of the function of the measure sought by the applicant was endorsed by the Belgian *Cour de cassation* in a ruling of 2009³⁰ and by the French *Cour de cassation* in a ruling of 2011.³¹

¹⁹ See Brussels Ibis Regulation, Art. 35; Maintenance Regulation, Art. 14; Succession Regulation, Art. 19. See also Brussels IIbis Regulation, Art. 20 (drafted slightly differently).

²⁰ Case 125/79, *Denilauler v Couchet Frères* [1980] ECR 1553, paragraph 15; Case C-261/90 *Reichert and Kockler v Dresdner Bank* [1992] ECR I-2149, paragraph 33.

²¹ Case C-104/03, *St. Paul Dairy Industries* [2005] ECR I-3481, paragraph 12.

²² *St. Paul Dairy Industries*, at paragraph 18.

²³ Case C-261/90 *Reichert and Kockler* [1992] ECR I-2149, paragraph 34.

²⁴ Case C-391/95, *Van Uden Maritime BV v. Deco – Line*, [1998] ECR I-7091: there should be “a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought” (paragraph 40).

²⁵ See, e.g., E. Pataut, *Rev. Crit. DIP* 2005, p. 750; M. Nioche, *op. cit.*, p. 22.

²⁶ See Case C-104/03 *St Paul Dairy Industries* [2005] ECR I- 03481.

²⁷ OLG München, 19 February 2014, *IPRax* 2015, p. 93, with note Niggemann (p. 75)

²⁸ *St Paul Dairy Industries*, at paragraphs 17 and 22.

²⁹ See, e.g., A. Nuyts, « Le règlement communautaire sur l’obtention des preuves : un instrument exclusif ? », *Rev. Crit. DIP* 2007, p. 62; B. Hess & C. Zhou, *IPRax* 2007, p. 189; C. Heinze, “Beweissicherung im europäischen Zivilprozessrecht”, *IPRax* 2008, p. 484; H. Gaudemet-Tallon, *op. cit.*, para. 308-1; F. Niggemann, *IPRax* 2015, p. 78.

³⁰ Belgian Cass. Civ. 1ère, 3 September 2009, case no C.08.0480.N: the lower court had ruled that an order appointing a judicial expert belonged to Provisional, including Protective Measures as it contributed to a speedy resolution of the case, was urgent, and would be essentially performed in Belgium. The *Cour de cassation* annulled the judgment of the lower court on the ground that it had failed to assess whether the measure aimed at preserving a factual or legal situation.

See also Cour d’appel Liège, 9 September 2010, case no 2010/RG/488.

³¹ French Cass. Civ. 1ère, 4 May 2011, case no 10-13.712, 420, *Jurisdata* no 2011-008216: the lower court had ruled that an order appointing a judicial expert belonged to Provisional, including Protective Measures for the sole

It is doubtful, however, that these subtleties are mastered by many courts of the Member States. They are often ignored by courts requested to deal with urgent applications. In France, many courts appoint judicial experts without questioning whether orders appointing judicial experts are Provisional, including Protective Measures and either take it for granted³² or rule expressly that they are without any qualification.³³ They then focus on the territoriality requirement: the expert should be appointed to carry out his work with the jurisdiction of the appointing court.³⁴

Conclusion

Under EU legislation on jurisdiction, the jurisdiction to appoint judicial experts lies in principle with the court having otherwise jurisdiction to decide the dispute. The rule is excellent. The purpose of the appointment of a judicial expert is to assist a court in its task; this court alone should decide whether and the extent to which it needs assistance, and thus appoint judicial experts to that effect.

Exceptionally, the court of the place where the expert is to carry out his task may have jurisdiction to appoint a judicial expert if the purpose of this intervention is to safeguard a factual or legal situation. The rule is also satisfactory insofar as protective measures should be available at the place where they might be urgently needed. However, there is no reason to give broad jurisdiction to courts which will not decide the case on the merits for the sole reason that the judicial expert would carry out his task locally.³⁵ Such power should be limited to those cases where a protective measure is genuinely needed. In other cases, it would create an unnecessary risk of interference with the proceedings on the merits developing in another Member State.

It must be underscored, however, that for a rule giving primarily jurisdiction to appoint a judicial expert irrespective of the place where the expert is to carry out his task to work efficiently, it must be accepted that experts have the power to carry out their task outside of the jurisdiction of the court appointing them. The CJEU has recently confirmed it in a ruling of 2013.³⁶

2.2.2. Parallel Experts Proceedings

As is the case for proceedings on the merits, parties could have incentives to initiate parallel proceedings and apply to different courts for appointment of judicial experts. The most obvious incentive could be the hope to convince a particular court to appoint an expert who might eventually reach more favourable conclusions for a given party.

Rare instances of parallel expert proceedings have indeed been identified. In certain cases, experts were appointed in different countries with overlapping tasks, and reached different conclusions.³⁷ In other cases, parties applied for appointment of judicial experts in different countries, but one court dismissed the application, so that only one expert was eventually appointed.³⁸

reason that it was to be performed in France. The *Cour de cassation* annulled the judgment of the lower court on the ground that it had failed to assess whether the measure aimed at preserving a factual or legal situation.

See also *Cour d'appel Reims*, 4 September 2012, case no 11/00798, Jurisdata no 2012-019620; *Cour d'appel Colmar*, 30 March 2012, case no 269/12, 11/04490, Jurisdata no 2012-018666.

³² See, e.g., *Cour d'appel Caen*, 27 February 2014, case no 13/02517, Jurisdata no 2014-007094.

³³ See, e.g., *Cour d'appel Bourges*, 16 January 2014, case no 12/01663, Jurisdata no 2014-000789.

³⁴ See, e.g., *Cour d'appel Caen*, 27 February 2014, *Cour d'appel Bourges*, 16 January 2014, cit. above.

³⁵ See P. Schlosser in B. Hess, T. Pfeiffer & P. Schlosser, *The Brussels I Regulation 44/2001, Application and Enforcement in the EU*, 2008, Beck-Hart-Nomos, para. 637, arguing that measures aiming at obtaining information should be largely available, and that *St Paul Dairy* should be reconsidered to grant local courts jurisdiction over information situated locally.

³⁶ See below 3.

³⁷ One such case is discussed below at 2.2.2.1.

³⁸ See OLG München, 19 February 2014, *IPRax* 2015, p. 93, with note Niggemann (p. 75).

Parallel expert proceedings should be handled differently depending on the basis of jurisdiction of the two requested courts.

2.2.2.1. Related Actions

The first case scenario is parallel proceedings initiated in two different countries before courts which each have jurisdiction on the merits.

Under the European law of jurisdiction, this case scenario is not possible where the proceedings brought in each court involve the same parties and the same cause of action. By virtue of the *lis pendens* doctrine, the court seized second must stay its proceedings, and ultimately decline jurisdiction.³⁹ However, where the actions are not the same, but are only related, the court seized second only has discretion, but is under no obligation, to decline jurisdiction.⁴⁰ In other words, related actions are tolerated in European civil procedure.

In complex transactions, different parties may provide different parts of the machine ultimately sold to the end customer. These parts might have been bought in the first place from other parties established in other Member States. Such complex transactions create endless opportunities for parallel related proceedings, between different parties and with respect to different contracts.

As related actions are tolerated under the European law of jurisdiction, it must be accepted that each court handling one of the related actions will want to fully assess the facts in order to decide the part of the dispute it is handling. This includes, as the case may be, appointing a judicial expert. This might be considered as inefficient and a waste of resources. But this has been the policy choice of the European lawmaker for fifty years. It would not be logical to complain about the possibility of parallel expert proceedings in cases where parallel judicial proceedings are admitted.

One example of such parallel expert proceedings is a case pending in both German and French courts. The case is concerned with a machine delivered in France by a German company, which exploded the very day it started its operation. The German seller initiated proceedings in Germany against the manufacturer of certain parts of the machine on the basis of a jurisdiction clause contained in the contract. A German expert was appointed, who conducted investigations in Germany on parts repatriated from France. Meanwhile, the French buyer initiated proceedings against the German seller and manufacturer in France. A French expert was appointed. The German manufacturer challenged the jurisdiction of the French courts, and ultimately lost before the French *Cour de cassation*.⁴¹ After five years, two reports were eventually produced. The French report discussed the findings of the German report over 25 pages, and reached a different conclusion. The French court ruled that, while the competence of the German expert was not questioned, the German expert proceedings raised a number issues, in particular insofar as the procedural rights of certain parties to the French proceedings were not respected. The court relied exclusively on the French report.

The fact that two experts were appointed in these related proceedings is a necessary consequence of the acceptance of related judicial proceedings in European civil procedure. I will discuss below whether the effect of foreign expert reports could be improved.⁴²

2.2.2.2. Appointment of a Judicial Expert as a Protective Measure

A second case scenario is parallel expert proceedings initiated in two different countries where only one court has jurisdiction to decide the case on the merits. Before the other

³⁹ See, e.g., Article 29 of the Brussels Ibis Regulation.

⁴⁰ See, e.g., Article 30 of the Brussels Ibis Regulation.

⁴¹ Cass. Civ. 1ère, 4 June 2009, case no 08-12482.

⁴² See below, 4.

court, the application for appointment of a judicial expert would be filed on the ground that it would be a protective measure. The second court would thus have jurisdiction because the investigation of the expert would be performed locally.⁴³ The only legitimate use of the second expert proceedings would be to protect some evidence. The second court could not possibly use the report of the expert it had appointed for deciding the case, or part of the case, on the merits, since it would not have jurisdiction on the merits.

In the absence of an immediate threat to the evidence in question, it seems that the only effect of the second expert proceedings would be to interfere with the proceedings developing before the court with jurisdiction on the merits. Parallel expert proceedings would also waste the resources of the parties and judicial resources of at least one Member State.

Parallel expert proceedings in this context should therefore be avoided. It is unclear, however, whether the *lis pendens* doctrine, and the doctrine of related actions apply as between interim proceedings such as applications to appoint judicial experts. A ruling of the CJEU of 2002 suggests that they probably do. In *Italian Leather*, the CJEU ruled that "decisions on interim measures are subject to the rules laid down by [the Brussels Ibis Regulation] concerning irreconcilability in the same way as the other 'judgments'."⁴⁴ The case was not concerned with parallel litigation, but rather with a conflict of interim measures, which had been issued. The CJEU has repeatedly held that the goal of rules on parallel proceedings is to preclude the delivery of conflicting decisions and the use of the provision on irreconcilability.⁴⁵ It would only be logical to apply *lis pendens* and other parallel litigation doctrines to parallel interim proceedings,⁴⁶ and some scholars have expressly argued so.⁴⁷ A number of European scholars argue, however, that doctrines on parallel litigation should not apply to parallel provisional proceedings,⁴⁸ but it is doubtful that their arguments can find support in European procedural law.⁴⁹

While the doctrine of *lis pendens* should logically apply to parallel expert proceedings, it would not necessarily produce a desirable result.⁵⁰ The doctrine of *lis pendens* is solely based on the time of seizure of the competing courts: the court first seized is preferred. In the context of parallel expert proceedings, the consequence would be that proceedings introduced first before a court which would not have jurisdiction on the merits would prevent the court having jurisdiction on the merits to appoint an expert in accordance to its needs. As already underscored, the essential ground for appointing a judicial expert is to assist the court having jurisdiction which will decide the case, and it seems wholly inappropriate to allow another court which does not have jurisdiction to interfere in the process of the competent court.

This issue could be resolved in one of two ways. The first would be for courts seized for the purpose of appointing an expert as a protective measure to assess and exercise their jurisdiction conservatively. They should apply conservatively the definition of Provisional,

⁴³ See above, 2.2.1.

⁴⁴ Case C-80/00, *Italian Leather SpA v WECO Polstermöbel GmbH & Co.*, [2002] ECR I-04995.

⁴⁵ See, e.g., Case C-144/86, *Gubisch Maschinenfabrik KG v Giulio Palumbo*, [1987] ECR I-04861, paragraph 8; Case C-406/92, *The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj"*, [1994] ECR I- 05439, paragraph 31.

⁴⁶ A. Briggs & P. Rees, *Civil Jurisdiction and Judgments*, 5th ed. 2009, Informa, London, para. 2.228: wondering whether the *Italian Leather* case should be interpreted as meaning that *lis pendens* should apply in the context of provisional measures.

⁴⁷ See, e.g., X. Kramer, *Common Market L.R.* 2003, p. 953; F. Niggemann, *IPRax* 2015, p. 78.

⁴⁸ See, e.g., J. von Hein & J. Kropholler, *Europäisches Zivilprozessrecht*, 9th ed. 2011, Beck, Munich, EuGVO, Art. 27, no 14; M. Nioche, *La décision provisoire en droit international privé européen*, 2012, Bruylant, Bruxelles, p. 291.

⁴⁹ Von Hein & Kroholler argue that applications for provisional measures would not be proceedings ('Anspruch') in the meaning of the provision establishing the *lis pendens* doctrine (see *id.*). It seems clear that the concept would be defined autonomously by the CJEU, and it is unclear why it should adopt a restrictive approach.

⁵⁰ M. Nioche, *op. cit.*, p. 292.

including Protective Measures, and only retain jurisdiction where a genuine safeguard measure would be needed.⁵¹ They should also exercise their jurisdiction conservatively, and entrust the expert with the limited task of conducting the investigations necessary to safeguard a factual or legal situation.

A second way to address parallel expert proceedings would be to amend the *lis pendens* rule and to provide for a priority rule in favour of the court having jurisdiction on the merits irrespective of the timing of seizure of the competing courts. Such a rule was introduced in the Brussels Ibis Regulation to strengthen choice of court agreements.⁵² It could also be introduced to prevent the operation of the *lis pendens* rule to the detriment of the court having jurisdiction on the merits and provide that, where an application to appoint a judicial expert is made to the court having jurisdiction on the merits, any court of another Member State shall stay its proceedings and ultimately decline jurisdiction when the court having jurisdiction on the merits will have appointed the requested expert.

2.2.2.3. Options de compétence

Finally, it is necessary to consider a third case scenario. The European law of jurisdiction often grants jurisdiction on the merits to several courts (*options de compétence*). This is the case in contractual matters, for instance: both the court of the place where the obligation in question is to be performed and the court of the domicile of any of the defendants has jurisdiction to try the dispute on the merits.⁵³ As already alluded to, pursuant to the *lis pendens* doctrine, the court first seized of the case will try the case alone. However, as long as no court has been seized of the merits of the case, several courts *potentially* have jurisdiction on the merits.

Applications for appointment of a judicial expert are often made before any court is seized of an action on the merits. It is therefore conceivable that an application to appoint an expert is made before one court, and that another will eventually be seized first on the merits. At the time where the expert was appointed, each court was equally legitimate to make such appointment. In a genuine European area of civil justice, it should not be possible for the court eventually seized on the merits to ignore the prior application and decision to appoint a judicial expert. Such a result would be reached by the mere application of the *lis pendens* doctrine: the court seized first of a matter (here, the appointment of a judicial expert) should deal with it alone. A pre-condition, however, should be that an expert report delivered in one Member State be used in proceedings on the merits on other Member States.⁵⁴

⁵¹ See OLG München, 19 February 2014, *IPRax* 2015, p. 93, with note Niggemann (p. 75).

⁵² See Article 31 of the Brussels Ibis Regulation.

⁵³ See Article 7(1) and 8 of the Brussels Ibis Regulation.

⁵⁴ See below, 4.

3. POWER OF JUDICIAL EXPERTS TO ACT OUTSIDE OF THE JURISDICTION OF THE APPOINTING COURT

KEY FINDINGS

- Under the Evidence Regulation, a court of a Member State may appoint a judicial expert to conduct investigation outside of its jurisdiction after submitting a request to that effect to an authority of the other Member State.
- The *ProRail* decision of the CJEU allows the courts of the Member State to bypass the Evidence Regulation and to appoint judicial experts who may operate on the territory of other Member States without submitting any prior request.
- The *ProRail* decision has crafted an exception for expert investigations affecting the power of the Member State where they will take place: submitting a request under the Evidence Regulation is mandatory.

Judicial experts are appointed by courts to assist them. They therefore participate in the delivery of justice, and could be considered as agents of the court, or as collaborators to the public service of justice. Clearly, they do not act in a private capacity. They are involved in an exercise of public authority.

In private international law, the traditional view has been that the exercise of public authority can only be territorial, as extra-territorial exercise of public authority would infringe the sovereignty of the relevant foreign state. As a consequence, a judge may not freely travel to a foreign country to exercise judicial functions and, likewise, a judicial expert may not travel to a foreign country to act as an agent of a court, or in the capacity of a collaborator to the public service of justice.⁵⁵

3.1. The New Freedom of Judicial Experts to Act throughout the EU

It is open to States participating in a project of regional integration such as the European Union to modify this rule. For the purpose of developing a genuine European area of civil justice, the Member States of the European Union could decide to allow a judicial expert appointed by the court of a Member State to freely carry out his task on the territory of other Member States.

This is not, however, the agreement reached by the Member States in 2001 when the European lawmaker adopted the Evidence Regulation. Under the Evidence Regulation, a court of a Member State may take evidence abroad either by requesting the court of another Member State to do it, or by doing it directly (including through the appointment of a judicial expert) in another Member State.⁵⁶ However, the direct taking of evidence in another Member State is only possible after submitting a request to that effect to an authority of that Member State, which may refuse to grant the request on certain grounds.⁵⁷ During the negotiation of the Evidence Regulation, Germany had proposed a special provision for judicial expertise eliminating all requirement of seeking prior

⁵⁵ See H. Muir Watt, *V^o Expertise*, *Encyclopedie Dalloz Droit international*, Dalloz, Paris, 1998, paragraph 26 ; N. Meyer-Fabre, "L'obtention des preuves à l'étranger", *Travaux du Comité français de droit international privé* 2002-2004, Pedone, Paris, p. 199 and 214.

⁵⁶ Evidence Regulation, Article 1.

⁵⁷ Evidence Regulation, Article 17.

authorisation or notification.⁵⁸ Both the European Parliament⁵⁹ and the Economic and Social Committee⁶⁰ agreed to the proposal, but it was nevertheless rejected, and replaced by the provision on the direct taking of evidence abroad. There is no doubt, therefore, that the Member States did not agree to allow judicial experts to freely operate throughout the European Union, and that they expected that they would still control the operation of judicial experts appointed by courts of other Member States on their territory.

In its *ProRail* decision of 2013, the CJEU ruled that the application of the Evidence Regulation was not mandatory, and that courts of Member States could freely take evidence abroad on the basis of their national legislation.⁶¹ As a consequence, the decision of a Belgian court to appoint a judicial expert expected to travel and operate in the Netherlands without submitting any request to the Dutch authorities was upheld. The CJEU ruled that the legislative history of the Regulation was inconclusive, as Germany had made its proposal at a stage where no provision on the direct taking of evidence had yet been included in the Regulation.⁶²

In 2001, the Member States refused to fully liberalize the operation of judicial experts throughout the EU and insisted that they wanted to be able to refuse the operation of foreign experts on their territory on certain (limited) grounds. Obviously, this did not facilitate cross-border judicial expertise, but so was the will of the European lawmaker. *ProRail* ignores it and establishes a way to sidestep the Regulation. The agenda of the CJEU seems to be furthering European integration. There is no doubt that *ProRail* contributes to the development of a genuine European area of civil justice. Whether the CJEU was legitimate to legislate in the stead of the European Parliament and the Council and in effect amend the Evidence Regulation is another matter.

A pragmatic reason to support the *ProRail* decision is that it probably already corresponds to the practice of many courts in the Member States. According to two studies on the application of the Evidence Regulation carried out in 2007 and 2012 at the request of the European Commission,⁶³ the awareness of the existence of the Evidence Regulation is growing, but the direct taking of evidence provision is rarely used by European lawyers. In many parts of Europe, judicial experts are appointed in interim proceedings where the subtleties of private international law are ignored. Experts are already appointed regularly and entrusted with tasks requiring them to travel abroad. As long as no coercion or access to public facilities is needed, it might be that no issue is perceived by the courts appointing them.

⁵⁸ Initiative of the Federal Republic of Germany with a view to adopting a Council Regulation on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters (OJ 2000 C 314, p. 1).

The proposal read: 'The taking of evidence should not as a rule be requested when the court of a Member State wishes inquiries to be conducted by an expert in another Member State. In such cases the expert may be appointed directly by the court of that Member State without any prior consent or notification of the other Member State being required.'

⁵⁹ Opinion of the Parliament, single reading, issued on 14 March 2001 (A5-0073/2001, OJ 2001 C 343, p. 184).

⁶⁰ Opinion of the Economic and Social Committee of 11 May 2001 (OJ 2001 C 139, p. 10).

⁶¹ Case C-332/11, *ProRail BV v Xpedys NV*, [2013] ECR I-0000 513.

⁶² *ProRail BV v Xpedys NV*, at paragraph 51.

⁶³ See *Study on the application of Council Regulation (EC) No 1206/2001 on the taking of evidence on civil and commercial matters*, March 2007, final_report_ec_1206_2001_a_09032007, accessible on the Internet at http://ec.europa.eu/civiljustice/publications/docs/final_report_ec_1206_2001_a_09032007.pdf, and *Study on the application of Articles 3(1)(C) and 3, and Articles 17 and 18 of the Council Regulation (EC) NO 1206/2001 of 28 May 2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters*, June 2012, final_report_1206_en, available at http://ec.europa.eu/justice/civil/files/final_report_1206_en.pdf

3.2. The Limit of the Powers of the Requested Member State

While the CJEU ruled in *ProRail* that the use of the Evidence Regulation was generally optional for the courts of Member States, it crafted an exception for circumstances in which the investigation of a judicial expert would “affect the powers of the State in which it takes place”.⁶⁴ In such circumstances, the use of the Evidence Regulation, and thus the control of the affected state, is mandatory. The direct taking of evidence is possible, but under the conditions of Article 17 of the Regulation, which include submitting a request to the affected State.

The CJEU gives one example of circumstances where the powers of the state might be affected: “where it is an investigation carried out in places connected to the exercise of such powers or in places to which access or other action is, under the law of the Member State in which the investigation is carried out, prohibited or restricted to certain persons.”⁶⁵

Other examples could certainly include cases where a Member State would make clear that its power would be affected by a given measure by legislating to this effect.⁶⁶ This could be the case of a law prohibiting the provision of certain information for the purpose of foreign proceedings, such as a blocking statute.

This last interpretation was rejected by the UK Court of Appeal in a judgment of 2012 where Lord Rimer explained:

*“ProRail is not authority for the proposition that a Member State, applying its domestic procedural law in litigation to which the parties before it have submitted, cannot lawfully make a procedural order against a party if compliance with it might expose that party to a risk of prosecution under some foreign law. It is authority for no more than that, if the domestic court wishes to obtain evidence in another Member State of a nature that can in practice only be obtained with the assistance of that Member State's judicial or other public authorities, the court can only obtain such evidence by a ‘court to court’ request under the regulation. That is all that ProRail decides.”*⁶⁷

This reading of the *ProRail* decision is unconvincingly narrow.⁶⁸ The CJEU crafted an exception for cases where the taking of evidence abroad would “affect the powers of the State in which it takes place”, and ruled that, in such cases, it would be required to seek the assistance of local authorities through the Evidence Regulation. The obligation to seek assistance of local authorities is the legal consequence of the exception, but does not define its scope.

While the *ProRail* decision could be criticized for bypassing the democratic process, its effect is undoubtedly to foster European integration and to contribute very effectively to the development of a European area of civil justice.

⁶⁴ *ProRail BV v Xpedys NV*, at paragraph 47.

⁶⁵ *Id.*

⁶⁶ See A. Nuyts, *Journal des Tribunaux*, 2014, p. 560.

⁶⁷ *Secretary of State for Health v Servier Laboratories Ltd* [2013] EWCA Civ 1234, at paragraph 101.

⁶⁸ A. Nuyts, *Journal des Tribunaux*, 2014, p. 559.

4. USE OF FOREIGN EXPERT REPORTS

KEY FINDINGS

- While the law of most Member States would allow a court to rely on an expert report delivered in the context of foreign proceedings, it seems that this rarely happens.
- Differences in the conception of the fundamental procedural rights of the parties in the context of expert proceedings have led courts to reject expert reports issued in other Member States for lack of procedural fairness.

The legal authority of expert reports is low. It seems that, in all Member States, courts are not bound by experts' opinions, and may decide to disregard them.⁶⁹ It further seems that, in many Member States, an expert report is a piece of evidence with no special status, that the court may thus weigh against other evidence to determine which one is the most reliable.⁷⁰ This is not to say that expert reports have no legal value. In some Member States (e.g. France, Luxembourg, Italy), expert reports can be set aside if the expert failed to comply with essential procedural rules such as the right of the parties to be heard in the expert proceedings.

Despite the low legal authority of expert reports and the power of judges to disregard them, there is wide agreement to consider that, in practice, courts typically follow and indeed endorse the report of the expert that they have appointed. Parties often challenge the conclusions of judicial experts and argue that the court should not endorse them. Parties sometimes produce reports of experts that they privately hired and which (unsurprisingly) contradict the report of the court appointed expert. Their arguments are, in most cases, rejected. In practical terms, therefore, the report of the court appointed expert is decisive, and the parties will often settle after the conclusions of the expert are released, knowing that the chances that the court would not follow them are very low. In certain Member States (e.g. France), an alternative route is to initiate proceedings to set aside the expert report on a procedural ground, as the court would then be prevented from formally relying on the report, and would typically appoint another expert.

In a genuine European area of civil justice, one could legitimately expect that expert reports freely circulate and are given the same authority throughout the European Union. It seems that the policy reasons which justify the free circulation of judgments in the EU should lead to the same result. The duplication of expert proceedings is, just as the duplication of judicial proceedings, a waste of resources, and may lead to conflicting outcomes which are highly damaging for the parties (who receive contradictory signals with respect to their rights and obligations) and for society (as it undermines the legitimacy of the relevant legal systems). Furthermore, the principle of mutual trust in the justice of other Member States has now become a fundamental principle of European civil procedure, and it demands that all procedural acts be considered as equally authoritative without regard to their origin.

However, it is doubtful that the European lawmaker could do much to improve the free circulation of expert reports in the EU from a legal point of view. This is because there are few *legal* impediments to their circulation. Since expert reports have a low legal authority in most Member States, the real issue is not whether the legal authority of an expert report delivered in the context of French proceedings might be extended to other Member States.

⁶⁹ See Institut européen de l'expertise et de l'expert, *Projet Eurexpertise – Le futur de l'expertise judiciaire dans l'Union européenne*, 2012, p. 20.

⁷⁰ See the comparative survey of the Institut européen de l'expertise et de l'expert in its *Projet Eurexpertise – Le futur de l'expertise judiciaire dans l'Union européenne*, 2012.

In most Member States, it is likely that a foreign expert report could already be considered by a local court, as another piece of evidence. The fundamental problem is the lack of knowledge of courts about the legal regime of judicial expertise in other Member States, and possibly the lack of trust in the conditions in which expert proceedings are conducted in other Member States. If courts knew about the legal regime of expertise in other Member States, and trusted the civil justice of other Member States, they could consider to rely on an expert report delivered in the context of foreign proceedings, and to give it the same *de facto* authority that they would give to the report of an expert that they would have appointed.

Knowledge of other civil justice systems could be improved by encouraging widely accessible publications on comparative civil procedure in the field. To be effective, such publications should not only cover the legal systems of all Member States, and be available in all official languages of the EU. They should also make efforts to present the national legal regimes in ways which are understandable by lawyers and judges from other Members States. They should also be regularly updated.

It is likely, however, that the most effective way to foster mutual trust would be to develop European standards of judicial expertise. The goal would not be to harmonize the laws of the Member States, but only to provide guidelines which courts or experts would then decide to follow or not. The hope would be that the courts of Member States could easily be convinced that foreign expert proceedings which would have complied with the European standards should be regarded as fair and acceptable, and thus given *de facto* the same status as expert proceedings following local standards. The establishment of a European list of experts committing to follow such guidelines would be the most efficient way of promoting their use. The existence of the list would give assurance to courts willing to appoint experts established in other Member States without requiring them to assess in detail the procedure and rules that they would follow. Finally, the existence of European standards would also encourage certain Member States to reform their law of judicial expertise.

While the essential issue is one of knowledge and trust in the civil justice systems of other Member States, some legal issues may also exist. One example is the different understanding of what the fundamental procedural rights of the parties should be in expert proceedings. Experienced practitioners report, for instance, that the French and the German systems have very different approaches in this respect.⁷¹ The result is that, if a report delivered by a judicial expert in the context of German proceedings is produced in France, it will be considered as non-compliant with the French conception of fundamental procedural rights and ignored on this ground.⁷² This issue would require an in depth study of the differences existing between the Member States with respect to the fairness of expert proceedings. The purpose of such study would be to assess whether the differences are as fundamental as courts have found them to be, or whether, by contrast, they are not as fundamental and could be resolved by a better understanding of the laws of other Member States. If the differences are indeed fundamental, the study should assess whether the case law of the European Court of Human Rights with respect to judicial expertise⁷³ is constraining enough to promote indirectly an approximation of the laws of Member States with respect to fairness of expert proceedings. If the case law of the European Court of Human Rights is not constraining enough, overcoming such differences would require action of the EU lawmaker.

⁷¹ I refer here to the expertise and experience of Ms Deshayes: see her contribution above.

⁷² One example is the Franco-German case discussed above at 2.2.2.1.

⁷³ See ECHR, *Feldbrugge v. Netherlands*, 29 May 1986, série A no 99; ECHR, *Mantovanelli v. France*, 18 March 1997, Reports of Judgments and Decisions 1997-II; ECHR, *Augusto v. France*, application no [71665/01](#), 11 January 2007; ECHR, *Martins Silva v. Portugal*, application no [12959/10](#).

5. A EUROPEAN MARKET FOR JUDICIAL EXPERTISE

KEY FINDINGS

- Judicial experts are protected by the European freedom to provide services, which has been used effectively to suppress certain indirect restrictions to its operation.
- The European freedom to provide services should be used to suppress certain judicial practices favouring the appointment of judicial experts established within the jurisdiction of the appointing court.

An essential dimension of a European market of judicial expertise would be an effective freedom for judicial experts to provide services throughout the EU.

This would mean that courts would appoint, or parties would hire, experts from anywhere in the European Union, without regard to their place of establishment or, even worse, nationality. In such a European market, a French court might appoint a university professor in physics from the University of Oxford, a Luxembourg court might appoint an expert listed on French lists of judicial experts, and a German court might appoint a Luxembourg lawyer as an expert in Luxembourg law.

The central issue is whether the court of a Member State may appoint an expert who habitually works in another Member State. At the outset, it must be underscored that the nationality of an expert should not matter within the European Union. Refusing to appoint an expert on the sole ground of his foreign nationality would amount to a blatant discrimination on the basis of nationality. I understand that, in any case, the laws of most Member States do not have a nationality requirement.⁷⁴ Similarly, requiring a local domicile would almost certainly be considered as an indirect discrimination on the basis of foreign nationality, and would thus fall under the same prohibition. My focus, therefore, is on the issue of whether the mere fact that an expert would habitually work in another Member State would be found as raising an issue, and ultimately make his appointment impossible, irrespective of his nationality or domicile.

The issue is not addressed by any specific EU legislation, but the application of general principles of EU law should afford significant protection to judicial experts willing to work in other Member States. In particular, the European freedom to provide services should give judicial experts the right to be hired/appointed in other Member States and afford them a protection against any restrictions that they might suffer in this respect.

However, a number of peculiarities of the activity of judicial experts has raised doubts as to whether they would indeed fall within the scope of the European freedom to provide services, and thus benefit from its protection. Fortunately, the CJEU has largely, but not completely, removed those doubts in its *Josep Peñarroja Fa* decision.⁷⁵

The *Josep Peñarroja Fa* case was concerned with a judicial expert translator established in Spain who wanted to work in France and, for that purpose, appear on French lists of judicial

⁷⁴ Many have the requirement that the expert be a national from a Member State, however. See the comparative survey of the Institut européen de l'expertise et de l'expert in its *Projet Eurexpertise – Le futur de l'expertise judiciaire dans l'Union européenne*, 2012.

⁷⁵ Cases C-372/09 and C-373/09, *Josep Peñarroja Fa* [2011] ECR 2011 I-01785.

experts. The Court ruled that the expert benefited from the European freedom to provide services, and that it was therefore illegal to prohibit, to impede or to render less advantageous his activities in France. However, the CJEU expressly limited the scope of its judgment to expert translators.⁷⁶ Yet, most of its reasons would apply to any other form of judicial expertise,⁷⁷ with one possible exception, that I will stress below. It is therefore reasonable to consider that the Court would reach the same conclusion, and offer the same protection, to other judicial experts.

5.1. The Scope of the Freedom to Provide Services

The first contribution of the case is to reject a number of challenges against the characterization of judicial experts as service providers in the meaning of EU law and thus against the application of the European freedom to judicial experts. The first argument was that the remuneration of judicial experts can be fixed by law rather than by the parties to a contract of services: this was found to be irrelevant.⁷⁸ The second argument was that judicial experts might act only upon appointment by judges, to perform duties as defined by judges, and not by private clients: again, this was found to be irrelevant for the purpose of characterizing judicial experts as service providers.⁷⁹

The third and more serious argument was that judicial experts being appointed by courts to assist them, they should be considered as engaged in activities connected with the exercise of official authority, which are not subject to the European freedom to provide services.⁸⁰ The CJEU found that, where the work of the expert leaves the discretion of judicial authority and the free exercise of judicial power intact, which is the case, I understand, under the laws of all Member States,⁸¹ it cannot be regarded as connected with its exercise.⁸² It must be stressed, however, that this part of the judgment specifically insisted on the fact that the expert was a translator, and that his duty was to provide an impartial translation, and “not to give an opinion on the substance of the case”.⁸³ The insistence of the Court on the peculiarity of the task of expert translators raises doubts as to whether it would also consider that judicial experts assisting courts on issues more directly relevant to the resolution the dispute are wholly unconnected with the exercise of judicial power. Most experts assist courts on the determination of issues of facts which are directly relevant for the resolution of the dispute (they would not be appointed otherwise). Examples include appointing an expert for determining the origin of the explosion of a machine in a factory, or the origin of the death of a patient in a hospital. However, while such determinations are indeed essential for the resolution of the case, they are not binding on the court, which may freely ignore them. Furthermore, experts may not “give an opinion on the substance of the case”. They may only give an opinion on the issue of fact which they were asked to determine. Only the court may apply the law to the fact as determined by the expert, draw conclusions as to the rights and obligations of the parties, and ultimately decide the substance of the case. The distinction is subtle, but it is clear, in all Member States as far

⁷⁶ *Josep Peñarroja Fa*, at paragraph 25.

⁷⁷ See e.g. E. Bernard, “L’expertise judiciaire confrontée au droit de l’Union européenne”, *Revue Expert*, avril 2011, p. 4 ; L. Namin, “L’expertise judiciaire à l’épreuve de la libre prestation de services”, *L’argus de l’assurance.com*, Juillet 2011, available at <http://www.argusdelassurance.com/jurisprudences/jurisprudence-ja/l-expertise-judiciaire-a-l-epreuve-de-la-libre-prestation-de-services.50809>

⁷⁸ *Josep Peñarroja Fa*, at paragraph 38.

⁷⁹ *Josep Peñarroja Fa*, at paragraph 39.

⁸⁰ Article 62 TFUE, referring to Article 51 TFEU, first paragraph.

⁸¹ See Institut européen de l’expertise et de l’expert, *Projet Eurexpertise – Le futur de l’expertise judiciaire dans l’Union européenne*, 2012, p. 20: courts are not bound to follow the reports of judicial experts.

⁸² *Josep Peñarroja Fa*, at paragraph 44.

⁸³ *Josep Peñarroja Fa*, at paragraph 43.

as I am aware. A doubt remains as to whether the CJEU would extend the protection of the European freedom to provide services to judicial experts other than expert translators, but it seems more likely than not that it would.

5.2. The Reach of the Freedom to Provide Services

The second contribution of the *Josep Peñarroja Fa* decision was to interpret broadly the concept of restriction to the freedom to provide services, and thus to widen its impact.

The target of the freedom to provide services is the legislation of Member States which prohibits, impedes or renders less advantageous the activities of a provider of services established in another Member State in which he lawfully provides similar services.⁸⁴ In the *Josep Peñarroja Fa* case, the legislation at issue was the French legislation on the registration of experts at regional and national level. The French government argued that such legislation was not a restriction to the freedom of foreign experts who were not allowed to register on the list, because French courts are not bound by such lists, and may freely appoint experts outside of the list. Registration on such lists is not an actual requirement to be appointed by a French court. Whether or not a foreign expert was registered on such lists did not, the argument went, change his right to be appointed.

The CJEU nevertheless found that such lists existed for the purpose of offering guidance to courts with respect to the skills and qualities of experts, and that it would influence the choice of judges, who would “tend to appoint experts enrolled in such registers, whom they can assume to have the attributes necessary for assisting them”.⁸⁵ As a consequence, the Court held that restricting access to such registers was to be considered as a restriction to the freedom of experts to provide services. It accepted, therefore, that a legislation impeding factually the freedom of experts to provide services in other Member States was to be considered as contrary to EU law.

The application of general EU law affords a robust protection to judicial experts willing to provide services in other Member States.

5.3. Judicial Practices as Restrictions to the Freedom to Provide Services?

While there might not be any legal obstacles to the appointment of foreign based expert in the laws of the Member States, judicial practices seem to remain overwhelmingly national, at least in the big Member States. Courts typically appoint local experts, working habitually in the Member State of the appointing Court.

In most fields, the knowledge required from the expert is not nation-specific. This is because most sciences are international. The leading French authority on chemistry is presumably as competent as the leading German authority on chemistry. It seems hard to criticize courts for not making efforts to look outside of their pool of experts and for

⁸⁴ See, to that effect, inter alia, Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 33, and Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 51 and the case-law cited.

⁸⁵ *Josep Peñarroja Fa*, at paragraph 52.

appointing one established locally, or at least meeting local quality insurance rules such as appearing on the local list.

However, in small Member States, there are often no local experts in a given field. Additionally, local experts are more likely than in bigger Member States to know the parties and thus to be unavailable for lack of impartiality. As a result, courts in certain small Member States have long sought experts based in other Member States. Luxembourg courts, for instance, regularly appoint experts based in other Member States. For that purpose, they look at the lists of experts available in these other Member States, for instance in France. This suggests that courts willing to make the effort to seek experts in other Member States can perfectly do so, and that the biggest obstacle to the development of a genuinely European market of judicial expertise is the habits of courts of big Member States.

Furthermore, one could imagine that certain issues arise more frequently in certain parts of the EU, because of geographical or climatic reasons for instance, and that local experts would develop a greater expertise on these issues. Likewise, certain goods could only be produced in certain countries of Europe, which might lead to a concentration of experts with experience in the functioning of those goods in these countries.⁸⁶ In such cases, courts should be looking for experts established outside of their jurisdiction if the expertise of such experts is higher than the expertise of local experts. It might be difficult, however, to identify competent experts based in other Member States. The establishment of a European list of experts could be an important step towards a more transparent European market of judicial experts, as recommended by the promoters of the EGLE project.⁸⁷

Finally, in certain rare instances, the expertise sought could logically depend on a certain relationship with one particular Member State. This is the case of expert translators, who should master the relevant language to a level of being a native speaker in that language. This is also the case of experts in the law of a given Member State: it seems clear that the best experts are lawyers with strong experience in the relevant law, either as legal practitioners or as academics.

An interesting example is the appointment by German courts of judicial experts in foreign law. German courts typically appoint German law professors with knowledge in the relevant foreign legal system. While there is no doubt that German legislation⁸⁸ would allow the appointment of foreign experts, most German scholars advise that German experts be appointed, for three reasons: 1) it is easier to send the file to a German based expert, 2) German experts are able to draft their report directly in German, which eliminates the need for translation and the associated costs, and 3) German experts understand the point of view of the requesting court.⁸⁹

In certain cases, however, the practice of German courts is hardly justifiable. Where Luxembourg law is found applicable by a German court (typically, after a car accident involving a German resident occurred on Luxembourg territory), the court typically appoints the professor of comparative law of Trier university, which is a few kilometers away from Luxembourg. Some very distinguished German scholars have held that position, who no

⁸⁶ See, e.g., J.-C. Guerinet, contribution to the conference "La technique expertale à l'épreuve de l'Europe", 2006, available at <http://www.cnideca.fr/PDF/COLLOQUE-07-04-2006.pdf>, referring to the fact that tunnelers (tunnel digging machines) are only produced in France and Germany.

⁸⁷ European Guide for Legal Expertise: see below the contribution of Mr J.R. Lemaire.

⁸⁸ § 63(1), Rechtshilfeordnung in Zivilsachen.

⁸⁹ See, e.g., H. Schack, *Internationales Zivilverfahrensrecht*, 6th. ed., Munich (CH Beck) 2014, para. 710; W. F. Lindacher, *Internationales Wettbewerbsverfahrensrecht*, Cologne (Carl Heymanns), 2009, § 16 para. 16.

doubt have provided excellent reports to German courts, but it seems highly illogical and inefficient not to appoint a Luxembourg legal professional for that purpose.⁹⁰ Luxembourg private law being derived from French law, expertise in German law is not particularly relevant for the purpose of ascertaining the content of Luxembourg law. Distance is obviously no proper excuse, and language even less, since Luxembourgers all speak German,⁹¹ which is an official language of the country and a required subject to pass the Luxembourg bar. It is interesting to compare the German practice with the English one in similar circumstances: parties will hire experts who will appear as the most legitimate to determine and explain the content of foreign law. This will typically mean seeking the assistance of professionals active in the relevant foreign legal system, whether as practitioners or as academics. Thus, in a case where Luxembourg law applied, parties hired, on one side, a Luxembourg lawyer, and on the other, a Luxembourg academic.⁹²

From the perspective of the development of a European market for judicial experts and a genuine European area of civil justice, the German practice to appoint German lawyers is not only dysfunctional and inefficient, but also a restriction to the freedom of experts to provide services in Germany.⁹³

Certain national practices favouring national experts over experts based in other Member States are no doubt restrictions to the European freedom of judicial experts to provide services. The fact that these practices might be judicial would not change the fact that they would be attributable to the relevant Member State.⁹⁴ There is no reason to believe that, should the matter be brought to the CJEU, it would not afford an appropriate protection to experts suffering from restrictions to their freedom to provide services.

⁹⁰ The German practice is criticized by a few German scholars who advocate the appointment of foreign experts: see, e.g., H. Linke & W. Hau, *Internationales Zivilverfahrensrecht*, 6th ed., Cologne (Otto Schmidt) 2015, para. 9.12.

⁹¹ But not necessarily the numerous foreigners living in Luxembourg, including this author. For avoidance of doubt, I am not contemplating being appointed as an expert in Luxembourg law by German courts, if only for that reason.

⁹² See, e.g., *LBI H.F. (in winding up proceedings) v Kevin Gerald Stanford, Landsbanki Luxembourg SA (in liquidation)* [2014] EWHC 3921 (Ch).

⁹³ See H. Linke & W. Hau, *op. cit.*, para. 9.12.

⁹⁴ The CJEU has found that mere declarations of public officials in the media were attributable to the relevant Member State, and could thus be characterized as a restriction: see, e.g., *Case C-470/03, A.G.M.-COS.MET Srl v Suomen valtio, Tarmo Lehtinen*, [2007] ECR I-02749.

6. CONCLUSION AND RECOMMENDATIONS

In many respects, existing EU law is satisfactory and does not hamper cross-border judicial expertise. In particular, the EU law of jurisdiction provides satisfactory jurisdictional rules (supra, 2.2.1), the ruling of the CJEU in *ProRail* has granted to judicial experts extensive freedom to carry out investigations throughout the European Union (supra, 3), and the ruling of the CJEU in *Peñarroja Fa* has confirmed that judicial experts can benefit from the European freedom to provide services and challenge restrictions to their activities on this ground (supra, 5).

However, the EU regime of judicial expertise remains unclear in a number of respects. First, it would be useful to clarify whether rules on parallel litigation apply to parallel expert proceedings (supra, 2.2.2). Secondly, it would also be useful to define further the exception crafted by the CJEU in its *ProRail* decision (supra, 3.2). Finally, the illegality of the remaining restrictions to the freedom of judicial experts to provide services throughout the EU should be confirmed (supra, 5.3). It is submitted that these clarifications should be left to courts and ultimately to the CJEU, and that there is no need for legislative action in their respect.

While existing EU law is largely satisfactory, there are still major issues with respect to cross-border judicial expertise. EU action would be necessary to address them.

- There is a lack of knowledge about the rules and practices followed in other Member States. Lack of knowledge generates distrust. Action would therefore be needed. Increasing knowledge is one possibility, but doing it efficiently is difficult. An alternative possibility would be to promote the adoption of European principles or guidelines on judicial expertise. The goal would be to increase the chances that the work of experts following such guidelines or principles would be better recognised throughout the EU. The establishment of a European list of expert committing to follow European guidelines would be the most efficient way of promoting their use. The two direct consequences would be that 1) courts would appoint more easily experts established in other Member States (supra, 5.3), and 2) expert reports delivered in the context of litigation in one Member State would be relied upon more easily in other Member States (supra, 4).
- Finally, the most worrying issue is the potential existence of radically different conceptions of procedural fairness to litigants in judicial expertise. French courts have rejected German expert reports on the ground that German proceedings did not comport with the French conception of the right to be heard and present one's case. It is unclear to the author of this Analysis whether the differences between the Member States in this respect are indeed fundamental, or whether they are simply the result of misunderstandings. A study should be conducted to assess this. If the results of this study are that there are indeed radical differences, and that the case law of the European Court of Human Rights will not, in effect, approximate the laws of the Member States on this point, the European lawmaker should intervene to define the minimum standards of fairness in expert proceedings which should be followed throughout the European Union (supra, 4).

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