

# **“EUREXPERTISE” PROJECT**

## **The future of civil legal expert examination in the European Union**

### **Overview and convergence**

### **27 countries of the EU and Norway**

### **Final Report**

**30 June 2012**

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## INTRODUCTION

EUREXPERTISE's goal was to provide the European institutions with consensual reform suggestions to decrease the amount of divergences found after a thorough inventory and objective analysis of the rules and practises in use in matters of civil expertise throughout the European Union.

The work carried out to reach this goal has revolved around three axes:

- inventory of the rules and practises in use in the 27 European Union member states;
- symposium to discuss the results obtained and identify the consensual axes of propositions;
- organisation of a consensus conference to once again endorse the potential contributions of this scientific methodological approach to the European expert issues

### **1. TAKING STOCK OF RULES AND PRACTICES**

A first inventory started by the French Court of Cassation within the network of Presidents of the Supreme Judicial Courts, was carried out on the base of a questionnaire on the following topics:

- Methods behind the decision to call for an expert examination
- Choice and appointment of the expert
- Expert's mission content
- Progression of the expert examination (contradictory, possible evolution,...)
- Funding
- Concluding the mission, and its effect
- Status, code of ethics, competences and responsibility of the expert
- Bibliography.

The "Eurexpertise" project group made of seventeen active European members (high magistrates, lawyers, solicitors and experts) met on average every six weeks for half-days or full days.

This collective work was carried out and enriched by the individual contributions of the group's members and the correspondents which were designated for each state.

In detail, they carried out the following:

- Collect the existing knowledge through questionnaires filled out during multiple exchanges with each country;
- Understanding and analysing the answers provided;
- Drawing up each country's file structured around a model set by the work group;
- Establish a synthesis table (28 states: EU + Norway) and comparative analysis of the procedures and customs in use;
- Identify possible convergence paths;
- Collect the commentaries of judges, legal experts and lawyers on the practical reality of expert examinations in the different countries to guarantee the widest consultation possible;
- Prepare the work for the Brussels symposium in March 2012, especially for the roundtables.

This inventory is drawn in the second part of this report.

## **2. BRUSSELS SYMPOSIUM**

Organised on 15<sup>th</sup> (pre-symposium), 16<sup>th</sup> and 17<sup>th</sup> March 2012, it brought together over 170 participants from twenty countries, eighteen of which were European Union member states.

The first half-day held on the afternoon of 15<sup>th</sup> March, brought the organisers and sixteen volunteer facilitator-rapporteurs together.

It allowed us to provide them with the latest results of the project, hand them the animation supports for their roundtables and the suggestions for the recommendations which the participants were supposed to work on.

The interventions introducing the different aspects of work were given on March 16 in the morning by:

- Mr. Bostjan ZUPANCIC, ECHR Judge
- Ms. Irmgard GRISS, former President of the Austrian Supreme Judicial Court and of the conference of the Presidents of the Supreme Judicial Courts of the European Union
- Mr. Daniel CHABANOL, Honorary counsellor to the French Council of State, former president of the Lyon Administrative Court of Appeals
- Mr. Jean-Raymond LEMAIRE, EEEI President
- Mr. Philippe JACQUEMIN, EEEI Vice-president

The text of these interventions is included in the “Symposium proceedings”, which is the third part of this report.

That afternoon was devoted to the eight roundtables.

Four roundtables were chaired in two languages, French and English, by two rapporteurs, and revolved around the following topics:

- Roundtable 1: Expert’s appointment and mission
- Roundtable 2: Progression of the expert examination and expert’s report
- Roundtable 3: Training, competences and expert assessment
- Roundtable 4: Status and code of ethics – free exercise and liability

Their goals were for the participants to reach consensus on:

- The review established by the Eurexpertise project group
- The value and point of the questions that were being debated
- The drawing up of a joint text on each topic (12 in all)

The texts we obtained were presented and discussed during the morning of March 17 during a plenary session after which a proposal was drawn up and approved unanimously by the participants for each of the twelve topics.

These unanimous proposals constitute the first part of this report.

The symposium ended with a general synthesis of the work carried out by M. Vincent VIGNEAU, first vice-president of the Nanterre Regional Court.

Finally, Mr. Alain NUEE, first president of the Versailles Court of Appeals, closed the symposium by putting into perspective the very promising results of the symposium, and suggesting the organisation of a European consensus conference on expertise in 2013/2014, and suggesting the main lines of a corpus of regulations for European judicial expertise which could be used in cross-border litigations.

### **3. THE BRUSSELS CONSENSUS CONFERENCE**

Within the “EUREXPERTISE” project, the Institute and the Belgian National College of Judicial (CNEJ) organised in December 2010, with the input of Mr. Alain NUEE, First President of the Versailles Court of Appeals, a consensus conference whose main goal was to define the status of the expert in Belgium.

This even profited from Mr. NUEE’s experience, since he had chaired the consensus conference organised by the French Court of Cassation in 2007 on the topic of expert examinations in civil procedures. It allowed us to prove once more the relevance of this methodological approach.

The consensus conference is a standardised method of scientific conduct for a collective reflection process to discuss controversial questions and reach good practice recommendations. The method is based on the scientific conference model, with specialist contradictory debates, and on the judicial model of the jury having an in-camera meeting after a public hearing.

The executive committee suggested five topics among an array of questions specially created and written to cover as many aspects as possible:

1. The definition of the expert
2. The guarantees of the expert’s competence
3. The guarantee of the expert’s independence and impartiality
4. Should there be a specific Code of ethics?
5. Is a professional expert organisation required?

This conference took place on December 3, 2010 at 2010 à LAMOT-SITE MALINES-MECHELEN.

It brought together magistrates and lawyers from all over the country, experts, professional organisations (Chartered Accountants (IEC), Company Auditors (IRE), Doctors, Architects, Surveyors, etc.), academic authorities, students, etc.

The jury members were picked along their academic qualities as well as their role in civil society among the representatives of the highest magistrates, the legal and non-legal academic world and the press. There were no ties with the Institute and the CNEJ, and they acted in a fully independent manner.

The jury took part in all the consensus conference as an observer.

It then had an in-camera meeting and drafted a consensus text including the conference work and the conclusion it drew on the five topics.

The quality of this text confirms the relevance of the method implemented. It was published and widely distributed as early as spring 2011.

This is described in chapter 4 of this report.

**Philippe JACQUEMIN**

**EEEI Vice-president**

## **PART 1 - 12 UNANIMOUS RECOMMENDATIONS ON JUDICIAL EXPERTISE IN THE EUROPEAN UNION**

### **1. RECOMMENDATION WORKSHOP 1: “APPOINTING AN EXPERT: MISSION AND EXPECTATIONS”**

#### **I. Principles regulating the use of judicial expertise**

- Judicial expertise is a court-ordered appraisal or implemented by the parties with the judge's approval or under his control.
- It should be ordered only if it is necessary to solve the dispute, if there are no easier, quicker or cheaper means of evidence.

#### **II. Conditions and tools available to the judge and/or the parties to select an expert**

A European-wide frame of reference should be established, periodically reviewed and publicly available. It should allow the judge to accurately pick a relevant expert who will have been subject to review, including on the level of ethics, either by a national judicial or administrative authority, or by a recognised professional order, or by a yet-to-be-determined European entity, and who will provide guarantees of technical competence, impartiality and independence.

#### **III. Type, content and form of the mission – the expert's autonomy**

The expert's mission must be restricted to technical questions.

This mission must be defined as precisely as possible since it binds the expert's activity.

The judge can, on his own initiative or at the parties' request, change the expert's terms of reference, depending on the progress of his mission, which has to mandatorily comply with the principle of adversarial debates.



## **2. RECOMMENDATIONS WORKSHOP 2 : EXPERTISE PROCEEDINGS AND THE EXPERT'S REPORT**

### **I. Judge's control over the expert proceedings**

The expert's independence does not exclude a monitoring by the judge:

- the judge must have the necessary resources to manage the case (dealing with incidents related to the expert's person, to the scope of the mission) and to monitor the requirements for a fair trial during the expertise proceedings (reasonable time frame, contradictory procedure, reasonable costs)
  - the expert has the right to seek directions in writing from the judge in any matter to do with the case
  - the judge should on his own motion, having heard the parties, or at the parties' request, be able to restrict or extend the expert's mission, within the observance of *res judicata*, or to extend the timeframe of the mission,
  - the judge should be able, on his own motion, and having heard the parties, replace an expert.
- At the beginning of the expertise, the expert should agree with the court a preliminary time-frame and /or stages for completion of the report.

### **II. Requirements for a fair trial**

The possibility for the parties to effectively discuss the expert's technical findings before the expert submits his opinion entails that:

- they know what evidence has been submitted to the expert's analysis and the technical basis on which the conclusions are reached
- they have his substantiated technical opinion in writing prior to the hearing before the judge.

The judge is the guardian of the adversarial nature of the expert examination.

In one of the groups a consensus could be reached on the proposal that there should be a preliminary report in all cases.

In the other group there was an agreement in principle with the formal disclosure of the expert opinion between the parties but it was not held necessary that there is a preliminary report. Other methods of disclosure were discussed such as exchange of information or a meeting.

### **III. The report**

The preliminary report, if there is one, should have the same structure as the final report. The report that closes the expert examination and should be submitted to each of the parties before they present their claims and requests to the judge should thus include, in the expert's as well as the judge's language:

- a summary of the entrusted task,
- the several steps of the expert's investigation
- the list of evidence examined by the expert and the list of evidence retained,
- presentation of the investigations carried out by the expert,
- a description of the findings made by or on behalf of the expert,
- the analysis done of said evidence by the expert,
- The observations made by the parties on the preliminary report and on the expert's answers therein,
- the expert's reply to and detailed technical opinion on each of the judge's questions, unless the expert states why he is unable to reply to one such question
- a detailed statement of time and expenses incurred by the expert for his work

On the judge's own motion or at the parties' request, the expert can be called upon to complete or clarify his report either orally or in written form.

Having discussed the structure and content of the report in the UK, the group thought that this solution would give the necessary structure without being too prescriptive.

### **3. RECOMMENDATIONS WORKSHOP 3 : “QUALIFICATIONS, COMPETENCE AND ASSESSMENT OF EXPERTS”**

#### **I. A well-known competence, identified and recognisable**

How can we certify the expert's prominence, independence and competence with regards to the European courts?

- A register should be drawn up at a European level following a registration procedure by gathering the existing registers in the various European Union countries. The national competent authority will provide information on the expert's availability for an European assignment.
- Registration at a national level implies a level of technical competence, sufficient training in the guiding principles of the fair trial and in procedural rules as well as in the expert's code of conduct and in expert procedures, and the ability to write a report in an understandable manner for all parties involved.
- On a European level general guidelines will be developed on criteria for abilitation.
- Each member state must thus implement a registration procedure allowing it to assess the candidate's degrees, his professional experience and his morality and his knowledge on expertise proceedings.
- At a European level there should be developed a set of transnational procedural rules regarding expertise and the expert.

#### **II. Qualification of experts**

Should one appoint an entity which can attest that the legal expert has undertaken adapted and up-to-date training in proceedings?

- For a renewal of his abilitation the expert has the duty and obligation to undertake continuing professional development covering his area of competence, as well as the proceedings rules which regulate expert examinations and expert practices in his specialty. And it should be verified by a national abilitation body.

#### **III. The assessment of experts**

Should the expert be attached to a standardised evaluation entity?

- a. Registering means that the authorities drawing up the register must regularly reassess the experts on the register by ensuring, among others, that they have undertaken continuing professional development training and by obtaining the opinions of the judges who referred them. The opinions of the authorities must take into account the quantity and quality of reports submitted.
- b. The judge should take part in the assessment of the experts.

## **4. RECOMMENDATION WORKSHOP 4: THE STATUS AND ETHICS OF EXPERTS: FREE EXERCISE AND LIABILITY**

### **I. One status**

The designation of the expert is by reference to a body of rights and duties.

### **II. One code of ethics, possible penalties**

To ensure compliance with these duties it will be necessary to establish a European wide body of regulations and ethical principles with a means of ensuring compliance. Compliance with this body of regulations and ethics will be a determining factor in the authority of the expert to practice and to produce reports and testimony in legal proceedings.

The code of conduct needs to take into account the ethical obligations of the expert to the legal process.

### **III. Free exercise and liability**

The francophone and anglophone workshops agree that a principal ethical obligation of the expert is to maintain sufficient professional insurance for the protection of the clients and other parties affected by errors made in the production of expert testimony and reports.

## Part 2 – Over view

For the 27 countries of the EU and NORWAY

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## **GENERAL OVERVIEW**

### **Authors**

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We should mention, as an introduction, that the state of the law described here does not exclude that a litigant might present himself before the court with a spontaneously and unilaterally appointed expert. This is valid, obviously, in all systems. However, the expert opinion thus provided does not have the characteristics of a “legal” expert opinion. And the expert opinion brought forth in this manner is permissible within the trial, just like any exhibit or argument meant to convince the court. But this expert opinion, unregulated by any procedure rules (and especially not subject either to the contradictory procedure or the impartiality requirement) does not belong to the field of legal case studies any more than the use of the internet to clarify a technical issue does, for example.

This study is mainly focused on legal expert opinions, which can be understood in the two following ways:

- Either the expert opinion is that which proceeds from a judge’s request, and not from a litigant’s unilateral behaviour;
- Or it is the expert opinion to which the judge has agreed, in principle, and which is carried out by an expert told that his work will be presented in a court room.

Thus, the expert opinion described in this note is that which contributes to the jurisdictional solution of a dispute, whether the litigation is pending or whether it is part of the perspectives of one of the actors.

We are not saying that there can be no reflection carried out on “private” expert opinions which are completely disjointed from court intervention<sup>1</sup>: this is a different matter.

### **I. The expert’s status**

#### ***I-1 General observations***

There are two major status categories in legal systems. In many systems (11 countries out of 22 usable answers), the expert is appointed by the court, and one could call him the court’s eye and technical brain, assimilated to the judge when it comes to obligations and prerogatives. Thus, in these countries, (representing half of the usable answers) the Judge is the only one allowed to appoint a legal expert opinion.

In other systems (11 countries), that we could qualify as “Anglo-Saxon” systems - indeed, this is namely the case in the United-Kingdom - once the decision of using an expert opinion has been taken (either by the court or with its approval), each litigant is asked to appoint its expert opinion (paid according to an agreement made between the litigant and the expert), and the judge intervenes only if

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<sup>1</sup> Let us note that while they serve their clients, lawyers and solicitors are subject to a stringent code of ethics which includes elements tending to guarantee their “probity” towards their clients [prohibiting conflicts of interest] and elements tied to the right of reply. One could then wonder about the advisability of linking the enrolment on the official list, when provision has been made for it, to the compliance with the code of ethics.

the litigants have not appointed one (9 countries). The expert then becomes a sort of “star witness” called upon by the litigant which chose him. His position becomes ambiguous, since the particular relation he has with the litigant cannot hide the fact that he is contributing to the administration of justice, in which case he is normally not allowed to lie or distort scientific truth to favour his litigant.

It seems appropriate, with the prospects of a common base of principles which could regulate a “European” type of expertise (expert opinion used in cross-border litigation, for example), to foresee that when the “Anglo-Saxon” system is used, the free choice of the expert opinion by the litigant should be framed by two parameters:

- will only be allowed in the litigation the opinion of an expert who will have explicitly subscribed to a code of ethics obliging him, among others, to be competent, unbiased and honest, an expert who will have mentioned that he knows that his work will become part of a;
- the report drawn up by this expert will have to mention, beyond the pure facts, and the affidavit provided by the litigants, the elements, exhibits and documents, on which he bases his opinion, so that this report will answer Karl Popper’s dear principle of falsifiability.<sup>2</sup>

## *I-2 Accreditation procedure*

A vast majority of the countries which provided a useful answer to this question (14 out of 23 usable answers) have an approval procedure, mostly carried out by the public institutions (in 12 cases the judicial authorities issue the accreditation). The enrolment relies on degrees as much as on experience, however the approval is either permanent (in four countries) or subject to renewal (every five years in six countries).

However, one must interpret this data with caution. Indeed, eleven countries out of the twenty that provided usable answers revealed that there are regular assessment tests, which seems to indicate that accreditation is submitted to renewal more often than suggested by the answers.

The essential question highlighted by the existence, or absence, of these procedures of assessment, is that of the verification of the expert’s knowledge and the scope of this verification. It is not the responsibility of a single organisation to decide on the quality of the university or scientific degrees held by an expert – this competence lies solely in the hands of academic juries or the scientific community. So the approval procedure, or, even if it is less constringent, the enrolment on a list can only hope to acknowledge an enrolled or approved expert’s renown, whether this acknowledgement is due to his profession, as is the case in four countries, to the legal system (this is the case in eight countries), or institutional bodies (in nine countries). Obviously, any enrolment or approval procedure highlights the issue of acknowledging a foreign expert’s good repute in the relevant country, which has been underpinned by the CJEU’s decision in the Peñarroja case.

In the case of an approval or a simple enrolment on a list, since these two procedures mandate or strongly facilitate the possibility of being appointed by a court, it appears necessary that on the one hand the criteria be displayed<sup>3</sup>, and on the other hand that essential emphasis be placed on the knowledge of procedure rules, this being the only point on which courts called to assess these enrolments can provide a clear judgment, free from the appreciation of the expert’s “technical” skill..

<sup>2</sup> We know that for K. Popper, it is only the falsifiability of a proposition which enables us to believe it to be scientific.

<sup>3</sup> This is implied by the CJEU Peñarroja decision.

### ***I-3 Code of ethics and penalties***

Sixteen countries versus five have drawn up codes of ethics, and in twenty countries versus three, penalties are provided for (in Estonia, Greece, France, Hungary<sup>4</sup>, Italy<sup>5</sup>, Lithuania, Poland, United-Kingdom and Sweden, among others). The issue, naturally, is whether or not such a possibility is only present in the texts, or if it has been applied, and how... On this point, our study will have to be continued, in order to also establish a hierarchy of penalties - which will be meaningful only if it follows an assessment of the situation in practice, independently from what the texts provide for.

### ***I-4 Responsibility***

Almost all the countries provide for the expert's civil and/or criminal liability. Only two countries report a total absence of liability and six provide for the expert's civil liability, whereas one provides for criminal liability and nineteen countries provide for both civil and criminal liability.

The Peñarroja jurisprudence – if the position taken for interpreters-translators must be extended to all experts, which is still not certain – will undoubtedly force some EU members to revise the legal expert liability systems.

## **II. Who has decision power to appoint the expert?**

From the start, we can see a strong consistency among member states of the European Union on the fundamental issue of knowing who has the decision power to appoint an expert. No matter the system (accusatory or inquisitorial), the decision to appoint an expert falls in the hands of the court, and if, as in the United-Kingdom, it is at the initiative of one of the litigants, the judge must approve or validate this decision even when the expert will be, in the second case, the litigant's expert and not the court's. This is proof that there is a strong consensus, which appears in many ways, to put the judge in charge of the trial. In only one country out of twenty-six usable answers, the decision to call for an expert opinion is completely out of the judge's hands.

Moreover, this is proven when examining the conditions in which this decision is made. On the positive side, we can see that in all the countries (except Sweden), the judge is entitled to mandate an expert opinion on his own initiative if it appears necessary to establish the truth, and this even when both litigants have not expressed any desire for it or would have been hostile to such a preliminary investigation.

On the negative side, however, the court is not obliged to grant the expert opinion request emitted by one or both litigants<sup>6</sup>, except in the relatively rare cases in which the law requires preliminary expert opinions. Obviously, this affirmation of the sovereignty of the court, in law, must be tempered by the observation that actually, the court – obliged to solve a case in which the factual elements are significant – can often only acquiesce to the suggestion of one or all litigants to resort to an expert opinion, when the facts presents are unclear.

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<sup>4</sup> If the expert is at fault, for example with an undue delay, the court can mandate a financial penalty. An absent expert can even find himself arrested and detained!

<sup>5</sup> Negligence in the report submission and fraud are criminal offences (1 year of detention and a fine of 10329 euros).

<sup>6</sup> Except in interim cases, whose conditions are much more flexible: In France, one only needs the requested expert opinion to be “useful” for the judge to be obliged to grant it.



### **III. Expert opinion appointment by the court**

#### *III-1 Choosing the expert:*

This unity breaks up as soon as the decision to use an expert opinion is taken and it is time to appoint the expert(s). If most of the countries (23 out of 25 usable answers) associate the litigants to the expert appointment decision, there are two major systems for this appointment:

- In half the countries (11 out of 22 usable answers), the judge is the only one to decide on the expert's name, and the existing lists – whether they are official or professional – are only there to provide him information;
- In the other countries, and especially in the United-Kingdom, the litigants appoint the expert (2 countries) or have the possibility to appoint him, the judge only coming in if both litigants do not come to an agreement (9 countries).

One should mention here that whether or not a person is registered on a list or not, whether this list is institutional or purely professional, has little legal bearing on the appointment procedure, even if we can consider that being registered on a list, and especially an official one, can be seen as a “seal” of quality and skill... This fact contrasts with the thorough procedure which is in place when establishing the registers... One must however set aside the countries in which the registration on a list holds for approval, which then seems to be a condition of court appointment.

We have not raise the question of whether a legal person could be appointed as expert. We believe this topic does not suffer debate anymore, depending on the type of litigation: it now appears natural for laboratories to be called on to provide expert opinions, but it is hard to imagine calling on a professional partnership for a medical expert opinion...

#### *III-2 Objective and subjective impartiality:*

In almost all the countries examined, the expert may be challenged for the usual reasons, even if he has the right (and even the duty) to withdraw if he believes that he lacks the impartiality required by his position (either in fact or in appearance, let us not forget the positions of the ECHR!). 23 out of 25 countries provide for a recusal, and 22 out of 24 countries.

#### *III-3 Defining the mission:*

In twenty-two out of twenty-five usable cases, the mission is set by the judge, even when he naturally must take the litigants' suggestions into account. This reinforces what was said: the expert serves the court, which controls the dispute, and this, even in the Anglo-Saxon systems.

### **IV. Expertise procedure**

There are divergences on different aspects.

#### *IV-1 Controlling the progress of expertise:*

The court controls the progress of the expert opinion in two out of three cases, (seventeen out of twenty-five countries) which can make us think on the contrary that once the expert opinion is started, the judges, in almost one country out of three, merely wait for the results, without interfering in its progression.

We can however notice that there is a tendency to involve a “magistrate in charge of expert opinions” in the monitoring of expert opinions, which confirms the two out of three ratio mentioned above. This magistrate focuses his attention on the compliance of the expert to the delays, on one hand, and on the incidents that may arise during his expert appraisal (such as one of the litigants refusing to communicate documents).

#### *IV-2 The contradictory procedure (Audi alteram partem):*

We could have expected that a significant majority of countries mandate this to the expert opinion progress. However, this is not the case: out of nineteen usable answers, only seven establish the need to carry out a contradictory procedure every time (among which the answers from France, from Belgium, from Greece, from Malta, or from Romania) while four countries (Germany, Spain, Austria, Bulgaria) do not mandate this procedure and organise the contradictory procedure “ex-post”, the litigants being able, after the report has been submitted, to debate its contents and question the expert during a hearing. And for seven countries the contradictory procedure is not mandatory...

Requesting contradictory procedure only after the report has been submitted could be debated, seeing the European Court of Human Rights’ requirements, which has ruled that when the expert’s opinions might influence the judge’s position considerably, the rules of fair hearing (and more specifically the contradictory procedure) should be applied to the phase of legal expertise (CEDH, Mantovanelli decision c/France, 18 mars 1997)<sup>7</sup>. This position was taken up in substance and with caution by the Court of Justice of the European Communities in a judgement passed on April 10, 2003 (Joachim Steffensen case), stating that admissibility of the results of analyses as evidence can cause an infringement of the right to a second opinion “*whether the evidence at issue in the main proceedings pertains to a technical field of which the judges have no knowledge and is likely to have a preponderant influence on their assessment of the facts and, should this be case, whether [the claimant] has a real opportunity [in front of the court] to comment effectively on that evidence*”.

On the contrary, there are solid practical reasons advocating for the contradictory procedure to only be organised after the expertise operations: the multiplication of meetings to which all litigants are invited is a source of significant costs, and often cause delays. Formalising the contradictory procedure would thus burden expertise operations.

The minimum good practice on which a majority of countries (eleven out of eighteen) seem to agree, falls in line with the Steffensen ruling, and can be formalised by stating that it is important for contradictory procedure to take place, at least, in presence of the expert, before he submits his report.

#### *IV-3 Expert’s participation in the hearing:*

For all the countries whose answers were usable (twenty-seven) the expert may be called by the judge to present himself at the hearing (25 cases) or must be present (two cases). This oral supplement to the written report can be decided unilaterally by the judge, or at the request of one of the litigants.

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<sup>7</sup> The European Union integrated the norms of the convention for protection of human rights and fundamental freedom in the fundamental principles of European community law and will adhere to this convention.

## V. Close of the expert examination and report

### V-1 Conciliation:

This topic does not appear to hold much interest for the countries in question, since we only received fourteen answers to this question: two are opposed to it, twelve of them mention that conciliation puts an end to the legal opinion. The expert, obviously, can, and even must, observe that the litigation for which his involvement was requested has disappeared, since the litigants have come to an agreement, which renders null any further proceeding. Experience shows that when there is an issue, it comes from the fact that the expert might have considered obtaining an agreement as the heart of his mission, and thus delayed his work due to trying to find a conciliation<sup>8</sup>.

### V-2 The report:

It is not surprising to notice that it is most often written (a written report is mandatory in eighteen countries, and not necessary in six countries), and that in general there is no set form (fifteen countries out of eighteen). There is no consensus when it comes to knowing if the report must be preceded (or not) by a preliminary report (four positive replies, and fourteen countries that on the contrary say it is not mandatory). There is a feeling – which is confirmed by various interviews – that, next to the regulations, the actual habits vary depending on the experts and the cases without it necessarily being set in stone... The French situation is proof of this.

The general absence, when it comes to the report's structure (fifteen out of twenty usable answers) could be a source of question. As we have said (see section 1.1, last subparagraph), the formal content of the report is not a trivial concern: without considering that a strict form could be imposed, one should expect a report to revolve around three axes: an observation of the facts (including a list of the exhibits and facts on which the report is based), an analysis of the contentious matter, and a presentation of the expert's approach which leads to his motivated position. The distribution of such a report allows one to criticise it and can thus ensure that the contradictory procedure is respected.

We are obviously not surprised to see that, in almost all the countries providing a useful answer, (twenty-five out of twenty-six), the expert's conclusions are not forced on the judge, who can also request a second opinion if he has not been convinced by the expert<sup>9</sup>. However, in Austria, the judge must provide explicit reasons if does not follow the expert's conclusions. This is not such a big difference as it appears. Indeed, the general obligation of all courts to motivate their decision can be specifically applied when it rules out the opinion, which has been argued, expressed by a specialist with acknowledged skill, when this skill was precisely the reason why he was appointed.

In most countries (15 out of 25 usable answers) the submission of the report does not signal an end to the expert's work. This affirmation, while legally accurate, must be kept in proportion: it can happen that the expert must complete his report for some reason or another (because, for example, he did not answer a question), or provide additional oral information which was considered necessary. But we can observe that, *in fact*, and in most cases, submitting the report is the expert's final act, and it triggers the payment of the expertise. One could believe that by submitting his report, the expert has

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<sup>8</sup> These issues are why in some countries, experts are forbidden to conciliate litigants.

<sup>9</sup> Sometimes the established norm mandates a second opinion, such as was the case when controlling the quality of foodstuff, where the right to a second opinion was established by Council Directive 89/397/EEC, on June 14, 1989 (see CHCE April 10, 2003, Steffensen).

relinquished his mission (which forbids him, normally, to modify or complete his report on his own initiative<sup>10</sup>), while, at the explicit request of the court, the case can be reopened, and the expert's mission reinitiated.

## **VI. Funding for the expert examination**

Financial transactions are carried out under the control and authority of the magistrate. They start with a payment on account, most often deposited, the amount of which is set by the judge in fifteen out of sixteen cases (except in the United-Kingdom, where, apparently, the litigants have to decide the amount of the deposit).

The fees are also generally set by the magistrate (in nineteen out of twenty-three cases), sometimes – in Germany, Austria, Estonia, Italy, Norway, Poland – according to a scale fixed by the law. Let us mention the original situation in Cyprus where setting the expert's fees is a matter between the expert and the litigants (the ones who asked for the expert opinion and got it), except if the losing litigant who did not ask for the expertise is ordered to pay these fees, in which case they are subject to a legal limit. The Spanish system is also unique, since expertise fees set by the judge cannot be higher than a third of the amount of the sentence set in the end.

The losing litigant is usually ordered to pay the fees. We can however mention the interesting case of Lithuania, a country in which when the expert opinion is mandated by the court, the Justice Department's budget covers the fees.

There is a debate, especially in Belgium, over whether or not the expert's taxation request can be forced on the judge if neither litigant contests it,.

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<sup>10</sup> This is not so in the United-Kingdom.

## OVERVIEW TABLE OF ANSWERS

This table summarises the answers given by the 27 countries of the EU and NORWAY - that is, 28 in total.

Country	Number of countries "processed"				28	Results in green > 75% of files processed				Results in blue > 50% of files processed			
Questions													
0° Other administrative order	NR	6	not appl.	0	Yes	16	No	6					
1° Procedural rulings in calling for year expert examination													
a) On the initiative of	NR	0	Not appl.	0	Judge or Litigant(s)	17	Judge	5	Litigant	6			
b) Myeardatory expert opinions	NR	4	Not appl.	0	if Litigants request it	0	Law	7	Yes	8	No	9	
c) Decision maker	NR	0	Not appl.	0	Judge	27	Litigant	1					
d) Is a pre-trial expert examination possible?	NR	10	Not appl.	0	Yes	12	No	5	Other	1			
2° Choice and appointment of the expert(s)													
a) Register	NR	1	Not appl.	0	No register	5	Institutional	10	Jurisdictional	8	Professional	4	Other
b) Oath	NR	9	Not appl.	0	Every mission	8	Permanent	9	No	2			
c) Choice of the Expert	NR	3	Not appl.	0	Judge	13	Only the Litigants	3	Litigants failing that the	9			
d) Litigants' participation in the appointment process	NR	0	Not appl.	2	Yes	24	No	2					
e) Nationality	NR	7	Not appl.	0	Country	2	EU	7	Unimportant	12			
f) Recusal by the Litigants	NR	1	Not appl.	0	Yes	25	No	2					
g) Expert's withdrawal (refusal of a mission)	NR	2	Not appl.	0	Yes	24	No	2					
h) Possibility of adding another expert	NR	1	Not appl.	0	By the Judge	16	By the Judge or the	7	By the expert	3	No	1	
i) Possibility of being assisted by another expert	NR	4	Not appl.	0	Yes	23	No	1					
3° Definition of the expert's mission													
a) Who determines the mission?	NR	2	Not appl.	0	Judge	23	Litigant(s)	3					
b) Type of mission	NR	9	Not appl.	0	The whole mission	0	Single question	3	Only observation	0	Tous	15	Other
4° Progress of the expert's mission													
a) Judge supervision	NR	2	Not appl.	0	Yes	18	No	8					
b) Form of contradictory procedure	NR	5	Not appl.	0	Immediate and	7	Deferred	5	Non mandatory	8	Other	3	
c) Participation in the hearing	NR	0	Not appl.	0	Mandatory	2	On request	26	No	0			
5° Close of the expert examination													
a) Does conciliation put an end to the expert's mission?	NR	11	Not appl.	1	Yes	14	No	2					
b) Form imposed on the report	NR	2	Not appl.	0	Oral	0	Written	19	No	7			
c) Does the report put an end to the expert's mission?	NR	2	Not appl.	1	Yes	10	No	15					
d) Is there an imposed structure for the report?	NR	6	Not appl.	0	Yes	6	No	16					
e) Is a preliminary report mandatory?	NR	8	Not appl.	0	Yes	4	No	16					
f) Is the judge bound by the expert's conclusions?	NR	0	Not appl.	0	Yes	1	No	27					
g) Possibility of a second opinion	NR	7	Not appl.	0	Yes	21	No	0					
6° Funding for the expert examination													
a) Security-Payment	NR	5	Not appl.	0	Plaintiff(s)	11	The Litigants	11	The government	0	No	1	
b) Determining the amount of payment due	NR	10	Not appl.	1	Judge	15	Litigant	2					
c) Possibility of additional payment	NR	10	Not appl.	2	Yes	16	No	0					
d) Determining fees and costs	NR	1	Not appl.	1	Judge	20	Litigants	4	Expert	2			
e) Possibility of contesting the fees	NR	6	Not appl.	2	Yes	18	No	2					
7° Expert responsibility within proceedings													
a) Are there any laws governing expert examinations?	NR	0	Not appl.	0	Yes	28	No	0					
b) Expert responsibility	NR	5	Not appl.	0	Civil	8	Criminal	1	Civil & Criminal	12	No	2	
c) Mandatory insurance for the expert	NR	11	Not appl.	0	Yes	7	No	10					
8° The expert's status													
a) Existence of selection criteria (accreditation)	NR	2	Not appl.	2	Yes	15	No	9					
b) Classification of skills	NR	7	Not appl.	0	Legal nomenclature	9	Other frameworks	5	No	7			
c) Required qualifications	NR	7	Not appl.	0	Assessment of	6	Qualification required	4	Accreditation	4	No	7	
d) Delivery of accreditation	NR	6	Not appl.	2	Justice	12	Profession (peers)	0	No accreditation	7	Other	1	
e) Possibility of certifying a legal person	NR	4	Not appl.	1	Yes	11	No	12					
f) Validity period for the accreditation	NR	6	Not appl.	2	1 year	0	5 years	6	For life	5	Other	3	No
g) Regular assessment tests	NR	5	Not appl.	0	Yes	12	No	11					
h) Supervision of the expert's mission	NR	8	Not appl.	1	Quality & Quantity	3	Quantity	4	Quality	1	No	11	
i) Expert's report	NR	8	Not appl.	1	Yes	7	No	12					
j) Code of ethics	NR	5	Not appl.	0	Yes	16	No	7					
k) Good practice	NR	8	Not appl.	0	Yes	12	No	8					
l) Possibility of penalties	NR	4	Not appl.	0	Yes	20	No	4					
m) ELaws governing the status of the expert	NR	3	Not appl.	0	Yes	20	No	5					

## **1. AUSTRIA**

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### **Other administrative order**

NO

It seems that independent authorities and not legal authorities control administrative decisions and their transformation into genuine jurisdictions is currently being discussed.

## **I. Procedural rules in calling for an expert examination**

### ***I. 1) On the initiative of***

The litigants conduct the trial. The plaintiff, who must prove the facts to underwrite his request, can ask for an expert on certain technical matters to be appointed, but the judge can also unilaterally make this decision.

### ***I.2) Mandatory expert examinations***

Yes in certain cases

### ***I. 3) Decision-maker***

The judge (or judges in the case of a chamber)

### ***I. 4) Is a pre-trial expert examination possible?***

There is also a very quick expert examination before any trial, if requested, in the case of a possible loss of evidence. In that case, the expert does not look for causes but merely offers observations. Third-party joinders are not allowed.

## **II. Choice and appointment of the expert(s)**

### ***II. 1) Register***

Legal experts are natural persons publically appointed by the district court judges and registered with the courts.

This register is available on the Justice Department's website: [www.sdgliste.justiz.gv.at](http://www.sdgliste.justiz.gv.at).

Registering is valid for five years and renewable once.

The expert must first be accredited and take an oath.



In his written application, the candidate must prove:

- he has solid knowledge of the regulations in place which regulate the proceedings in front of the various jurisdictions, and of the legal expert's code of ethics. He must also prove he has knowledge relevant to drawing up expert examinations.
- if possible, that he has been an active member of his profession for ten years before registering in his specialty or a sister specialty. Five years of activity is enough if the candidate has been through higher education or similar.
- he has the ability to carry out legal acts.
- he is physically and mentally fit.
- his nationality is Austrian or that of a member state of the European Union and European Economic Area.
- his usual place of residence is in the jurisdiction of the district court he wishes to register with.
- he has taken out a third-party liability insurance policy.

To verify the candidate's abilities, a commission carries out an examination. This examination is usually oral, but the commission may request a probationary expert examination if it deems it necessary.

## ***II. b) Oath***

Permanent.

## ***II. 3) Choice of the Expert***

The choice of the expert is at the judge's discretion. The litigants can suggest an expert to the judge but the judge is not bound by this choice.

The public expert registered with the court has priority.

## ***II. 4) Participation by the parties in the appointment process***

Yes, if the litigants jointly suggest a name, the judge will appoint this expert.

## ***II. 5) Nationality***

EU/EEA

## ***II. 6) Recusal by the litigant parties***

The expert can be recused for the same reasons as a judge. This is notably the case if the expert has a personal interest in the litigation, if he is one of the litigants or has ties with one.

## ***II. 7) Expert's withdrawal (refusal of a mission)***

The expert can ask the court to be withdrawn if he believes there is a danger of bias.

## ***II. 8) Possibility of adding another expert***

By the judge

## ***II. 9) Possibility of being assisted by a colleague***

YES

## **III. Definition of the expert's mission**

### ***III. 1) Who determines the mission?***

The judge, taking into account the litigant's observations, determines the expert's missions and sets a very strict deadline. The parties must cooperate with the expert and provide him with additional information if needed. If they do not comply with the expert's requests, the judge can intervene by setting a deadline to the litigants for them to hand over the missing elements.

The legal expert is usually appointed with a full mission, except when it is a pre-trial expert examination: in that case, the mission is confined to observations

### ***III. 2) Type of mission***

Summary proceedings: simple observations. In depth: any kind of mission.

## **IV. Progress of the expert's mission**

### ***IV. 1) Judge supervision***

The expert must follow the mandate issued by the judge.

### ***IV. 2) Form of contradictory procedure***

He cannot request the cooperation of the litigants without first applying for it to the judge.

The litigants may not comment on the expert examination before it has been submitted to the court. They can comment the written report and ask for the expert to be called in for a hearing during which they may ask him.

### ***IV. 3) Participation in the hearing***

Yes, mandatory, if requested by the judge or the litigants.

But if an oral participation is not requested by any party, the report may simply be written.

## **V. Close of the expert examination**

### ***V. 1) Does conciliation put an end to the expert's mission?***

No, not automatically, the judge must close the expert's mission if the litigants tell him the litigation is over.

### ***V. 2) Form imposed on the report***

The conclusions are presented in a written form and must be argued.



The expert must mention the litigants' observations inasmuch as they are relevant to fulfilling his mission. He must enclose the litigants' account.

***V. 3) Does the report put an end to the expert's mission?***

If the judge or the parties request it, the expert must present his conclusions orally during a hearing and can be questioned.

***V. 4) Is there an imposed structure for the report?***

NO, but the expert must give detailed descriptions of the various stages of his investigations and the manner in which he reached his conclusions.

He must reply to the diverging questions or opinions expressed by the parties during the expert examination, insofar as they are relevant.

He must attach to his report the elements of evidence and documents handed to him by the litigants or by third parties.

***V. 5) Is a preliminary report mandatory?***

NO

***V. 6) Is the judge bound by the expert's conclusions?***

Austrian civil proceedings are regulated by the free sifting of evidence. The judge is not bound by the expert's opinion but must argue the reasons for which he has chosen (or not) to base his decision on the expert examination.

If the legal expert examination goes against a private expert examination, the legal expert must argue his different opinion.

***V. 7) Possibility of a second opinion***

YES

**VI. Funding for the expert examination**

***VI. 1) Security – Payment***

The expert's fees are expenses; they are paid in advance by the litigant requesting the expert examination and must be paid by the litigant who loses the trial.

***VI. 2) Determining the amount of payment due***

By the judge

***VI. 3) Possibility of additional payment***

YES

***VI. 4) Determining fees and costs***

The legal expert's fees are set by §§ 24 to 42 of the *Gebührenanspruchsgesetz von 1975 (GebAG-*

1975 Austrian taxation bill). The judge sets the fees according to the time spent, the amount of work carried out, as well as market prices in the expert's professional field.

#### ***VI. 5) Possibility of contesting the fees***

YES

### **VII. Expert liability within proceedings**

#### ***VII. 1) Are there any laws governing expert examinations?***

YES

#### ***VII. 2) Expert liability***

If, due to an error made by the expert, the expert examination is flawed, he is liable to the litigants according to civil law (§§ 1299, 1300 Austrian civil law - ABGB). Third-party liability is exceptional.

Moreover, article § 121 StGB lays out the criminal punishment in case the expert violates confidentiality.

If the expert refuses to hand in an expert examination, he will be replaced and is liable for the costs incurred by his refusal. The expert can be stricken from the list of legal experts if he hands in a "bad" expert examination more than once.

#### ***VII. 3) Mandatory insurance for the expert***

YES

### **VIII. The expert's status**

The expert is an occasional partner with the court. He only intervenes when the judge does not have sufficient knowledge to make his decision. The expert then helps him better understand certain technical or specific aspects of the case. Moreover, he contributes to observing the facts.

As an occasional partner with the judge, the expert must be thorough, loyal, unbiased and impartial. He must strictly follow the proceedings regulations. The expert is bound by professional secrecy.

#### ***VIII. 1) Existence of selection criteria (accreditation)***

YES

#### ***VIII. 2) Classification of skills***

Unofficial framework: <http://www.sachverstaendige.at/nomenklatur.html>.

#### ***VIII. 3) Required qualifications***

Knowledge assessment by a commission made of judges and experts, appointment by the president of the court of appeals.

**VIII. 4) Grant of accreditation**

By the justice department.

**VIII. 5) Possibility of accrediting a legal person**

NO

**VIII. 6) Validity period for the accreditation**

5 years.

**VIII. 7) Regular assessment tests**

Every ten years.

**VIII. 8) Supervision of the expert's mission**

For the 10 year assessment, the expert must submit an activity report.

To this end he must archive all his reports and appended documents for a 7-year period.

**VIII. 9) Expert's activity report**

Yes, during the regular renewal phase.

**VIII. 10) Code of ethics**

YES

**VIII. 11) Good practice**

NO

**VIII. 12) Possibility of penalties**

YES

**VIII. 13) Laws governing the expert's status**

YES

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[www.gerichts-sv.at](http://www.gerichts-sv.at)

## **2. BELGIUM**

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### **Other administrative order**

YES

## **I. Procedural rules in calling for an expert examination**

### ***I. 1) On the initiative of***

The burden of evidence is on the litigant who requests the discharge of an obligation or on the one who claims to be freed from it.

The judge has the power to order an expert examination at his discretion, unless the law mandates it unilaterally, or if one of the litigants requests it.

The judge can mandate the experts to carry out observations or give a technical opinion to help solve litigation he has to rule, or he can order an expert examination on a precautionary basis, in case of a genuine and objective threat to litigation to preserve the evidence of facts which could determine the outcome of this litigation.

The judge decides if the expert examination is strictly necessary.

The judge limits the choice to what is sufficient to solve the litigation, by favouring the simplest, fastest and least costly measure.

The litigants can jointly oppose to the mandating of an expert examination.

The litigants can request a private expert examination but its scope is usually smaller, especially since there is no contradictory procedure.

### **I.2) Mandatory expert examinations**

YES, provided for by law

### **I.3) Decision-maker**

The judge

### **I.4) Is a pre-trial expert examination possible?**

YES, as a precautionary measure

## **II. Choice and appointment of the expert(s)**

### ***II. 1) Register***

There is no official register of legal experts in spite of attempts by expert associations to establish expert accreditation.

### ***II. 2) Oath***

For each mission

### ***II. 3) Choice of the Expert***

The expert is chosen according to his experience, his knowledge and the reputation he has in a specific field.

The expert can be an employee, an independent worker, a civil servant or a public entity.

### ***II. 4) Participation by the parties in the appointment process***

The litigants can give their opinion when appointing an expert; it will usually be followed if the litigants agree.

The judge cannot interfere with the litigants' choice without arguing his decision.

### ***II. 5) Nationality***

It seems the expert must have a European Union nationality.

### ***II. 6) Recusal by the litigant parties***

The experts can be recused for the same reasons as judges, especially lack of impartiality and conflict of interest.

The expert chosen by the litigants can only be recused for causes which have appeared or been known after his appointment.

### ***II. 7) Expert's withdrawal (refusal of a mission)***

The expert who knows he is in a situation to be recused must warn the litigants and withdraw, unless they exempt him from it.

### ***II. 8) Possibility of adding another expert***

The judge can also appoint a college of experts if the situation calls for it.

### ***II. 9) Possibility of being assisted by a colleague***

The expert can be assisted by technical advisers.

The judge must mention if the expert needs to be assisted in his decision to order an expert examination.



### **III. Definition of the expert's mission**

#### ***III. 1) Who determines the mission?***

The judge

#### ***III. 2) Type of mission***

Expert examinations, observations, consultations, etc...

### **IV. Progress of the expert's mission**

#### ***IV. 1) Judge supervision***

Any contestation relative to the expert examination which happen during it, between the litigants or between the litigants and the experts, including the request to replace the experts, and any contestation relative to the extension or the widening of the mission, are dealt with by the judge.

If the judge does not find sufficient information in the report, he can order either a supplementary expert examination to be carried out by the same expert, or a new expert examination to be carried out by another expert.

The judge who ordered the expert examination or the judge appointed to this effect follows the expert's mission progress and ensures that the deadlines are met and the contradictory procedure takes place.

The experts carry out their mission under supervision of the judge who can at anytime, unilaterally or at the request of the litigants, assist in operations.

If one of the litigants requests it, the judge can replace the expert who is not fulfilling his mission. If both litigants jointly request it, the judge must replace the expert.

The expert sends the judge, the litigants and the counsels a provisional report every six months on the progress of his work.

The judge can push back the deadline for the final report to be submitted following an argued request by the expert.

#### ***IV. 2) Form of contradictory procedure***

In a civil case, the litigants must collaborate with the expert examination. Otherwise, the judge can infer what he will.

The expert examination cannot be opposed by the litigant required in a forced intervention after the expert sent his provisional opinion, unless the litigant gives up thanks to the un-opposability.

The expert attempts to conciliate the litigants, and notes that his expert opinion has become pointless if it works out.

#### ***IV. 3) Participation in the hearing***

If the litigants request it, the judge can hear their technical advisors.

The judge can hear the expert during the hearing, a decision made unilaterally or after the request of one of the litigants.



## **V. Close of the expert examination**

### ***V. 1) Does conciliation put an end to the expert's mission?***

YES

### ***V. 2) Form imposed on the report***

The report must be written.

### ***V. 3) Does the report put an end to the expert's mission?***

The expert's mission normally ends when he submits his final report.

### ***V. 4) Is there an imposed structure for the report?***

The final report is dated and mentions the presence of the litigants during the work, their oral statement and their requisitions. It also has a list of documents and notes provided by the litigants to the expert, and can only reproduce them inasmuch as it is relevant to his opinion.

The expert can then provide precision to his report during the hearing, both in civil and criminal matters.

### ***V. 5) Is a preliminary report mandatory?***

YES

### ***V. 6) Is the judge bound by the expert's conclusions?***

The judge is not bound by the expert's conclusions, even if the conclusions are most often followed. The judge can decide what kind of evidence is held by the expert examination.

### ***V. 7) Possibility of a second opinion***

In theory yes, the judge is not bound to follow the expert's opinion.

## **VI. Funding for the expert examination**

In civil proceedings, there is no pricing of the expert's fees and expenses.

### ***VI. 1) Security-Payment***

The judge decides the payment of a security, the payment deadline and the litigant(s) who should pay it.

### ***VI. 2) Determining the amount of payment due***

If the expert considers the security or the available part insufficient, he can ask the judge to deposit an additional security or to authorise more of the security to be made available.

Increased availability is also allowed to cover a reasonable part of the expected expenses for the work that has already been carried out.

### ***VI. 3) Possibility of additional payment***

YES

### ***VI. 4) Determining fees and costs***

The expert draws up a detailed list of expenses and fees.

If the expert does not submit his expenses and fees, or if the litigants do not agree on the amount of the expenses and fees being claimed by the experts, these are taxed by the judge without prejudice to possible damages.

There is no consensus as to whether the judge can have an opinion or whether he must accept as is the list submitted by the expert if the litigants agree to it, or are late in contesting it.

When closing the trial, this amount will be taxed as legal costs.

After final imposition, the Security is taken out by the experts from the amount which they are owed.

The possible remains is promptly reimbursed to the litigants by the clerk according to the pro-rata of the amount they were supposed to pay down and the amount they effectively paid.

The expert can only receive a direct payment after their list of expenses and fees was completely taxed, and as long as the security payment was insufficient.

### ***VI. 5) Possibility of contesting the fees***

YES

## **VII. Expert liability within proceedings**

### ***VII. 1) Are there any laws governing expert examinations?***

YES

### ***VII. 2) Expert liability***

The expert is civilly liable while he carries out his mission.

The expert's criminal liability can be involved under common offenses which specifically apply to experts, especially if he has falsified his writer reports or oral presentations or accepted a direct payment of one of the litigants involved, knowing it is forbidden, or under ordinary law.

### ***VII. 3) Mandatory insurance for the expert***

NO

## **VIII. The expert's status**

The Judicial Code does not mention the question of the expert's status.

### ***VIII. 1) Existence of selection criteria (accreditation)***

Not applicable

### ***VIII. 2) Classification of skills***

Not applicable

### ***VIII. 3) Required qualifications***

Not applicable

### ***VIII. 4) Grant of accreditation***

Not applicable

### ***VIII. 5) Possibility of accrediting a legal person***

It appears that a legal person cannot be appointed, since the rules to recuse an expert cannot apply to them.

### ***VIII. 6) f) Validity period for the accreditation***

Not applicable

### ***VIII. 7) Regular assessment tests***

Not applicable

### ***VIII. 8) Supervision of the expert's mission***

Not applicable

### ***VIII. 9) Expert's activity report***

Not applicable

### ***VIII. 10) Code of ethics***

Not applicable

### ***VIII. 11) Good practice***

Not applicable

### ***VIII. 12) Possibility of penalties***

### ***VIII. 13) Laws governing the expert's status***

**NO**

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### **3. BULGARIA**

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#### **Other administrative order**

YES

### **I. Procedural rules in calling for an expert examination**

#### ***I. 1) On the initiative of***

During main proceedings: to the judge's discretion. It is up to the litigants to prove the facts they are presenting. They can thus request an expert to be appointed when they believe it necessary. In that case, they must specify the facts to be proven, the expert's necessary area of competence and the object of the expert examination, with a mission made of precise questions. The judge has the final say, and can also unilaterally order an expert examination.

#### ***I.2) Mandatory expert examinations***

Yes, set by the law

#### ***I. 3) Decision-maker***

The judge

#### ***I. 4) Is a pre-trial expert examination possible?***

YES

### **II. Choice and appointment of the expert(s)**

#### ***II. 1) Register***

For each administrative or regional court, registers of specialists approved as experts are created. The Supreme Court of Cassation, the Supreme Administrative Court, the Supreme Cassation Prosecutor General's Office, the Supreme Administrative Prosecutor General's Office and the National Investigation Service if necessary, approve the registers specific to their needs and activities.

Expert registration can be suggested by the ministries, public institutions, communes, professional organisations and scientific institutes or a candidate can present a spontaneous request.

Before applying for the expert's enrolment on a register, the institution must, after interviewing the

candidate, ensure he has the necessary qualities in light of the principles of equality, independence, objectivity, confidentiality, and observation of ethical rules as stated by the relevant regulations, as well as verify the scientific basis of the analytical means at his disposal.

The registers are approved by commissions which are made up of the following: president of the court of appeals (or his deputy), appeals procurator (or his deputy), regional court president, regional procurator, administrative court president and head of the regional investigation service.

The registers for the Supreme Court of Cassation, Supreme Administrative Court, Supreme Cassation Procurator's Office, Supreme Administrative Procurator's office and National Investigation Service are approved by a commission which includes the president of the Supreme Court of Cassation, Supreme Administrative Court, the General Prosecutor and the head of the National Investigation Service.

The expert register has for each expert a cross-reference to the common nomenclature of competence fields – expert opinion in forensic sciences, medicine, psychology, economics, engineering and technics, biology, materials, substances and products, agribusiness, art and others.

To be registered as an expert, a person must have all his rights and match the following requirements:

- Have professional training and have the given skills or knowledge specific to the field in question;
- have worked at least five years in his specialty;
- to not have been convicted for a general crime;
- to not have lost the right to hold certain posts or engage in certain activities;
- to not hold a judicial role in the legal system;
- have a permanent resident permit in Bulgaria if the person is a foreign citizen.
- the criteria of age (formerly less than 65 years old) was repealed in 2010.
- if necessary, the court can appoint a non-registered specialist as an expert.

## ***II. 2) Oath***

There is no legal provision for the expert to swear an oath. As soon as he is referenced on the register, he is bound by the obligations stemming from the relevant legal provisions, including ethical rules. At each appointment (before the expert's oral report has been heard and before his written report has been submitted), the court reminds the expert of the criminal liability for false or misleading findings.

## ***II. 3) Choice of the Expert***

The judge determines the focus and the mission of the expert examination according to the litigants' request; he lists the material provided to the expert and checks the name of the expert, his training, specialty, scientific level, scientific title, position and if applicable, the name of the institution he works in.

The expert can be a private citizen or a civil servant.

## ***II. 4) Participation by the parties in the appointment process***

The litigants can give their opinion on any of these points, however the judge is not bound by their opinion.

## **II. 5) Nationality**

Foreign experts are allowed if they have a long-term residence permit.

## **II. 6) Recusal by the litigant parties**

For the same reasons as judges.

(Examples: litigant in a trial, doubt on impartiality, personal interest in the litigation, tie with one of the litigants due to a joint liability).

## **II. 7) Expert's withdrawal (refusal of a mission)**

The expert is obliged to ask for his withdrawal in the cases for which recusal is foreseen.

An expert can refuse an appointment on the same grounds as those for witnesses, including – as well as those for recusals – the ex-spouse of one of the parties and the person who acted as a mediator in the same dispute.

Just like witnesses, experts may also refuse to answer a particular question, stating their reasons for this refusal. For example if the answer might cause immediate damage, dishonour, or criminal prosecution to himself or to his close relatives (descendants or relatives in the ascending line, siblings, spouse and ex-spouse, child, father and mother of the spouse/partner).

The court exempts the expert from the assigned task if he cannot accomplish it for lack of the necessary qualifications or because he is ill or any other objective reason, as well as in the cases in which he has not written the report within the stipulated deadline.

## **II. 8) Possibility of adding another expert**

Depending on the judge's decision

## **II. 9) Possibility of being assisted by a colleague**

Only with the agreement and authorisation of the organisation in charge of the proceedings.

# **III. Definition of the expert's mission**

## **III. 1) Who determines the mission?**

The mission's content is set by the judge. The litigants can ask specific questions, but the judge is not bound by the litigants' requests.

## **III. 2) Type of mission**

Any question that must be clarified for the resolution of the dispute and whose answer requires particular knowledge (in the fields of science, technical art, etc.) may be subject to an expert examination. Finding causes is often part of the expert's mission - in general, the expert mission must be defined on an *ad hoc* basis.

Because, unlike witnesses, who provide information on facts, the expert's particular role is to assist the judge by proposing **conclusions** based on facts - conclusions that the judge would himself come to if he had the necessary knowledge – in general the simple notice of facts is not part of the expert's mission.

Yet some tasks that include the notice of facts may be assigned to experts, (which is why some provisions concerning witnesses are also applicable to experts). For example, when the task includes



the examination of material evidence which the expert will describe before the judge, his role is similar to that of a witness.

According to the Civil Code of Procedure, the specific means of gathering material evidence (that sometimes coincide with the fact that needs to be proven) is their direct examination by the judge (if necessary the judge may be assisted by an expert), in the hearing room, or, if this is not possible, by a judicial visit of the site with the parties' participation.

The examination of a person is entirely entrusted to an expert, in order to ensure respect for personal dignity.

## **IV. Progress of the expert's mission**

### ***IV. 1) Judge supervision***

The court's powers are limited to controlling the requirements to which the expert is liable and to ensuring the conditions to formulate conclusions within a deadline. The court which has appointed an expert checks his identity, his specialty and his skills, his ties with the litigants and the existence of any reasons for recusal. It follows the progress of the expert examination which must comply with proceedings, and can thus set deadlines for the expert examination to be carried out and determine the necessary measures for this deadline to be respected – litigants' cooperation, communicating the elements held by third parties...

The expert must comply with the general obligations of scientific evidence, and must be of good faith, objective, analyse all the points of view, and provide a thorough report while formulating an expert opinion; he has to obey the rules of professional secrecy and code of ethics. He is personally liable for carrying out the concrete tasks that have been set, within the deadlines that are set, to show up in front of the given court when he is called in; to provide his report on the questions which have been asked.

### ***IV. 2) Form of contradictory procedure***

Not mandatory

The litigants must provide the elements requested by the expert. They have the possibility of presenting their observations after.

The judge can meet the parties' request to be present while the expert accomplishes his mission, for example during measurement proceedings.

If the parties express opinions during the expert examination, the expert must reply to them.

When the parties' analyses differ and insofar as is possible, the expert should offer alternatives.

### ***IV. 3) Participation in the hearing***

On request

## **V. Close of the expert examination**

### ***V. 1) Does conciliation put an end to the expert's mission?***

Conciliation puts an end to the expert's mission and to the dispute, after approval of the agreement by the court.



Conciliation itself may require an expert examination and be based on the expert's findings.

An amicable settlement may also put an end to the mission provided the parties withdraw the case from before the court.

#### ***V. 2) Form imposed on the report***

Submit a written report and explanations on the report in a public hearing, with the judge and the litigants able to ask questions.

The law does not require an expert to append to his report all the documentary evidence submitted to him by the litigants or by third parties, but he must mention them in his report.

Generally the expert bases his opinion on the case file, to which he has access. If the parties submit other files to the expert during his assignment, they must also file them with the court as part of the documentary evidence.

The parties may also ask the court to force the opposing party or third parties to present documents they possess that are of importance to the dispute.

It is sometimes difficult or even impossible, for practical reasons, to file all the documentary evidence that the expert must examine (for example one of the parties' extensive accounting files); the expert may also have to examine evidence that is in administrative offices or establishments and that by its very nature cannot be filed in full (such as urban plans); in practice, experts append excerpts of this to their report.

#### ***V. 3) Does the report put an end to the expert's mission?***

If the report is not sufficiently complete or clear, or if there are any doubts on the accuracy of the opinions, reflections and conclusions presented, the judge can order a supplementary expert examination or a second expert examination.

#### ***V. 4) Is there an imposed structure for the report?***

According to applicable regulations, the report must describe the materials used, the investigations and analyses that were carried out, the scientific and technical means used, as well as the results and conclusions reached by the expert.

In some fields (for example medical and psychological examinations), the report's formal content is specified in even more detail.

#### ***V. 5) Is a preliminary report mandatory?***

There is no provision in the law for a preliminary report, and in practice it is not done.

#### ***V. 6) Is the judge bound by the expert's conclusions?***

The expert's conclusions do not bind the court, which must take into account all the elements of evidence which it has at its disposal.

#### ***V. 7) Possibility of a second opinion***

If there are various reports with diverging opinions, the judge, if he cannot decide alone, must use the proceedings possibilities in place and request either a supplementary expert examination or a new expert examination to clarify the case.

## **VI. Funding for the expert examination**

### ***VI. 1) Security-Payment***

By the requester

### ***VI. 2) Determining the amount of payment due***

The judge

### ***VI. 3) Possibility of additional payment***

The court may order additional payment.

### ***VI. 4) Determining fees and costs***

The fees and costs are set by the judge and take into account:

- The complexity and specificity of the mission
- The skill and qualification level of the expert
- The time required to carry out the expert examination (each actual hour worked is paid five leva - around 2,56 €)
- The amount of work carried out;
- The necessary expenses to carry out the expert examination, such as the use of material, consumables, technical means and equipment.

### ***VI. 5) Possibility of contesting the fees***

YES

## **VII. Expert liability within proceedings**

### ***VII. 1) Are there any laws governing expert examinations?***

There is a law setting a code of ethics with which legal experts must comply (order n° 1/16.01.2008). These regulations state that the expert must carry out his mission independently, objectively and impartially.

### ***VII. 2) Expert liability***

In case of damages caused by an inaccurate report, the expert can be liable according to the rules of civil law.

+ Criminal liability for “deliberate presentation of a false written or oral conclusion in front of a court”.

### ***VII. 3) Mandatory insurance for the expert***

YES

## VIII. The expert's status

### *VIII. 1) Existence of selection criteria (accreditation)*

YES

### *VIII. 2) Classification of skills*

Common nomenclature

### *VIII. 3) Required qualifications*

Assessment of knowledge

### *VIII. 4) Grant of accreditation*

By the justice department

### *VIII. 5) Possibility of accrediting a legal person*

NO

### *VIII. 6) f) Validity period for the accreditation*

Enrollment on the register is not subject to any determined period.

The commissions (see II.1 above) update the registers and publish them annually. Based on proposals from the ministries, public establishments, the communes, professional orders and scientific institutes or on suggestions by the presidents of the respective bodies of the judiciary, commissions strike the expert from the register (except in the event of a death or when the expert asks to be withdrawn) if he no longer meets the requirements (not have been convicted for a general crime, not have lost the right to hold certain posts or engage in certain activities, not hold a judicial role in the legal system, and have a permanent resident permit in Bulgaria if the person is a foreign citizen); also in the event of a practical impossibility to work on concrete tasks for a period that is longer than 6 months or in the event of persistent behaviour that is contrary to the principles set out in II.1 above.

### *VIII. 7) Regular assessment tests*

The above-described procedure is the only regular assessment mechanism.

### *VIII. 8) Supervision of the expert's mission*

See point 6 above for control of the accreditation, and point 9 below for the activity report.

### *VIII. 9) Expert's activity report*

Legislation requires only that the expert keep records of his reports and materials, of the samples used for comparative analyses, as well as of any other evidence used. Access to these records is only allowed to the institutional bodies that ordered them.

### *VIII. 10) Code of ethics*

YES

### **VIII. 11) Good practice**

Rules of good practice have been adopted by professional organisations and expert associations.

### **VIII. 12) Possibility of penalties**

YES

### **VIII. 13) Laws governing the expert's status**

YES: Order n° 1/16.01.2008, Art. 195-203 Code of Civil Proceedings, Art. 395-403 Judiciary System Act

## **IX. Bibliography**

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STOYCHO RADANOV et PETKO LISSAEV – *Guide encyclopédique en médecine légale*

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Page de l'Association bulgare des experts judiciaires et des experts –

BA « VLEK » : [expert-bg.com/menu1.htm](http://expert-bg.com/menu1.htm)

## **4. CYPRUS**

### **Authors**

**Christian EMORINE**, *Consultant*

**Patrice HUVER**, *Expert*

### **Other administrative order**

NO

Neither other administrative order nor specific regulations

Administrative litigation is reserved to the Supreme Court

### **I. Procedural rules in calling for an expert examination**

#### *I. 1) On the initiative of*

Judge or litigants

#### *I.2) Mandatory expert examinations*

UNSPECIFIED

#### *I. 3) Decision-maker*

The judge

#### *I.4) Is a pre-trial expert examination possible?*

UNSPECIFIED

### **II. Choice and appointment of the expert(s)**

#### *II. 1) Register*

UNSPECIFIED

#### *II. 2) Oath*

UNSPECIFIED

#### *II. 3) Choice of the Expert*

UNSPECIFIED

#### *II. 4) Participation by the parties in the appointment process*

YES

#### *II. 5) Nationality*

UNSPECIFIED

#### *II. 6) Recusal by the litigant parties*

YES

***II. 7) Expert's withdrawal (refusal of a mission)***

UNSPECIFIED

***II. 8) Possibility of adding another expert***

UNSPECIFIED

***II. 9) Possibility of being assisted by a colleague***

UNSPECIFIED

**III. Definition of the expert's mission**

***III. 1) Who determines the mission?***

UNSPECIFIED

***III. 2) Type of mission***

UNSPECIFIED

**IV. Progress of the expert's mission**

***IV. 1) Judge supervision***

NO

***IV. 2) Form of contradictory procedure***

UNSPECIFIED

***IV. 3) Participation in the hearing***

On request

**V. Close of the expert examination**

***V. 1) Does conciliation put an end to the expert's mission?***

UNSPECIFIED

***V. 2) Form imposed on the report***

NO

***V. 3) Does the report put an end to the expert's mission?***

NO

***V. 4) Is there an imposed structure for the report?***

UNSPECIFIED

***V. 5) Is a preliminary report mandatory?***

UNSPECIFIED

***V. 6) Is the judge bound by the expert's conclusions?***

NO

***V. 7) Possibility of a second opinion***

UNSPECIFIED

**VI. Funding for the expert examination**

***VI. 1) Security-Payment***

UNSPECIFIED

***VI. 2) Determining the amount of payment due***

UNSPECIFIED

***VI. 3) Possibility of additional payment***

UNSPECIFIED

***VI. 4) Determining fees and costs***

By the litigants, but there is a legal limit to the fees if they are to be paid by the unsuccessful litigant.

***VI. 5) Possibility of contesting the fees***

YES

**VII. Expert liability within proceedings**

***VII. 1) Are there any laws governing expert examinations?***

YES: Professionalism and impartiality.

***VII. 2) Expert liability***

NO

***VII. 3) Mandatory insurance for the expert***

UNSPECIFIED

**VIII. The expert's status**

***VIII. 1) Existence of selection criteria (accreditation)***

NO

***VIII. 2) Classification of skills***

NO

***VIII. 3) Required qualifications***

NO

***VIII. 4) Grant of accreditation***

No accreditation

***VIII. 5) Possibility of accrediting a legal person***

YES, possibility to appoint a legal person

***VIII. 6) f) Validity period for the accreditation***

No accreditation

***VIII. 7) Regular assessment tests***

UNSPECIFIED

***VIII. 8) Supervision of the expert's mission***

UNSPECIFIED

***VIII. 9) Expert's activity report***

UNSPECIFIED

***VIII. 10) Code of ethics***

NO

***VIII. 11) Good practice***

No, no code of good practice

***VIII. 12) Possibility of penalties***

NO

***VIII. 13) Laws governing the expert's status***

YES

The expert is simply a witness (Code of Justice, Art. 48).

**IX. Bibliography**



## **5. DENMARK**

### **Contributing correspondent**

**Børge DAHL**, *First president of the Supreme Court*

### **Authors**

**Christian EMORINE**, *Consultant*

**Béatrice DESHAYES**, *Avocat & Rechtsanwältin - Partner HW&H*

### **Other administrative order**

No other administrative order (see. < org. judiciaire par pays.pdf> / 'legal systems by country'). But there is specialised training: a litigant can come forth at the Maritime and Commercial Court – but it is not mandatory. It is then made of one or three judges, and of two or four judge – experts.

There is no specific expert examination proceeding in this jurisdiction.

## **I. Procedural rules in calling for an expert examination**

### ***I. 1) On the initiative of***

The court appoints an expert on request of a litigant.

The court can refuse to appoint an expert if the procedure seems superfluous but usually the request is granted.

Restrictions:

- One cannot request an expert on purely legal matters, unless it is as a consultant about laws from another State (but the rules of international law – i.e. EU, human rights, international treaties – which can be applied to Denmark as assimilated to national law).
- The expert examination cannot address the shortcomings of part of the taking of evidence unless this evidence cannot be obtained through ordinary means.

### ***I.2) Mandatory expert examinations***

Under family law, i.e. in litigations over child custody or visitation rights, it is mandatory to appoint a child psychologist expert.

### ***I. 3) Decision-maker***

The judge

A single judge makes the decision in the name of the District Court. The proceedings can be oral, but are generally written. The judge can refuse the request if he considers it useless to appoint an expert, but usually grants the request when the litigants are in agreement.

### ***I.4) Is a pre-trial expert examination possible?***

Before any main proceedings: the court appoints an expert on the request of one or more litigants.

The appointment is made by a single magistrate, in the name of the District Court in question. They proceedings can be oral, but are generally written.

## **II. Choice and appointment of the expert(s)**

### ***II. 1) Register***

Some public organisations have expert registers, from which the court might make his pick when the issue falls within their area of competence, i.e. forensics.

Under family law, all the courts have a register of child psychology experts.

When there is no list, if both litigants agree, the court will appoint an expert who seems competent.

A civil servant cannot usually be appointed as an expert, unless he is a member of a register held by one of the official organisations mentioned above.

### ***II. 2) Oath***

#### **No Oath.**

During the hearing to which the expert is called, the judge reminds him of his obligations and of the penalties which could be applied in case of offense. See point 7 – b below.

### ***II. 3) Choice of the Expert***

The judge

If the litigants agree on the name of an expert, the judge usually appoints him (even if he is not obliged to).

### ***II. 4) Participation by the parties in the appointment process***

The litigants can agree on the name of an expert. The court is not bound by this choice, but it is very rare that it does not follow the suggestion.

The litigants can refuse the court's choice if they have valid reasons to.

### ***II. 5) Nationality***

Not important

### ***II. 6) Recusal by the litigant parties***

Possible, if the expert does not respect professional requirements or cannot be independent, or in case of conflicts of interest

Recusal is put the court's discretion.

### ***II. 7) Expert's withdrawal (refusal of a mission)***

In principle, not possible, except for foreign experts or civil servants taken with other duties. In practice, the judge avoids choosing an expert who might have to withdraw.

### ***II. 8) Possibility of adding another expert***

Adding another expert: if need be, the expert must tell the court if there are questions beyond his area of competence, and the judge can then appoint another expert on the litigants' request.

### ***II. 9) Possibility of being assisted by a colleague***

A partner or consultant's intervention is possible, but the appointed expert is the only one liable for the mission's progress and the report.

## **III. Definition of the expert's mission**

### ***III. 1) Who determines the mission?***

The litigants agree on the questions asked the expert.

If there is no agreement, the court sets the expert's mission.

### ***III. 2) Type of mission***

All

There is no conciliation mission, only the judge, or a lawyer appointed by the judge, can carry out that type of mission.

## **IV. Progress of the expert's mission**

### ***IV. 1) Judge supervision***

The judge supervises the progress of the expert's mission, he can set deadlines and order expert examination measures.

On the request of the litigants, the judge can add additional questions.

### ***IV. 2) Form of contradictory procedure***

The *in situ* investigation techniques must be contradictory but the expert's other procedures until he submits his report do not have to be. The report can be discussed and contested during a hearing which the expert attends.

The litigants are legally required to collaborate. On the request of a litigant, the judge can order another litigant to provide a document. Refusal to obey is not penalised, but the judge can let it influence his decision. There may be issues due to professional secrecy or medical confidentiality.

### ***IV. 3) Participation in the hearing***

On request

## **V. Close of the expert examination**

### ***V. 1) Does conciliation put an end to the expert's mission?***

Conciliation puts an end to the expert's mission. The judge can however interfere to tax the expert's fees if the litigants disagree on this issue.

### ***V. 2) Form imposed on the report***

The expert submits a written report, which does not necessarily put an end to his mission. There is no form imposed, but the report must account for the background, the questions asked, the expert's proceedings, and must answer the questions. There may be some standards specific to the profession to which the expert belongs.

### ***V. 3) Does the report put an end to the expert's mission?***

No, the expert is generally called to the court's hearing and is confronted to the litigants' questions.

### ***V. 4) Is there an imposed structure for the report?***

There is no mandatory structure, but the report must account for the background, the questions asked, the expert's proceedings and must answer the questions. There may be some standards within the profession to which the expert belongs.

The expert must (possibly applying his own professional standards) explain the approach that led him to formulate his answer to the questions asked, or his conclusions will not carry the same weight as if the report was well structured.

The expert is not obliged to answer the opinions given by the litigants; he is only obliged to answer the questions asked during the mission.

The elements produced in front of the expert are not added as appendices to the report, but their processing is described when justifying the conclusions.

### ***V. 5) Is a preliminary report mandatory?***

The expert does not have to produce a preliminary report.

### ***V. 6) Is the judge bound by the expert's conclusions?***

The court is never bound by the expert's conclusions.

### ***V. 7) Possibility of a second opinion***

A second opinion is possible, on an argued request of one of the litigants and if the judge agrees to it. The second expert's report does not replace the first: the judge then has either two identical or two different conclusions.

## **VI. Funding for the expert examination**

### ***VI. 1) Security-Payment***

Payment is possible but unusual ...

*... hence the lack of answer about the possibility of supplementary payment (A.N.)*

Payment is pre-paid by the litigant who requested the expert.

If the court believes that the report was not useful, the litigant has the burden of paying the expert.

Otherwise, the burden is usually put on the unsuccessful litigant.

## **VI. 2) Determining the amount of payment due**

The judge

## **VI. 3) Possibility of additional payment**

UNSPECIFIED

## **VI. 4) Determining fees and costs**

The expert's fee is taxed by the judge, after a proposal by the expert, and with the agreement of the litigants. There is no legal payment scale, but there are specific rules to professions which may apply.

## **VI. 5) Possibility of contesting the fees**

The amount thus taxed can be contested in an appeal stemming from a litigant or from the expert.

# **VII. Expert liability within proceedings**

## **VII. 1) Are there any laws governing expert examinations?**

The expert must respect the professional rules which regulate his specialty, impartiality and professional secrecy.

There is no representative structure of legal experts as such.

There is no specialty register.

☞ *Except for the registers mentioned above in point 2-a (A.N.)*

There is no code of ethics or "good practice" specific to legal expert examination.

The expert does not take an oath. During the hearing to which he is called, the judge reminds him of his legal duties and of the penalties that apply in case of infringement of these duties.

## **VII. 2) Expert liability**

The expert who does not comply with the professional rules as expected can be replaced, his fees reduced or can even be considered liable.

Criminal behaviour when carrying out one's mission can lead to criminal charges.

There is no general obligation to take out third-party liability insurance, although there may specific rules within the expert's profession.

## **VII. 3) Mandatory insurance for the expert**

NO

# **VII. The expert's status**

## **VIII. 1) Existence of selection criteria (accreditation)**

NO

Except in child psychology

***VIII. 2) Classification of skills***

NO

***VIII. 3) Required qualifications***

NO

***VIII. 4) Grant of accreditation***

No accreditation

***VIII. 5) Possibility of accrediting a legal person***

The expert is a natural person. A legal person cannot normally be appointed unless it is an official organisation.

***VIII. 6) f) Validity period for the accreditation***

No accreditation

***VIII. 7) Regular assessment tests***

NONE

***VIII. 8) Supervision of the expert's mission***

NO

***VIII. 9) Expert's activity report***

NO

***VIII. 10) Code of ethics***

YES

Impartiality, respect of the rules regulating the expert's profession and professional secrecy

***VIII. 11) Good practice***

NO

***VIII. 12) Possibility of penalties***

YES

False declarations can be sanctioned by a fine or a prison sentence.

***VIII. 13) Laws governing the expert's status***

YES

Law on legal proceedings (retsplejloven) n° 1053 of October 29 2009, section 196-211.

## **IX. Bibliography**

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- "Syn og skøn: efter retsplejelovens regler i skattesager og i andre sager"; Poul Bostrup & Grete Due; 1st ed.; 2007, Forlaget Thomson
- "Syn og skøn"; Erik Hørlyck; 3rd ed.; 2004; Jurist- og Økonomforbundets Forlag

## **6. ESTONIA**

### **Corresponding contributor**

**Mari-Liis LIPSTOK**, *Assistant to the First President of the Supreme Court*

### **Authors**

**Christian EMORINE**, *Consultant*

**Patrice HUVER**, *Expert*

### **Other administrative order**

YES

Administrative order: rules common to civil law

Administrative Court in the lower court, specialised court for the Court of Appeals and the Court of Cassation

## **I. Procedural rules in calling for an expert examination**

### ***I. 1) On the initiative of***

The court appoints an expert on the request of a litigant or on its own initiative.

The court can use an expert's report which was written for another procedure (including a criminal procedure) and if need be, can ask its writer additional questions, either in writing or during the hearing.

The judge can refuse an expert examination requested by a litigant if he believes it useless.

Restrictions: one cannot use an expert for purely legal matters (*jura novit curia* principle), except as a consultant on international law regulations, laws from another country, or customs.

### ***I.2) Mandatory expert examinations***

Not provided for.

### ***I. 3) Decision-maker***

The judge

### ***I.4) Is a pre-trial expert examination possible?***

On the request of any litigant arguing that there is an interest to act to establish the condition of a person, the situation and the value of something, the cause of a damage or shortcoming affecting something, the mode of damage elimination or object repair and their cost (C.P.C. Art. 244-3). Action carried out in front of the competent jurisdiction during the main proceedings. At the lower level (county court), the decision is taken by a single judge (C.P.C. Art. 16-1). The procedure is entirely written: the order specifies the facts and effective elements to be gathered by the expert (C.P.C. Art. 247-1).



## **II. Choice and appointment of the expert(s)**

### ***II. 1) Register***

The expert is appointed from a register of partners working for the Estonian Forensic Science Institute (EKEI), a state agency, or on a register of experts not affiliated to EKEI, this register is held by the Justice Department.

Exceptionally, and when there is a strong reason for it, the court can appoint a non-registered expert.

A civil servant can be appointed as expert (the EKEI partners are civil servants).

A legal person cannot be an expert but one of its members can be.

### ***II. 2) Oath***

Permanent, or when accepting the mission if the expert is not on the register

### ***II. 3) Choice of the Expert***

The judge

### ***II. 4) Participation by the parties in the appointment process***

The judge takes the litigants' opinion into account, they can suggest names.

### ***II. 5) Nationality***

No restriction, including heading a public expert institute, if the expert knows Estonian and has a qualification equivalent to the required Estonian qualification.

### ***II. 6) Recusal by the litigant parties***

The legal expert can be recused by a litigant.

The recusal is at the court's discretion.

### ***II. 7) Expert's withdrawal (refusal of a mission)***

The expert can withdraw with due cause. Withdrawing without due cause can lead to being stricken from the expert register.

The expert can withdraw if the elements available to carry out his mission appear to be insufficient or if he believes the expert examination to be pointless seeing the facts in the case

.

### ***II. 8) Possibility of adding another expert***

If need be, a panel of experts can be appointed.

There is no law preventing another expert and/or colleagues, but the appointed expert or panel is the only one responsible for the mission's progress.

## ***II. 9) Possibility of being assisted by a colleague***

YES

## **III. Definition of the expert's mission**

### ***III. 1) Who determines the mission?***

The mission is determined by the judge and the expert must abide by it.

If need be, the expert can ask the judge for information on the background, the mission's goal, etc.

### ***III. 2) Type of mission***

ALL

## **IV. Progress of the expert's mission**

### ***IV. 1) Judge supervision***

The judge can give the expert orders while the mission is in progress; the litigants are apprised.

### ***IV. 2) Form of contradictory procedure***

The contradictory procedure is not as of right: the court must specify the proceedings for the mission's progress, especially about the extent of the investigation power given to the expert and the presence (or not) of the litigants during the expert operations (C.P.C. Art. 297-4). The litigants can directly ask the expert questions during the hearing to which he has been called, or can send these questions in writing to the court who will forward them to the expert (C.P.C. Art. 303-3).

If a litigant obstructs the progress of the expert's mission, the judge can order him to put an end to the obstruction.

Refusing to collaborate can be penalised by a fine.

### ***IV. 3) Participation in the hearing***

On request

## **V. Close of the expert examination**

### ***V. 1) Does conciliation put an end to the expert's mission?***

Conciliation puts an end to the trial as long as it is confirmed by the court (C.P.C. Art. 428 (1)-4).

### ***V. 2) Form imposed on the report***

The report is usually written, unless ordered otherwise by the court.

It details the proceedings carried out by the expert and concludes with the answers to the questions asked by the court.

The working folder must be kept for five years

***V. 3) Does the report put an end to the expert's mission?***

The report does not necessarily put an end to the expert's mission.

The expert can be called in for a hearing at the court and subjected to the questions of the court and the litigants.

These questions have however to be first vetted by the judge.

***V. 4) Is there an imposed structure for the report?***

NO

***V. 5) Is a preliminary report mandatory?***

The expert is not obliged to hand in a preliminary report.

***V. 6) Is the judge bound by the expert's conclusions?***

The court is not bound by the expert's opinion, but must argue any rejection of all or part of the expert's conclusions.

***V. 7) Possibility of a second opinion***

YES

**VI. Funding for the expert examination**

***VI. 1) Security-Payment***

The expert examination attributed to a public organisation is funded with public funds. In civil law, an independent expert can be granted a security for his fees, as well as for his costs, if the mission takes more than 30 days of his time (C.P.C. Art. 158). In administrative law, paying a security is systematic (C.P.A., Art. 88-1).

Usually, defaulting on a security payment can, if the court decides it, cause obstruction to the expert's mission (C.P.C. Art. 238 (3)-5). In civil law, however, the expert will be paid when he has completed his mission, whether or not there was a security (C.P.C. Art. 151-3). A mission can thus be carried out even if there is no payment.

***VI. 2) Determining the amount of payment due***

The judge

***VI. 3) Possibility of additional payment***

When an overrun can be foreseen, the expert will advise the court immediately (C.P.C. Art. 302-5).

***VI. 4) Determining fees and costs***

The fees and costs are taxed by the court according to a fixed scale.

#### ***VI. 5) Possibility of contesting the fees***

YES

### **VII. Expert liability within proceedings**

#### ***VII. 1) Are there any laws governing expert examinations?***

Law of May 30 2001 on legal expert examination (JO I, 2001, 53, 309).

Code of civil procedure, April 20 2005 (JO I, 2005, 26, 197), Chapter 32 “Expert Opinion”

The expert must abide by the professional rules regulating his specialty with honesty and impartiality. There is no code of ethics specific to legal experts.

The independent expert must prove that he knows Estonian and that he has a higher education Estonian qualification or foreign qualification, and has been a professional in his specialty for at least three years, has the means necessary to carry out the missions and a permanent professional income, and has a clean police record

#### ***VII. 2) Expert liability***

Weak implementation of the mission can be penalised by a fine and / or compensation matching the cost of the unusable expert opinion.

Intentional breach of the rule of honesty can lead to a criminal punishment.

#### ***VII. 3) Mandatory insurance for the expert***

NO

### **VII. The expert's status**

#### ***VIII. 1) Existence of selection criteria (accreditation)***

YES

The independent expert must prove that he knows Estonian and that he has a higher education Estonian qualification or foreign qualification, and has been a professional in his specialty for at least three years, has the means necessary to carry out the missions and a permanent professional income, and has a clean police record.

#### ***VIII. 2) Classification of skills***

Estonian Forensic Science Institute classification of skills (EKEI)

#### ***VIII. 3) Required qualifications***

Accreditation

#### ***VIII. 4) Grant of accreditation***

By the Justice Department or the EKEI for its own partners.

#### ***VIII. 5) Possibility of accrediting a legal person***

Yes but only if choosing an unregistered expert

#### ***VIII. 6) f) Validity period for the accreditation***

The expert takes an oath once and for all when accredited by the Institute.

The registration as an expert is valid for three years. Renewal is neither tacit nor automatic, but must be requested by the expert three months before the end of the three years.

#### ***VIII. 7) Regular assessment tests***

YES

During the renewal, every three years.

#### ***VIII. 8) Supervision of the expert's mission***

Quantitative

#### ***VIII. 9) Expert's activity report***

YES

#### ***VIII. 10) Code of ethics***

No code of ethics as such. The expert must carry out the mission with skill, honesty and impartiality.

#### ***VIII. 11) Good practice***

NO

#### ***VIII. 12) Possibility of penalties***

YES

#### ***VIII. 13) Laws governing the expert's status***

Law of May 30 2001 on legal expert examination (JO I, 2001, 53, 309).

Code of civil procedure, April 20 2005 (JO I, 2005, 26, 197), Chapter 32 "Expert Opinion"

### **IX. Bibliography**

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[www.ekei.ee](http://www.ekei.ee) : EKEI (Estonian Forensic Science Institute, state agency)

No bibliography in English or French

## **7. FINLAND**

**Author**

**Alix LOUBEYRE**, *Doctoral student*

### **Separate administrative jurisdiction**

#### **I. Procedural rules in calling for an expert examination**

##### *I. 1) On the initiative of*

Expert-witness system (party expert), but the judge can decide to call for an expert if an issue must be resolved based on “a professional’s specific knowledge”.

##### *I.2) Mandatory expert examinations*

YES

##### *I. 3) Decision-maker*

The judge

##### *I.4) Is a pre-trial expert examination possible?*

NR

#### **II. Choice and appointment of the expert(s)**

##### *II. 1) Register*

No register

##### *II. 2) Oath*

Yes, at each mission unless the expert is a civil servant

##### *II. 3) Choice of the Expert*

In a specialised field, “a person who is known to be competent and honest”

##### *II. 4) Participation by the parties in the appointment process*

YES

##### *II. 5) Nationality*

NR

##### *II. 6) Recusal by the litigant parties*

YES

##### *II. 7) Expert’s withdrawal (refusal of a mission)*

Yes, namely for reasons of conflict of interests or to ensure observance of professional secrecy.

## ***II. 8) Possibility of adding another expert***

YES

## ***II. 9) Possibility of being assisted by a colleague***

NR

## **III. Definition of the expert's mission**

### ***III. 1) Who determines the mission?***

The judge if he has appointed himself

### ***III. 2) Type of mission***

NR

## **IV. Progress of the expert's mission**

### ***IV. 1) Judge supervision***

Yes, the judge asks the questions which the expert must answer and determines the deadline within which he must submit his report.

### ***IV. 2) Form of contradictory procedure***

The parties may request that the expert comes before the Court

### ***IV. 3) Participation in the hearing***

Yes, on request.

The expert report must generally be read, in whole or in part, during the hearing.

## **V. Close of the expert examination**

### ***V. 1) Does conciliation put an end to the expert's mission?***

NR

### ***V. 2) Form imposed on the report***

Written: the expert must give a detailed report of his results and of the actions carried out to achieve these results.

### ***V. 3) Does the report put an end to the expert's mission?***

NR

### ***V. 4) Is there an imposed structure for the report?***

NR

### ***V. 5) Is a preliminary report mandatory?***

NR

### ***V. 6) Is the judge bound by the expert's conclusions?***

No. The expert examination is an element of proof among others, based on the principle of "free

evaluation of evidence” by the judge.

***V. 7) Possibility of a second opinion***

YES

**VI. Funding for the expert examination**

***VI. 1) Security-Payment***

Yes, at the judge’s request, paid by the party that requested the expert opinion, or in certain cases by the national treasury.

***VI. 2) Determining the amount of payment due***

By the party.

***VI. 3) Possibility of additional payment***

***VI. 4) Determining fees and costs***

By the judge “of reasonable fees and of reimbursement of the expert’s expenses”

***VI. 5) Possibility of contesting the fees***

YES

**VII. Expert liability within proceedings**

***VII. 1) Are there any laws governing expert examinations?***

Yes, Chapter 17, Sections 44 to 55 of the Code of Judicial Procedure

***VII. 2) Expert liability***

NR

***VII. 3) Mandatory insurance for the expert***

**VIII. The expert’s status**

***VIII. 1) Existence of selection criteria (accreditation)***

NO, there is no register

***VIII. 2) Classification of skills***

NO

***VIII. 3) Required qualifications***

Assessed *in concreto* by the judge

***VIII. 4) Grant of accreditation***

Not applicable



***VIII. 5) Possibility of accrediting a legal person***

NO

***VIII. 6) f) Validity period for the accreditation***

Not applicable

***VIII. 7) Regular assessment tests***

NO

***VIII. 8) Supervision of the expert's mission***

NO

***VIII. 9) Expert's activity report***

NO

***VIII. 10) Code of ethics***

NO

***VIII. 11) Good practice***

NO

***VIII. 12) Possibility of penalties***

NO

***VIII. 13) Laws governing the expert's status***

NO

**IX. Bibliography**

## **8. FRANCE**

### **Contributing correspondent**

**Vincent LAMANDA**, *First President of the Court of Cassation*

### **Authors**

**CNCEJ**, *France*

**Alain NUEE**, *First President of the Versailles Court of Appeals (France)*

### **Other administrative order**

YES

## **I. Procedural rules in calling for an expert examination**

### ***I. 1) On the initiative of***

The burden of evidence normally falls on the litigants, and the one requesting the discharge of an obligation to prove it. Conversely, the litigant who claims to be free must justify payment or the fact which led to the extinction of his obligation.

An expert examination can only be ordered on a fact if the litigant claiming this fact does not have enough evidence to prove it. It is not meant to address the shortcomings of a litigant in the taking of evidence, which means that the litigant requesting the examination must have previously made the effort of establishing evidence with facts which could be obtained through ordinary means.

The judge is free to decide on the advisability of ordering an expert examination. However, in some cases, the legislative authorities force the judge to call for investigation, either if the litigants request it or unilaterally.

### ***I.2) Mandatory expert examinations***

The judge can freely decide on the advisability of ordering an expert examination. However, in some cases, the legislative authorities force the judge to call for investigation, either if the litigants request it or unilaterally.

### ***I. 3) Decision-maker***

The judge

### ***I.4) Is a pre-trial expert examination possible?***

Yes, if before the beginning of the trial there is a legitimate reason to keep or establish factualevidence which could influence the outcome of the dispute, the judge may order a pre-trail investigation on a litigant's request.

## **II. Choice and appointment of the expert(s)**

### ***II. 1) Register***

Every year, the courts of appeal draw up registers of technicians who, due to their skills, may be appointed as experts. This registration is valid for five years.

Also, every year, the Court of Cassation draws up a register of legal experts of national reputation, aimed at trial judges.

### ***II. 2) Oath***

Yes, its validity is equal to the length of the registration.

A non-registered expert must take an oath when acting as an expert.

### ***II. 3) Choice of the Expert***

The expert is freely appointed by the judge who determines his mission just as freely. This expert can be a private individual or a civil servant.

The litigants are always free to present the report of a private expert which they have hired.

### ***II. 4) Participation by the parties in the appointment process***

NO

In practice, the judge alone appoints the expert but he can solicit the opinion of the litigants on the relevant specialty, the name of the potential expert and, if need be, the number of experts to appoint within a panel. Moreover, a draft of the mission is often suggested by one of the litigants.

### ***II. 5) Nationality***

Not important

### ***II. 6) Recusal by the litigant parties***

The experts can be recused by the litigants for the same reasons as judges:

- 1° If the expert or his spouse has a personal interest in the dispute;
- 2° If the expert or his spouse is creditor, debtor, heir, or donee to one of the parties;
- 3° If the expert or his spouse have family ties or are allied to one of the litigants or his spouse up to and including the fourth degree;
- 4° If there has been a trial or if there is an on-going trial between him or his spouse and one of the litigants or their spouses;
- 5° If he has already heard the case as a judge or arbitrator or if he has advised one of the litigants;
- 6° If the expert or his spouse is responsible for the administration of the property of one of the litigants;
- 7° If there is a subordination tie between the expert or his spouse and one of the litigants or their spouses;
- 8° If there is known friendship or enmity between the expert and one of the litigants.

### ***II. 7) Expert's withdrawal (refusal of a mission)***

Yes, the expert does not have to explain his refusal.

## ***II. 8) Possibility of adding another expert***

In civil law, the expert can ask another expert to help him when the mission calls for a technician in a different specialty than his own.

## ***II. 9) Possibility of being assisted by a colleague***

Yes, he is responsible for them, and must mention their name in the report.

# **III. Definition of the expert's mission**

## ***III. 1) Who determines the mission?***

The judge

During the mission, the litigants can ask the court that the expert carry out certain research or hear certain individuals.

## ***III. 2) Type of mission***

Expert examinations, observations, consultations, etc.

# **IV. Progress of the expert's mission**

## ***IV. 1) Judge supervision***

The expert examination's procedure is supervised by the judge, who ensures that the investigation goes smoothly, and can set deadlines and order necessary measures.

The litigants must help the investigation and the judge can draw conclusions from their refusal to communicate elements which the expert has asked to see.

This obligation, written down in the law, is sometimes confronted with legitimate obstacles such as professional secrecy, medical confidentiality, business confidentiality, etc.

## ***IV. 2) Form of contradictory procedure***

Mandatory and permanent

## ***IV. 3) Participation in the hearing***

The judge can ask the expert to give an oral presentation at the hearing.

# **V. Close of the expert examination**

## ***V. 1) Does conciliation put an end to the expert's mission?***

YES

#### ***V. 2) Form imposed on the report***

Written

#### ***V. 3) Does the report put an end to the expert's mission?***

As a general rule, the expert's mission comes to an end when he submits his written report and notifies the litigants of its existence. The end of his mission can be extended if there are additional inquiries to be carried out.

The judge may ask the expert to give an oral presentation at the hearing.

#### ***V. 4) Is there an imposed structure for the report?***

NO

#### ***V. 5) Is a preliminary report mandatory?***

No, however, the preliminary report is strongly recommended since the conclusions of the consensus conference have been known.

#### ***V. 6) Is the judge bound by the expert's conclusions?***

The judge is not bound by the observations and conclusions of the expert. Even though he chose to appoint the expert to clarify missing elements, he is not bound by this opinion, even if, in practice, judges usually follow the conclusions of the experts they have appointed. The reasons behind this is that the mission given to the expert by the judge is not a delegation of his jurisdictional authority. The magistrate only asks the technician to help him understand and gain knowledge about certain facts without relinquishing his power to rule. He is thus free to accept or not the conclusions and decides at his sole discretion on their objectivity, value and scope. Thus he must look in the expert's report for all the elements of evidence which will help him establish his decision, without being bound by the findings of the report. He can follow them or deviate from them by relying on, for example, a second expert examination which was carried out unofficially by one of the litigants, or only take some of the conclusions into account.

#### ***V. 7) Possibility of a second opinion***

YES

### **VI. Funding for the expert examination**

#### ***VI. 1) Security-Payment***

Yes, by the requesting litigant unless there is a specific reason for the decision

#### ***VI. 2) Determining the amount of payment due***

By the judge

### ***VI. 3) Possibility of additional payment***

Yes, on the expert's request, at the judge's discretion.

### ***VI. 4) Determining fees and costs***

When experts are appointed by a judge, their fees, are set by this same judge depending on the investigations carried out, the respect of the deadlines agreed upon and the quality of the work presented. These fees are paid by the unsuccessful litigant in civil cases and by the State in criminal cases.

Private experts appointed by litigants are paid by them.

### ***VI. 5) Possibility of contesting the fees***

YES

## **VII. Expert liability within proceedings**

### ***VII. 1) Are there any laws governing expert examinations?***

The rules relative to the progress of expert examinations are Articles 232 and following of the Code of Civil Procedure, Articles 156 and following of the Code of Criminal Procedure and Articles R.621 and following of the Code of Administrative Justice.

There is no regional or linguistic specificity to the expert examination, the Republic is one and indivisible and its official language is French.

### ***VII. 2) Expert liability***

Civil, fault-based common law

### ***VII. 3) Mandatory insurance for the expert***

No, but imposed by expert companies and the National Council.

## **VIII. The expert's status**

### ***VIII. 1) Existence of selection criteria (accreditation)***

Before registering an individual on an expert's register, the courts of appeals take into account the opinion of commissions made up of magistrates and experts which assess the skills of the candidates. This assessment procedure is renewed every five years.

### ***VIII. 2) Classification of skills***

The expert register is drawn up by each court of appeal and has a reference to a general nomenclature of the areas of competence for each expert.

### ***VIII. 3) Required qualifications***

Yes, accreditation when the knowledge is certified

### ***VIII. 4) Grant of accreditation***

By the Court of appeal.

### ***VIII. 5) Possibility of accrediting a legal person***

A legal person can be appointed as expert

### ***VIII. 6) f) Validity period for the accreditation***

Two years for a first registration, then five years

### ***VIII. 7) Regular assessment tests***

When re-registering.

### ***VIII. 8) Supervision of the expert's mission***

YES, quantitative

### ***VIII. 9) Expert's activity report***

Each year, legal experts must send an activity report to the Court of appeal from which they depend.

### ***VIII. 10) Code of ethics***

Whether the expert is registered or not or whether or not he belongs to a regulated profession, the expert is subject to a general obligation of conscience, loyalty, objectivity and impartiality. He is also bound by professional secrecy. He must personally carry out his mission in the deadline set and answer to the judge who appointed him.

### ***VIII. 11) Good practice***

The expert must strictly abide by the trial's guiding principles, first among which is the principle of contradictory procedure, which is part of the guarantee of a fair trial. This principle which asserts that a contradictory procedure happens before a decision is taken which could cause prejudice, means that the investigation proceedings are carried out in the presence of the litigants and their representatives, first summoned in good time so that the litigants can obtain all the documents or be informed of all the elements which helped found the technician's opinion, so that they may present their observations and their evidence during this proceeding, so that they can receive the technician's report and appendices and may discuss and contest the expert's opinion.

### ***VIII. 12) Possibility of penalties***

There are five kinds of penalties which can be administrated if the technician fails in his obligations. Not observing his obligations can lead to the judge replacing him, reducing his fees, lead to disciplinary sanctions if he is an expert registered with a court of appeal or the Court of Cassation, the cancellation of his report and can engage his civil liability.

### ***VIII. 13) Laws governing the expert's status***

The legal expert's status is determined by Law n°71-498 of June 29 1971 and Decree n°2004-1463 of

December 23 2004.

There is no mandatory representation body.

The legal experts registered within a same court of appeal usually gather into associations and companies.

The National Council of Legal Expert companies is a private organisation which brings together the different expert companies and associations.

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#### CNCEJ publishing

- ☐ Conference acts
  - latest titles:
  - *Au cœur des conflits : l'expertise* (en 2000),
  - *Expert du juge, expert de partie : vérité scientifique et vérité judiciaire* (en 2004),
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- ☐ *Livre Blanc de l'expertise judiciaire*, en 2003.

[CNCEJ website: www.cncej.org](http://www.cncej.org)

#### Statistic elements on the number, value and cost of expert examinations

In civil law, 70 % of the expert examinations are ordered in summary proceedings and 17 % by provisional judgement by the trial judges. They are mainly decided in three types of litigation: contract law (41 %), liability law (25 %) and family law (18 %). Taken as a whole, civil expert examinations mainly cover the area of construction (40.6 %), and the field of medicine (35 %).

Every other civil expert examination costs less than 1 200 €.

The average cost is however higher: 2 174 €. One expert examination out of four costs between 300 and 530 €, whereas 7 % costs more than 3 000 €.

## **9. GERMANY**

### **Authors**

**Béatrice DESHAYES**, *Avocat & Rechtsanwältin - Partner HW&H*

**Philippe JACQUEMIN**, *Expert, EEEI Vice-President*

### **Other administrative order**

YES

## **I. Procedural rules in calling for an expert examination**

### ***I. 1) On the initiative of***

The judge decides unilaterally if the expert examination is required, but in civil proceedings, the litigants must ask for such a measure when the burden of evidence lies with them. If both parties jointly request an expert examination, the judge cannot refuse it (a possibility which is rarely used).

The expert examination can be ordered by the trial judge if he believes that he does not have sufficient proof.

### ***I.2) Mandatory expert examinations***

Under exceptional circumstances, an expert opinion can be mandatory (before any wardship decision, for example).

### ***I. 3) Decision-maker***

The judge

### ***I. 4) Is a pre-trial expert examination possible?***

The expert examination can be the object of a summary judgement before any trial (“*selbständiges Beweisverfahren*”) if there is a risk of loss of evidence, or when the research of causes or the assessment of the costs of damage proves itself to be necessary or useful to avoid litigation.

## **II. Choice and appointment of the expert(s)**

### ***II. 1) Register***

The candidates are appointed as experts after following a strict selection procedure with the specialist units of regional governments, notably the chambers of commerce and industry, chambers of crafts, and, sometimes the order of architects and engineers, who all hold the expert registers. To be registered, the expert must usually prove that:

- there is a general need for experts in the targeted field
- he has knowledge specific to the field for which he seeks accreditation, knowledge which sets him apart from other experts

- he works in the private sector,
- there is no relationship of subordination which could influence the expert's independence, neutrality, or bias.
- he is over 30 and under 62 years old when applying.

Any person who meets the necessary conditions has a right to be accredited as expert. The capacity of expert is granted for a period of five years. Renewal can be sought at the end of this period, which is then good for a further ten years.

## ***II. 2) Oath***

The expert must give an oath, swearing to operate independently and impartially, and not to submit to instructions coming from the litigants or from third parties.

## ***II. 3) Choice of the Expert***

Normally, the judge appoints an expert listed on public registers, but the judge can also choose a professional who has not taken the oath (especially if the specialty required is not listed on the registers), as long as the expert has no personal interest in the litigation.

## ***II. 4) Participation by the parties in the appointment process***

If the litigants agree on the identity of an expert, the judge must accept this appointment.

## ***II. 5) Nationality***

EU and European Economic Area; the expert must live in Germany.

## ***II. 6) Recusal by the litigant parties***

The expert can be recused for the same reasons as the judge, except for those taken from the summons to be a witness: if the expert is a party to the trial, if there is any doubt on his impartiality, if he has a personal interest in the case or if he has or has had any ties with one of the litigants.

## ***II. 7) Expert's withdrawal (refusal of a mission)***

The expert can ask to withdraw for the same reasons that a witness can ask not to give a statement. He can also refuse by bringing to light the ties he has with one of the litigants and the possible bias it might provoke.

## ***II. 8) Possibility of adding another expert***

By the judge

## ***II. 9) Possibility of being assisted by a colleague***

YES

# **III. Definition of the expert's mission**

## ***III. 1) Who determines the mission?***

The judge is the only one who determines the mission (based on the litigants' request). The mission

depends on the issues for which the expert's technical or scientific knowledge is essential. Very specific questions of evidence are raised. But the litigants may, once they have received the report, ask supplementary questions, leading to – if the court allows it – a new phase of the expert examination.

### ***III. 2) Type of mission***

UNSPECIFIED

## **IV. Progress of the expert's mission**

### ***IV. 1) Judge supervision***

The court is in charge of the expert's mission; it can give instructions and explanations on the content of the mission and the way to carry it out.

### ***IV. 2) Form of contradictory procedure***

The judge also decides on the level of interaction between the expert and the litigants. For example, he can allow them to take part in the investigations. The litigants may not unilaterally initiate contact with the expert. This first contact must mandatorily go through the court.

The expert can obtain from each litigant the documents necessary, as long as the other party is warned of it. If one of the litigants refuses to hand over documents, the expert can turn to the judge who will order them to be handed over. However, the expert is not required to immediately communicate to the litigants the evidence he has uncovered during his mission, and very often, this disclosure only happens when the expert examination report is handed in.

The expert cannot hear witnesses on his own initiative. If hearing witnesses becomes relevant during his mission, the expert must ask the judge for permission.

It is only after the report has been handed in that the litigants can bring their observations or present their objections. They can thus ask the judge to call the expert in for a hearing to ask him questions or point out potential contradictions in his report.

### ***IV. 3) Participation in the hearing***

If requested, the expert can be called in for a hearing to complete or explain his conclusions.

## **V. Close of the expert examination:**

### ***V. 1) Does conciliation put an end to the expert's mission?***

YES

### ***V. 2) Form imposed on the report***

The results of the expert examination are generally presented in a written report but the judge can always order the expert to appear in front of the court to complete or explain his written conclusions. This is the case if the expert's report is insufficient or incomplete, if the judge does not understand it, especially in case of doubt, lack of precisions or thoroughness, in case of misunderstanding on the expert's part of the facts previously established by the court, or simply at the request of the litigants.

The expert examination report is one of the five forms of evidence allowed by the German Code of Civil Procedure. It is the form of evidence with the greatest value as evidence (a private expert examination is only documentary evidence).

***V. 3) Does the report put an end to the expert's mission?***

NO

***V. 4) Is there an imposed structure for the report?***

There are recommendations made by the expert institute (Institut für Sachverständigenwesen) as to the structure of the report.

***V. 5) Is a preliminary report mandatory?***

NO

***V. 6) Is the judge bound by the expert's conclusions?***

The judge is in no way bound by the expert's conclusions, but according to jurisprudence, the judge must explain the reasons for which he has not followed the expert in his judgement, and must instigate a new expert examination.

***V. 7) Possibility of a second opinion***

Possibility of a second opinion if the first is considered insufficient.

## **VI. Funding for the expert examination**

***VI. 1) Security – Payment***

In civil law, the litigant who carries the burden of evidence must make a security down payment to ensure the expert is remunerated.

***VI. 2) Determining the amount of payment due***

By the judge

***VI. 3) Possibility of additional payment***

YES

***VI. 4) Determining fees and costs***

The legal expert's fees are set by the *Justizvergütungs- und Entschädigungsgesetz* (law on remuneration in justice and on compensation), to an hourly rate which ranges from 50 to 95 Euros, plus expenses. The final tally of the operations is then sustained by the unsuccessful party.

***VI. 5) Possibility of contesting the fees***

YES

## **VII. Expert liability within proceedings**

### ***VII. 1) Are there any laws governing expert examinations?***

YES

### ***VII. 2) Expert liability***

Under the tort liability of legal experts, which is specifically regulated by the German Civil Code, the expert is liable for any gross negligence or wilful misconduct if the negligence or misconduct in his report leads to in a court ruling which is detrimental to one of the litigants..

### ***VII. 3) Mandatory insurance for the expert***

No, but the Chambers of Commerce and Industry with which the experts are registered often recommend taking out insurance.

## **VIII. The expert's status**

### ***VIII. 1) Existence of selection criteria (accreditation)***

YES

### ***VIII. 2) Classification of skills***

Nomenclature according to the organisation which provides accreditation.

### ***VIII. 3) Required qualifications***

Accreditation is given according to degrees and experience

### ***VIII. 4) Grant of accreditation***

Professions (chambers of commerce and industry, crafts trade chamber, chamber of architects...)

### ***VIII. 5) Possibility of accrediting a legal person***

NO

### ***VIII. 6) Validity period for the accreditation***

5 years, renewable for ten years.

### ***VIII. 7) Regular assessment tests***

Before renewing, the organisation providing the accreditation checks if the enrolment conditions are still valid (especially the mandatory on-going training).

### ***VIII. 8) Supervision of the expert's mission***

Qualitative.

### **VIII. 9) Expert's activity report**

No, unless the organisation providing the agreement requests it.

### **VIII. 10) Code of ethics**

Most of the chambers of commerce and industry have internal regulations which determine the rights and duties of experts, but the code of ethics is generally limited to the duty of fulfilling one's mission in good conscience, independently and impartially.

Example: [http://www.ihk-ordwestfalen.de/fileadmin/medien/02\\_Wirtschaft/55\\_Recht\\_FairPlay/11\\_Sachverstaendige/medien/SVO\\_20100609.pdf](http://www.ihk-ordwestfalen.de/fileadmin/medien/02_Wirtschaft/55_Recht_FairPlay/11_Sachverstaendige/medien/SVO_20100609.pdf)

### **VIII. 11) Good practice**

The expert's role is traditionally to assist the judge. He must restrict himself to a technical assessment of the issue presented and cannot provide any legal assessment of the dispute. That said, he must not shy from the legal aspects of the questions asked, to provide a technical answer which is as relevant as possible.

### **VIII. 12) Possibility of penalties**

YES

### **VIII. 13) Laws governing the expert's status**

Yes, notably § 39 Gewerbeordnung; Sachverständigenordnung of the chambers of commerce.

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- a) not focused on a special field of expertise
  - Der Sachverständige Fachzeitschrift für Sachverständige, Kammern, Gerichte und Behörden (Verbandszeitschrift des BVS)
- b) focused on a special field of expertise (e.g.)
  - Der Bausachverständige Zeitschrift für Bauschäden, Grundstückswert und gutachterliche Tätigkeit
  - Der Kfz-Sachverständige

## **10. GREECE**

**Contributing correspondent**  
**Antonios ATHINAIOS**, *Supreme Court judge*

**Author**  
**Gilbert MOUTHON**, *Expert*

### **Other administrative order**

YES

### **I. Procedural rules in calling for an expert examination**

#### *I. 1) On the initiative of*

Judge or litigants

#### *I.2) Mandatory expert examinations*

NO

#### *I. 3) Decision-maker*

The Judge

#### *I.4) Is a pre-trial expert examination possible?*

YES

### **II. Choice and appointment of the expert(s)**

#### *II. 1) Register*

Professional

Mandatory for criminal trials with the litigants allowed to appoint the person they choose.

#### *II. 2) Oath*

At each mission

#### *II. 3) Choice of the Expert*

By the judge, after consulting the parties

#### *II. 4) Participation by the parties in the appointment process*

YES



## ***II. 5) Nationality***

European Union

## ***II. 6) Recusal by the litigant parties***

YES

## ***II. 7) Expert's withdrawal (refusal of a mission)***

YES

## ***II. 8) Possibility of adding another expert***

YES, but he must be appointed by the Court

## ***II. 9) Possibility of being assisted by a colleague***

UNSPECIFIED

## **III. Definition of the expert's mission**

### ***III. 1) Who determines the mission?***

The judge

### ***III. 2) Type of mission***

Any type of technical question.

## **IV. Progress of the expert's mission**

### ***IV. 1) Judge supervision***

NO

### ***IV. 2) Form of contradictory procedure***

Immediate and permanent.

### ***IV. 3) Participation in the hearing***

On request

## **V. Close of the expert examination**

### ***V. 1) Does conciliation put an end to the expert's mission?***

YES

### ***V. 2) Form imposed on the report***

NO

***V. 3) Does the report put an end to the expert's mission?***

YES

***V. 4) Is there an imposed structure for the report?***

The report must explain the expert's actions, his opinions on the questions submitted to him, and the facts on which he is basing his opinion.

***V. 5) Is a preliminary report mandatory?***

NO

***V. 6) Is the judge bound by the expert's conclusions?***

NO

***V. 7) Possibility of a second opinion***

YES

**VI. Funding for the expert examination**

***VI. 1) Security-Payment***

Must be paid by the party that called for the expert opinion

***VI. 2) Determining the amount of payment due***

UNSPECIFIED

***VI. 3) Possibility of additional payment***

YES

***VI. 4) Determining fees and costs***

By the expert himself with the parties' agreement. In the event of a disagreement, by the Court before which the Expert may bring the parties that called on his opinion.

***VI. 5) Possibility of contesting the fees***

Not if they were decided by the judge.

**VII. Expert liability within proceedings**

***VII. 1) Are there any laws governing expert examinations?***

YES

***VII. 2) Expert liability***

Civil and criminal

***VII. 3) Mandatory insurance for the expert***

NO

**VIII. The expert's status**

***VIII. 1) Existence of selection criteria (accreditation)***

Knowledge and competence in a particular field.

***VIII. 2) Classification of skills***

YES

***VIII. 3) Required qualifications***

NR

***VIII. 4) Grant of accreditation***

NR

***VIII. 5) Possibility of accrediting a legal person***

NO

***VIII. 6) f) Validity period for the accreditation***

In practice, there is no limit to the validity period, although the law provides for an annual change of the listed experts on a rotational basis.

***VIII. 7) Regular assessment tests***

NO

***VIII. 8) Supervision of the expert's mission***

NO

***VIII. 9) Expert's activity report***

NO

***VIII. 10) Code of ethics***

NO

#### ***VIII. 11) Good practice***

Not exactly, the two main rules governing expert examinations are impartiality and competence in a specialised field.

#### ***VIII. 12) Possibility of penalties***

YES

#### ***VIII. 13) Laws governing the expert's status***

YES

Articles 368-392 of the Code of Criminal Procedure and 159-168 of the Code of Administrative Procedure

### **IX. Bibliography**

## **11. HUNGARY**

**Author**  
**Gilbert MOUTHON, Expert**

### **Other administrative order**

YES

### **I. Procedural rules in calling for an expert examination**

#### ***I. 1) On the initiative of***

If the court does not have the required experience to establish or assess facts and circumstances.

The litigant with the burden of evidence is obliged to announce if it requests an expert examination.

#### ***I.2) Mandatory expert examinations***

YES

#### ***I. 3) Decision-maker***

The judge

#### ***I.4) Is a pre-trial expert examination possible?***

UNSPECIFIED

### **II. Choice and appointment of the expert(s)**

#### ***II. 1) Register***

There are “judicial chambers” which are territorially competent and a list of legal experts which usually follows the area of nomenclature.

To register, the expert must have the required qualifications and at least five years of experience, unless a ministerial decree states otherwise.

Natural persons, professional associations and companies registered as forensics specialists, as well as expert institutions created with this goal in mind, government agencies, legally authorised institutions or organisations may act as legal experts. The forensic scientist register is held by the Justice and Public Administration Department.

It is possible to appoint a civil servant or a public entity as legal expert.

A legal person can be appointed as legal expert.

In spite of the establishment of official registers, the judges may appoint an unregistered expert when none of the registered expert matches the case’s needs: an occasional expert can be appointed.

A member or employee in a company may act as legal expert only in the field in which he is registered in the forensic scientists register.

If two independent experts’ examinations do not clarify a question which has come up during litigation, the court can appoint a “college of experts”. The member of such a “college of experts”

must have a university degree in the field, an academic title or at least ten years of experience as legal expert in the given field. The members and president of the agency are appointed for five years by the Justice Department with the approval of the Minister in charge of the field in question.

The expert can ask for the contribution of a non-registered person as legal expert as well as the help of unqualified personnel to carry out operations which do not require specific knowledge.

As a general rule, the expert must ask permission or at least notify the authorities. In the experts' report, the answer to the questions given by the consultant must be clearly marked.

## ***II. 2) Oath***

UNSPECIFIED

## ***II. 3) Choice of the Expert***

Litigants, if not, the judge

## ***II. 4) Participation by the parties in the appointment process***

If the litigants agree, the judge is bound by their decision.

## ***II. 5) Nationality***

UNSPECIFIED

## ***II. 6) Recusal by the litigant parties***

In civil law, grounds for recusal are the same as those that apply to judges.

*NB. Some European legislations, such as Hungary's, more generally refer to codes of ethics applicable to experts.*

The court can appoint another expert to replace the one originally appointed.

If the court has appointed an expert on the basis of the litigants' mutual consent, he can only be appointed if the previous expert is late in submitting his report or if he is unable to carry out his responsibility for one of the recusal reasons or for another important reason.

## ***II. 7) Expert's withdrawal (refusal of a mission)***

UNSPECIFIED

## ***II. 8) Possibility of adding another expert***

Legal experts must carry out their mission without help from other experts, but other experts can be appointed for subjects for which specific expertise is necessary.

If the questions are beyond the expert's area of expertise, he can suggest the court appoint additional experts with the necessary knowledge to confront the specific issues.

In the case when the legal expert and the additional expert have diverging opinions, the judge can order for a new expert to be appointed in the panel of competent legal experts: multiple expert examinations are thus made available for the judge to rule on the dispute.

## ***II. 9) Possibility of being assisted by a colleague***

YES

## **III. Definition of the expert's mission**

### ***III. 1) Who determines the mission?***

The judge

### ***III. 2) Type of mission***

If the expert discovers an offense which is not in the mission's parameters or if he learns of the intent to commit an offense which might endanger the life or health of another person, he is obliged to tell his supervisory authority, the judge.

He must also notify the court if he cannot end his mission within the original deadline

## **IV. Progress of the expert's mission**

### ***IV. 1) Judge supervision***

The expert's reports are prepared under the judge's supervision

### ***IV. 2) Form of contradictory procedure***

The court can order the expert to carry out investigations and inspections with the court, or the litigants, *in absentia*.

### ***IV. 3) Participation in the hearing***

On request

## **V. Close of the expert examination**

### ***V. 1) Does conciliation put an end to the expert's mission?***

UNSPECIFIED

### ***V. 2) Form imposed on the report***

According to the proceedings regulations, the expert gives an oral statement with the litigants present.

In reality, the expert submits his report in writing and only gives an oral statement if necessary.

If the court believes it necessary, the expert can be summoned.

### ***V. 3) Does the report put an end to the expert's mission?***

UNSPECIFIED

***V. 4) Is there an imposed structure for the report?***

UNSPECIFIED

***V. 5) Is a preliminary report mandatory?***

UNSPECIFIED

***V. 6) Is the judge bound by the expert's conclusions?***

The expert's conclusions do not bind the court, the judge takes them into account as any piece of evidence.

***V. 7) Possibility of a second opinion***

If the expert's opinion is unclear or incomplete, if it is in itself contradictory or contradicts the opinion of another expert, or if it hides certain established facts which can be substantiated, or if there is a doubt as to its authenticity, the expert can be asked to provide information necessary to the request by the court, and the court can decide to appoint another expert.

**VI. Funding for the expert examination**

***VI. 1) Security-Payment***

Normally, the requesting litigant pays a security on the fees and costs.

In complicated cases, the judge can order the legal expert to draw up a preliminary operation plan with estimated costs and fees incurred.

The litigant with the burden of evidence is obliged to announce if it requests an expert examination.

***VI. 2) Determining the amount of payment due***

The judge

***VI. 3) Possibility of additional payment***

YES

***VI. 4) Determining fees and costs***

When the expert has submitted his report or given his oral statement, the court determines the fees and costs incurred, which can be contested either by the expert or the litigants.

The court orders the amount to be paid to the legal expert either from the amount paid down in security by the requesting litigant, or from the payments subsequently due by the unsuccessful litigant.

***VI. 5) Possibility of contesting the fees***

YES



## VII. Expert liability within proceedings

### *VII. 1) Are there any laws governing expert examinations?*

The most important legal texts which regulate legal experts are the Code of Civil Procedure, the Law on the Chamber of Legal Experts, the Code of Criminal Procedure, the Law on the Extent of Legal Experts' Activities, and on the Appointment of Legal Experts and various specific decrees.

### *VII. 2) Expert liability*

YES

Civil and criminal

### *VII. 3) Mandatory insurance for the expert*

UNSPECIFIED

## VIII. The expert's status

### *VIII. 1) Existence of selection criteria (accreditation)*

Code of Civil Procedure

### *VIII. 2) Classification of skills*

UNSPECIFIED

### *VIII. 3) Required qualifications*

UNSPECIFIED

### *VIII. 4) Grant of accreditation*

UNSPECIFIED

### *VIII. 5) Possibility of accrediting a legal person*

UNSPECIFIED

### *VIII. 6) f) Validity period for the accreditation*

UNSPECIFIED

### *VIII. 7) Regular assessment tests*

The legal expert must take part in the training ordered by ministerial decree.

If he does not comply with the registration conditions and training requirements, the expert can be stricken from the expert's register.

### *VIII. 8) Supervision of the expert's mission*

UNSPECIFIED

### *VIII. 9) Expert's activity report*

YES

***VIII. 10) Code of ethics***

UNSPECIFIED

***VIII. 11) Good practice***

Ministerial decree

***VIII. 12) Possibility of penalties***

If the expert is at fault, for example with an undue delay, the court can mandate a fine.

An absent expert can find himself arrested and detained.

***VIII. 13) Laws governing the expert's status***

YES

**IX. Bibliography**

## **12. IRELAND**

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### **Other administrative order**

NO

### **I. Procedural rules in calling for an expert examination**

#### *I. 1) On the initiative of*

Except for litigation about physical injury compensation for which the judge can unilaterally appoint an expert, the decision to call for one belongs to the litigants.

#### *I.2) Mandatory expert examinations*

NO

#### *I. 3) Decision-maker*

Generally the litigants

The judge when it concerns physical injury compensation

#### *I. 4) Is a pre-trial expert examination possible?*

NO

### **II. Choice and appointment of the expert(s)**

#### *II. 1) Register*

NO

#### *II. 2) Oath*

UNSPECIFIED

#### *II. 3) Choice of the Expert*

The expert appointed by the judge is usually picked from the register of experts held by the President of the High Court along with the presidents of the Circuit Courts and District Courts.

## ***II. 4) Participation by the parties in the appointment process***

The judge does not appoint the expert except in cases involving compensation for personal injury. In all other matters only the parties can call for experts of their choosing.

## ***II. 5) Nationality***

Irrelevant

## ***II. 6) Recusal by the litigant parties***

The expert must remain unbiased even if he is appointed by the parties. If he appears to be biased, there is a debate before the judge on his credibility and the probative value of his report.

## ***II. 7) Expert's withdrawal (refusal of a mission)***

The expert is free to turn down a party's request.

## ***II. 8) Possibility of adding another expert***

UNSPECIFIED

## ***II. 9) Possibility of being assisted by a colleague***

UNSPECIFIED

# **III. Definition of the expert's mission**

## ***III. 1) Who determines the mission?***

The party that calls for the expert opinion defines his mission.

The expert is this party's technical consultant.

## ***III. 2) Type of mission***

UNSPECIFIED

# **IV. Progress of the expert's mission**

## ***IV. 1) Judge supervision***

NO, but *ex-post* assessment of the probative value of the expert opinion

## ***IV. 2) Form of contradictory procedure***

There is no contradiction during the mission – the expert acts alone and independently and submits a written report to the party that appointed him. The contradiction is introduced by the notification of the report - written according to the rules of disclosure - and later at the hearing, during which examination or cross-examination questions may include the work carried out by another party's expert.

The expert has a duty of impartiality but remains the expert of the party that has appointed him.

At the hearing he will be questioned by both parties (examination followed by cross-examination).

#### ***IV. 3) Participation in the hearing***

The expert submits his report to the litigant who appointed him.

He is summoned to a hearing and may be interrogated by the opposing side.

### **V. Close of the expert examination**

#### ***V. 1) Does conciliation put an end to the expert's mission?***

Not applicable, expert-witness system.

#### ***V. 2) Form imposed on the report***

There is no imposed form for the report.

#### ***V. 3) Does the report put an end to the expert's mission?***

After a written report has been submitted, the expert gives oral evidence before the jurisdiction.

#### ***V. 4) Is there an imposed structure for the report?***

NO

#### ***V. 5) Is a preliminary report mandatory?***

NO

#### ***V. 6) Is the judge bound by the expert's conclusions?***

No., but the judge must argue his decision not to follow an expert's conclusions.

The mission entrusted to an expert is not submitted to any specific framework and merely results from one party's wish to support its position with evidence.

The judge assesses its probative value.

#### ***V. 7) Possibility of a second opinion***

Cross-examination in fact takes place by confronting the expert opinions produced by both parties to the trial and through the questioning (cross-examination) of the experts – each party can decide to call for another expert opinion to refute the findings of the opposing party's expert.

### **VI. Funding for the expert examination**

#### ***VI. 1) Security-Payment***

When the judge appoints the expert, he states which litigant will have to pay for this measure.

When the expert is appointed by a litigant, the litigant directly pays the technician. After the litigation, the matching costs are put in the same basket as the proceedings costs with which the judge has burdened one of the parties.

***VI. 2) Determining the amount of payment due***  
UNSPECIFIED

***VI. 3) Possibility of additional payment***  
UNSPECIFIED

***VI. 4) Determining fees and costs***

When the expert is appointed by a litigant, the fees and costs are determined between the litigant and himself.

***VI. 5) Possibility of contesting the fees***  
Not applicable

**VII. Expert liability within proceedings**

***VII. 1) Are there any laws governing expert examinations?***

There are no other texts regulating expert examinations than the texts on the rules of evidence.

***VII. 2) Expert liability***

The expert is immune from criminal prosecution relative to the mission he carries out.

Irish law provides for the same immunity for experts as for any other witness, and this protects them from libel claims pertaining to their testimony.

***VII. 3) Mandatory insurance for the expert***  
Not applicable

**VIII. The expert's status**

***VIII. 1) Existence of selection criteria (accreditation)***  
Not applicable

***VIII. 2) Classification of skills***  
Not applicable

### ***VIII. 3) Required qualifications***

There is no register – each expert solicited by a party must show evidence of his competence when he is heard before the judge so that the probative value of his work can be assessed.

### ***VIII. 4) Grant of accreditation***

Not applicable

### ***VIII. 5) Possibility of accrediting a legal person***

Not applicable

### ***VIII. 6) f) Validity period for the accreditation***

Not applicable

### ***VIII. 7) Regular assessment tests***

There is no association of experts or official representative body. There is no mechanism for the regular control of experts' activities.

### ***VIII. 8) Supervision of the expert's mission***

NONE

### ***VIII. 9) Expert's activity report***

NO

### ***VIII. 10) Code of ethics***

The expert must be impartial even when he is appointed by a litigant.

### ***VIII. 11) Good practice***

UNSPECIFIED

### ***VIII. 12) Possibility of penalties***

UNSPECIFIED

### ***VIII. 13) Laws governing the expert's status***

NO

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## **13. ITALY**

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**Gastone ANDREAZZA**, *(criminal) expert*

**Françoise TRAVAILLOT**, *French liaison magistrate in Rome*

### **Authors**

**Alain NUEE**, *First President of the Versailles Court of Appeals (France)*

**Patricia GRANDJEAN**, *Councilor at the Versailles Court of Appeals (France)*

### **Other Administrative order**

YES

## **I. Procedural rules in calling for an expert examination**

### ***I. 1) On the initiative of***

Decision exclusively made by the judge when he believes it necessary, according to unspecified forms (it appears to be decided on a case by case basis).

In civil law, the jurisprudential restriction to appointing an expert covers the prohibition to remedy the shortcomings of one litigant in producing evidence unless this piece of evidence cannot be obtained through normal means, to establish the scope of the law or avoid establishing facts that have not been pleaded by the litigants.

### ***I.2) Mandatory expert examinations***

YES

### ***I. 3) Decision-maker***

The judge

### ***I.4) Is a pre-trial expert examination possible?***

NO

## **II. Choice and appointment of the expert(s)**

### ***II. 1) Register***

The registers are established by jurisdictions whose offices base their decision on the curriculum vitae and documents provided by the applicant.

The registers can list civil servants who work as experts when this is not contrary to their statutes and



who are preferably chosen for criminal cases.

In civil law, the judge must ensure a reasonable rotation among the appointments of the registered experts.

## ***II. 2) Oath***

YES

The expert swears an oath when he presents his findings at the hearing. However, the absence of oath is not a ground of nullity for the expert's deposition.

## ***II. 3) Choice of the Expert***

The judge always appoints and chooses the expert.

However the parties can appoint technical consultants to cooperate with the judicial expert within a "technical contradictory procedure" and who will participate in drafting the final report.

The number of consultants chosen by each party must not be higher than that of the experts appointed by the judge.

The judge preferably appoints a registered expert but can, in particular situations, appoint a consultant who is not registered.

## ***II. 4) Participation by the parties in the appointment process***

NO

## ***II. 5) Nationality***

Procedural rules do not impose that an expert be of Italian nationality. However, save for some exceptions, they do impose that the expert reside within the area of jurisdiction that appoints him and that he belong to a professional order.

## ***II. 6) Recusal by the litigant parties***

For classical reasons (family ties, enmity, conflict of interests, etc.)

## ***II. 7) Expert's withdrawal (refusal of a mission)***

The expert appointed by the judge is under the obligation of accomplishing his mission.

However, he can withdraw if he gives proof of a legitimate reason (that corresponds to the causes of withdrawal applicable to judges). Illegitimate withdrawal from a mission is punished by a fine, a prison sentence, and/or a prohibition to practice one's profession.

## ***II. 8) Possibility of adding another expert***

The judge can appoint several experts together and an additional expert can be added at the original expert's request and with the judge's approval.

## ***II. 9) Possibility of being assisted by a colleague***

An expert can call for a specialist to assist him in part of his mission, but he remains responsible for this specialist's report and for the use of his investigations and findings for his own report.

### **III. Definition of the expert's mission**

#### ***III. 1) Who determines the mission?***

The judge determines the mission

#### ***III. 2) Type of mission***

The mission is based on the technical analysis of facts in light of the expert's knowledge. If the assignment covers important factual elements that are decisive for a solution to the dispute, it can be more or less defined - depending on the needs of the case - in a general, specific, or more or less detailed manner, according to the judge's needs.

### **IV. Progress of the expert's mission**

#### ***IV. 1) Judge supervision***

The judge can assist and participate in the expert's work but in practice and with rare exceptions, the judge does not supervise the progress of the mission and the expert works independently.

#### ***IV. 2) Form of contradictory procedure***

The contradictory procedure is implemented by submitting a preliminary report on which the litigants can make remarks which the expert will have to reply to in his final report. At a litigant's request, the judge may speed up the contradictory procedure by asking the expert he appointed to carry out his proceedings in partnership with the litigants' technical consultants.

#### ***IV. 3) Participation in the hearing***

The expert orally presents his conclusions in the hearing.

### **V. Close of the expert examination**

#### ***V. 1) Does conciliation put an end to the expert's mission?***

UNSPECIFIED

#### ***V. 2) Form imposed on the report***

The report is orally presented. If the expert carried his mission out independently (without the judge's intervention), the judge can ask for a written report to be submitted.

#### ***V. 3) Does the report put an end to the expert's mission?***

The mission only ends with the end of the trial (not the presentation of the report).

Most often the mission ends when the written report is submitted. This report is mandatory in all cases when the expert has worked independently (without the judge's intervention). Nevertheless, at the judge's request the expert can be summoned to the hearing in order to present his findings.

***V. 4) Is there an imposed structure for the report?***

NO

***V. 5) Is a preliminary report mandatory?***

NO

***V. 6) Is the judge bound by the expert's conclusions?***

The judge is not bound by the expert's conclusions, but if he goes against them, he must provide arguments as to why. Jurisprudence also states that the court may, in criminal and civil cases, choose among the different hypotheses presented by the experts the one which is believed to be the most relevant. The court chooses according to its sovereign power of decision in the case when there is a lack of rules of evidence set by the law, provided it explains in detail the reasons for its choice by describing coherent, logical steps of reasoning and whose worth cannot be verified by third degree of jurisdiction which is only competent in deciding matters of law.

***V. 7) Possibility of a second opinion***

YES

**VI. Funding for the expert examination**

***VI. 1) Security-Payment***

Procedural rules do not provide for the possibility of giving a down payment to the expert.

A payment on account towards the expert's fees is set by the judge and usually paid by the person requesting the expert opinion. The judge can then oblige the unsuccessful litigant to pay back the expert's fees.

***VI. 2) Determining the amount of payment due***

The judge

***VI. 3) Possibility of additional payment***

UNSPECIFIED

***VI. 4) Determining fees and costs***

The fee is set by the judge and ensured according to a legal scale which can be fixed or sliding, depending on the specialty. The variable fee, when it is allowed for in a text, can depend on the time given to carry out the mission, the value in litigation or it can be within a range set by the law.

The cost of the expert examination is borne in advance by a party, generally the requesting party, and if it wins its case on the substance of the dispute, the judge sentences the unsuccessful litigant to reimbursing them.

#### ***VI. 5) Possibility of contesting the fees***

It is possible to legally challenge the decision determining the expert's fees.

### **VII. Expert liability within proceedings**

#### ***VII. 1) Are there any laws governing expert examinations?***

Laws regulating the expert's intervention mean the expert could incur civil or criminal liability through his mission.

Criminal offence in case of neglect when submitting the report or in case of fraud (a year in prison and a fine of 10329 euros). Rules of law violations when carrying out a mission can lead to the cancellation of the expert examination and the neglect can mean that the fees are reduced by up to half, to which one must add compensation to the litigants. In criminal cases, the expert who can withdraw from his mission can be condemned to a fine ranging from 154 to 1549 euros if he does not give his opinion within the set deadline or if he is negligent.

#### ***VII. 2) Expert liability***

Civil and criminal

#### ***VII. 3) Mandatory insurance for the expert***

The expert has no legal obligation to underwrite insurance.

### **VIII. The expert's status**

#### ***VIII. 1) Existence of selection criteria (accreditation)***

The rules regulating experts are set by the Code of Civil Procedure and the Code of Criminal Procedure as well as by a presidential decree. Experts are gathered in several associations that are not a representative organisation.

#### ***VIII. 2) Classification of skills***

Yes, nomenclature

#### ***VIII. 3) Required qualifications***

YES

Qualifications required + Curriculum vitae

#### ***VIII. 4) Grant of accreditation***

An expert's registration is subject to an accreditation approved by the court for four years based on a classification of skills and an assessment of his curriculum vitae and his qualifications.

#### ***VIII. 5) Possibility of accrediting a legal person***

A legal person cannot be an "expert".

#### **VIII. 6) *Validity period for the accreditation***

Four years

#### **VIII. 7) *Regular assessment tests***

An assessment test takes place when renewing the accreditation

#### **VIII. 8) *Supervision of the expert's mission***

UNSPECIFIED

#### **VIII. 9) *Expert's activity report***

UNSPECIFIED

#### **VIII. 10) *Code of ethics***

There is no text establishing the enrolment criteria for experts on the jurisdictions' registers, nor a code of ethics.

Experts are bound by rules of civil procedure but are free to practice at their will within these rules.

#### **VIII. 11) *Good practice***

UNSPECIFIED

#### **VIII. 12) *Possibility of penalties***

Criminal offence in case of neglect when submitting the report or in case of fraud (a year in prison and a fine of 10329 euros).

Rules of law violations when carrying out a mission can lead to the cancellation of the expert examination and neglect can mean that the fees are reduced by up to half, excluding compensation to the litigants.

#### **VIII. 13) *Laws governing the expert's status***

YES

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## **14. LATVIA**

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### **Other administrative order**

YES

## **I. Procedural rules in calling for an expert examination**

### ***I. 1) On the initiative of***

In civil law, the expert examination is determined if the litigation calls for it.

Appointment is by joint agreement between the parties.

### ***I.2) Mandatory expert examinations***

No, only in criminal trials.

### ***I. 3) Decision-maker***

If the appointment does not satisfy the court or if the litigants disagree, the magistrate makes the decision.

### ***I.4) Is a pre-trial expert examination possible?***

NO

## **II. Choice and appointment of the expert(s)**

### ***II. 1) Register***

Two kinds of experts:

- state legal experts, holding a qualification valid for five years
- private experts holding accreditation from the government in the case where no legal expert had the necessary skills.

### ***II. 2) Oath***

For state experts, once only; for private accredited experts, every time.

## ***II. 3) Choice of the Expert***

The judge

## ***II. 4) Participation by the parties in the appointment process***

YES

Appointment by consensus (the judge has the final decision if the litigants' choice does not fulfil the conditions set by the Court)

## ***II. 5) Nationality***

Given the qualification or accreditation required, it seems clear that the choice of the expert is biased towards (or even imposes) nationality

## ***II. 6) Recusal by the litigant parties***

UNSPECIFIED

## ***II. 7) Expert's withdrawal (refusal of a mission)***

Yes: not competent, not independent...

## ***II. 8) Possibility of adding another expert***

The judge can appoint an expert panel that will jointly sign the report and is collectively responsible for it.

## ***II. 9) Possibility of being assisted by a colleague***

Yes, but only the appointed expert will sign the report and is responsible for its content.

# **III. Definition of the expert's mission**

## ***III. 1) Who determines the mission?***

The judge.

In civil law, the litigants may request an expert examination from the court and suggest what questions they would like the expert to answer.

## ***III. 2) Type of mission***

The expert cannot be assigned with determining legal facts.

# **IV. Progress of the expert's mission**

The expert's mission is set by the code of procedure in question.

## ***IV. 1) Judge supervision***

UNSPECIFIED

When carrying out his mission, the expert is independent.



#### ***IV. 2) Form of contradictory procedure***

This principle bears no relation to the expert's work.

#### ***IV. 3) Participation in the hearing***

On request

The expert can be called in to offer precisions or additional information to his report and/or answer questions from the players in the trial.

### **V. Close of the expert examination**

#### ***V. 1) Does conciliation put an end to the expert's mission?***

UNSPECIFIED

#### ***V. 2) Form imposed on the report***

YES. The report must be written. It must answer all the questions asked, describe the process that was followed, the methods used, and the measures taken by the expert to reach his conclusions.

#### ***V. 3) Does the report put an end to the expert's mission?***

No, the expert can be asked to provide more details or more information in his report and/or to answer questions during the hearing.

#### ***V. 4) Is there an imposed structure for the report?***

YES

He must answer all the questions asked, describe the process followed, the methods used and measures taken to reach his conclusions.

#### ***V. 5) Is a preliminary report mandatory?***

NO

#### ***V. 6) Is the judge bound by the expert's conclusions?***

NO, the expert's report is evidence that has no higher value than other pieces of evidence.

#### ***V. 7) Possibility of a second opinion***

UNSPECIFIED

### **VI. Funding for the expert examination**

#### ***VI. 1) Security-Payment***

UNSPECIFIED

**VI. 2) Determining the amount of payment due**  
UNSPECIFIED

**VI. 3) Possibility of additional payment**  
UNSPECIFIED

**VI. 4) Determining fees and costs**

In civil law, for “private” expert examinations, the fees and costs are set by mutual understanding. For legal expert examinations, the fees are set by a ruling of the Council of Ministers.

**VI. 5) Possibility of contesting the fees**  
NO

**VII. Expert liability within proceedings**

**VII. 1) Are there any laws governing expert examinations?**

**YES VII. 2) Expert liability**  
Civil and criminal

**VII. 3) Mandatory insurance for the expert**  
NO

**VIII. The expert's status**

**VIII. 1) Existence of selection criteria (accreditation)**  
YES

The accreditation and certification procedures are not specified.

**VIII. 2) Classification of skills**

There is a classification of expert skills set by each state based on the area of expertise and methods used.

For other fields, the experts are classified along the usual skills in matters of expert opinions.

**VIII. 3) Required qualifications**  
UNSPECIFIED

**VIII. 4) Grant of accreditation**

By the Justice Department

The requirements to apply for legal expert accreditation are set by the law which states, beyond the need to be independent, the expert's duties:

- to give an objective and scientifically based opinion on all his missions,
- to refuse any mission outside of his area of knowledge,
- to carry out his mission according to the Code of Procedure, acknowledged methods, scientifically approved and authorised by the Council of legal experts,

- to only communicate the results to the persons allowed to receive them (confidentiality),
- to respect the person, especially a child, who might be the object of his expert examination,
- to regularly maintain his level of skills.

An expert commission can be created to cover more than one specialty.

#### ***VIII. 5) Possibility of accrediting a legal person***

No, the expert is a natural person, there is no private expert structure in Latvia.

#### ***VIII. 6) f) Validity period for the accreditation***

Five years

#### ***VIII. 7) Regular assessment tests***

There is a supervising institution ("Board of legal experts") which periodically organises accreditation, decides on potential suspensions or strikes from the register, supervises and controls the activity of legal experts.

Accredited experts are represented by an association: the "Latvian Association of Independent Experts".

#### ***VIII. 8) Supervision of the expert's mission***

YES

Qualitative and quantitative

#### ***VIII. 9) Expert's activity report***

UNSPECIFIED

#### ***VIII. 10) Code of ethics***

YES

#### ***VIII. 11) Good practice***

Yes, a guide to good practice has been published for experts of the various specialisations, but it is not compulsory.

#### ***VIII. 12) Possibility of penalties***

YES

In administrative and civil law: possible punishment with a fine

#### ***VIII. 13) Laws governing the expert's status***

YES

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## **15. LITHUANIA**

### **Contributing correspondent**

**Rita BUCINSKAITE**, *Responsible for European Law – Supreme Court*

### **Authors**

**Philippe JACQUEMIN**, *Expert, EEEI Vice-President*

**Béatrice DESHAYES**, *Avocat & Rechtsanwältin - Partner HW&H*

### **Other administrative order**

YES

### **I. Procedural rules in calling for an expert examination**

The terms to call on an expert opinion are similar in all procedures;

In civil law, they are specified by Articles 160 and 212 of the CCivP.

#### ***I. 1) On the initiative of***

The expert examination is decided by the judge every time an issue requires a specialist's knowledge. It can be requested by the litigants.

#### ***I.2) Mandatory expert examinations***

UNSPECIFIED

#### ***I. 3) Decision-maker***

The judge

He is not bound by the mission requested by the litigants but must explain his refusal.

#### ***I.4) Is a pre-trial expert examination possible?***

UNSPECIFIED

### **II. Choice and appointment of the expert(s)**

#### ***II. 1) Register***

A national register is established, in compliance with art. 4 of the Law (Law on Forensic Examination LFE)

If there is no registered expert, the judge is free to appoint the person he wants.

There are various expert examination institutional agencies whose competences are defined:

- Lithuanian centre for forensics answers to the Justice Department,
- Centre for Police forensics of Lithuania,
- Forensics service answering to the Justice Department
- Forensics Psychiatry Service answering to the Justice Department

- Fire research centre answering to the Home Office
- Lithuanian laboratories of customs
- Central bank of the Republic of Lithuania

Most of the registered experts work for one of these agencies.

Private experts (registered on a national list) also do exist.

## ***II. 2) Oath***

UNSPECIFIED

## ***II. 3) Choice of the Expert***

UNSPECIFIED

## ***II. 4) Participation by the parties in the appointment process***

In some cases, mentioned in the code of civil procedure, the court must first try to get the litigants' agreement, if not, each litigant suggests ten experts and can refuse 5 of the opposing side as well as give an opinion about the five remaining ones. The final appointment among the ten remaining candidates is made by the judge.

## ***II. 5) Nationality***

Given the necessary accreditation, the choice of expert is biased towards nationality.

An expert from an EU member state, or a state which has an assistance agreement, can be appointed.

## ***II. 6) Recusal by the litigant parties***

The expert's recusal can be requested especially if he has ties with one of the litigants, an interest in the outcome of the litigation or on a general basis for the same reasons as magistrates.

## ***II. 7) Expert's withdrawal (refusal of a mission)***

The expert can refuse the mission, especially if he is not competent, not independent or if he believes the elements provided are insufficient... but his request must be argued.

## ***II. 8) Possibility of adding another expert***

If there is a necessary plurality of experts, one of them is appointed to write the general report.

## ***II. 9) Possibility of being assisted by a colleague***

UNSPECIFIED

# **III. Definition of the expert's mission**

## ***III. 1) Who determines the mission?***

The litigants can ask the court for an expert examination and suggest the questions which they would like the expert to answer.

The court is sole judge of the final mission but must argue any rejections.  
The judge can complete the expert examination or request a new one.

### *III. 2) Type of mission*

UNSPECIFIED

## **IV. Progress of the expert's mission**

### *IV. 1) Judge supervision*

Yes but indirectly

- he determines the mission
- the court provides the expert with the elements (documents, pieces, etc.)
- he can request additional information or order a new expert examination

### *IV. 2) Form of contradictory procedure*

UNSPECIFIED

### *IV. 3) Participation in the hearing*

The expert can be called in to give precision or additional information about his report and/or answer the questions of the trial's players.

## **V. Close of the expert examination**

### *V. 1) Does conciliation put an end to the expert's mission?*

UNSPECIFIED

### *V. 2) Form imposed on the report*

Yes, written

### *V. 3) Does the report put an end to the expert's mission?*

No, the expert can be called to provide clarifications or additional information on his report and/or answer the questions during the hearing.

### *V. 4) Is there an imposed structure for the report?*

The report must answer all the questions asked, describe the process followed, the methods used and measurements taken to obtain the results.

### *V. 5) Is a preliminary report mandatory?*

UNSPECIFIED

***V. 6) Is the judge bound by the expert's conclusions?***

The judge is not bound by the expert examination's conclusions but has to argue any disagreement with it in his ruling

***V. 7) Possibility of a second opinion***

UNSPECIFIED

**VI. Funding for the expert examination**

***VI. 1) Security-Payment***

Expert examination on request of one or both litigants: the fees are set by the judge and covered in equal amounts by the litigant(s).

Expert examination ordered by the Judge: cost of the expert examination covered by the Justice Department's budget.

***VI. 2) Determining the amount of payment due***

UNSPECIFIED

***VI. 3) Possibility of additional payment***

UNSPECIFIED

***VI. 4) Determining fees and costs***

UNSPECIFIED

***VI. 5) Possibility of contesting the fees***

UNSPECIFIED

**VII. Expert liability within proceedings**

***VII. 1) Are there any laws governing expert examinations?***

The main rules regulating the expert (Art. 12 of LFE):

- to only accept missions which match his skills
- confidentiality, respecting state secrecy, professional and business confidentiality, ...
- loyalty, honesty, objectivity, impartiality

***VII. 2) Expert liability***

YES

He can be punished with a fine up to about 1 200 € and also to community service hours

### ***VII. 3) Mandatory insurance for the expert*** UNSPECIFIED

## **VIII. The expert's status**

### ***VIII. 1) Existence of selection criteria (accreditation)***

The experts are given accreditation by a qualification commission. They are then registered on their request by the Justice Department within a year.

### ***VIII. 2) Classification of skills*** UNSPECIFIED

### ***VIII. 3) Required qualifications*** UNSPECIFIED

### ***VIII. 4) Grant of accreditation*** UNSPECIFIED

### ***VIII. 5) Possibility of accrediting a legal person*** UNSPECIFIED

### ***VIII. 6) f) Validity period for the accreditation*** UNSPECIFIED

### ***VIII. 7) Regular assessment tests***

Not systematic, assessed on a case by case basis. Striking someone from the register, on the initiative of the Ministry or the institution (cancellation of accreditation) is regulated by Section 15 of the Ministry Decree of 14/07/2008 and Art.5 and 6 of the LFE.

### ***VIII. 8) Supervision of the expert's mission*** UNSPECIFIED

### ***VIII. 9) Expert's activity report*** UNSPECIFIED

### ***VIII. 10) Code of ethics*** UNSPECIFIED

### ***VIII. 11) Good practice*** UNSPECIFIED



### **VIII. 12) Possibility of penalties**

Stricken from the register (Cancellation of the accreditation)

Decree N°1R-243 of the Justice Department (13/06/2008) establishes a “Council of coordination of legal expert examination activities”

### **VIII. 13) Laws governing the expert's status**

UNSPECIFIED

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## **16. LUXEMBOURG**

**Contributing correspondent**

**Christiane RECKINGER**, *Councilor at the Luxembourg Court of Appeal*

**Author**

**Daniel CHABANOL**, *Honorary State Councilor (French)*

### **Other administrative order**

YES

#### **Procedural Rules in calling for an expert opinion**

##### ***I. 1) On the initiative of***

It can be decided on the judge's own motion or organised "at the parties' request", provided they give substantiated cause for it. The judge may refuse to order an expert opinion (except otherwise provided for by law, such as Art. 1678 of the Civil Code), if he believes it would be complementing the parties' lack of proof. The parties are thus understood as having to establish the benefits and necessity of the expert examination.

##### ***I.2) Mandatory expert examinations***

In certain cases, the law can impose on the judge to order an expert examination. For example, in matters pertaining to rescinding a sale for damages, Article 1678 of the Civil Code stipulates that evidence of the damage will be provided by means of an expert examination.

##### ***I. 3) Decision-maker***

The judge

##### ***I.4) Is a pre-trial expert examination possible?***

It is possible to call for an interim expert examination before the start of the trial if it is deemed necessary for the establishment or the safeguard of the evidence.

#### **II. Choice and appointment of the expert(s)**

##### ***II. 1) Register***

Yes, the Ministry of Justice establishes registers of "accredited" and sworn experts in the various fields of expertise.

##### ***II. 2) Oath***

Yes, before a Chamber of the Superior Court of Justice, when accreditation is issued.

##### ***II. 3) Choice of the Expert***

The parties can discuss the choice of the expert and suggest one or several names, or jointly suggest an expert to be appointed by the judge.

## ***II. 4) Participation by the parties in the appointment process***

The parties can discuss the choice of the expert and suggest one or several names, but the judge remains free to make the decision (and, namely, is not bound by the registers).

## ***II. 5) Nationality***

Irrelevant

## ***II. 6) Recusal by the litigant parties***

On the same grounds as for judges:

- 1° if he is a relative or in-law of the parties or of one of the parties, including second cousins.
- 2° if the expert's wife is a relative or in-law of one of the parties, or if the expert is a relative or in-law of the wife of one of the parties to the above-mentioned degree when this wife is alive, or if she is deceased, if there are no children; if she is deceased and there are no children, the father-in-law, son-in-law, or brothers-in-law cannot be experts.
- 3° if the expert, his wife, their ascendants or descendants or in-laws in the same line, are involved in a dispute on a similar question as that between the parties;
- 4° if there is a trial in their name in a court where one of the parties will be a judge; if they are creditors or debtors of one of these parties;
- 5° if, in the five years prior to the recusal, there was a criminal trial between them and one of the parties, or the expert's spouse or direct relatives or in-laws;
- 6° if there is a civil lawsuit pending between the expert, his wife, their ascendants and descendants, or direct in-laws, and one of the parties, and if this lawsuit, if brought by said party, was brought before the trial in which recusal is suggested; if this trial is over and has been over only in the six months prior to the recusal;
- 7° if the expert is the guardian or deputy guardian or trustee, the heir apparent, the donator, master or guest of one of the parties; if he is the administrator of an establishment, company, or management that is a party in the case; if one of the parties is the expert's heir apparent;
- 8° if the expert has given counsel, argued or written about the dispute; if he has previous knowledge of it as expert or arbitrator; if he has requested, recommended, or taken part in the trial costs; if he has borne testimony as a witness; if since the start of the trial he has drunk or eaten with one or the other of the parties in their home, or received gifts from them;
- 9° if there is mortal enmity between him and one of the parties; if there has been assault, insults, or threats on his part, whether verbal or written, since the start of the proceedings or in the six months prior to the proposed recusal.

## ***II. 7) Expert's withdrawal (refusal of a mission)***

Not provided for

## ***II. 8) Possibility of adding another expert***

The expert is entitled to request the opinion of another technician but only in a specialist field that is distinct from his own.

## ***II. 9) Possibility of being assisted by a colleague***

Provided the latter is a specialist in a different field.

# **III. DEFINITION OF THE EXPERT'S MISSION**

## ***III. 1) Who determines the mission?***

The judge determines the mission.

### ***III. 2) Type of mission***

Article 436 Civil Code of Procedure:

The judge who appointed the expert or the judge in charge of supervising expert examinations can expand or restrict the mission entrusted to the technician.

The parties may refer to the judge in order to increase the scope of the expert's mission and order an additional expert examination.

## **IV. PROGRESS OF THE EXPERT'S MISSION**

### ***IV. 1) Judge supervision***

The expert examination is carried out under the supervision of a specially appointed judge who can attend the expert's meetings, ask him questions, set deadlines, and, if the need arises, replace him. The same judge rules on any difficulties that may arise during the examination, namely on matters relating to the refusal of disclosing documents.

### ***IV. 2) Form of contradictory procedure***

Yes - the expert must summon the parties to the meetings, disclose all the evidence on which he will base his report, collect the parties' remarks and give them the opportunity to debate and dispute his opinion. This means the expert has to make a preliminary report.

### ***IV. 3) Participation in the hearing***

The expert may be invited to the hearing in order to complete, clarify or explain his conclusions (this can also be done in writing).

## **V. Close of the expert examination**

### ***V. 1) Does conciliation put an end to the expert's mission?***

The expert must try to reconcile the parties insofar as it is possible. Conciliation may put an end to the expert's mission; in this event, the expert notes that his assignment has become irrelevant and reports to the judge.

### ***V. 2) Form imposed on the report***

NO

### ***V. 3) Does the report put an end to the expert's mission?***

The expert's mission ends when he submits his report to the court registry and notifies the parties.

### ***V. 4) Is there an imposed structure for the report?***

NO

### ***V. 5) Is a preliminary report mandatory?***

There is no mandatory preliminary report and there is only one report even if there are several experts involved.

### ***V. 6) Is the judge bound by the expert's conclusions?***

The judge is not bound by the expert's findings and conclusions.



### ***V. 7) Possibility of a second opinion***

The parties always have the possibility of asking for a second expert opinion.

## **VI. Funding for the expert examination**

### ***VI. 1) Security-Payment***

According to Article 467 of the New Code of Civil Procedure, the judge ordering an expert examination determines the amount of a down payment on the expert's fees. He determines the party or parties that will, within the deadline he has set, deposit the security-payment at the "Caisse des Consignations" or another agreed upon credit institution.

### ***VI. 2) Determining the amount of payment due***

The judge

### ***VI. 3) Possibility of additional payment***

It is possible to refer to the judge to have him order the deposit of additional payment as an adversarial measure.

### ***VI. 4) Determining fees and costs***

Control and tax by the judge if the parties dispute the amount the expert has claimed (with a possible appeal against the order at the Civil Chamber of the Court of Appeal). In the event of a tax, the judge bases his calculations on a system of hourly rate provided for by law.

The parties pay for the expert opinion, except in criminal cases.

### ***VI. 5) Possibility of contesting the fees***

When the parties contest the amount of the costs and expenses claimed by the technician, it is taxed by the judge, who can issue an enforcement order.

The taxation of costs and expenses can be appealed against before the Civil Chamber of the Court of Appeal acting in the Council Chamber.

## **VII. Expert liability within proceedings**

### ***VII. 1) Are there any laws governing expert examinations?***

Article 432 and following in the New Code of Civil Procedure govern the investigative measures carried out by a technician.

Articles 87 and 88 of the Code of Criminal Procedure govern the expert examination ordered by the investigating judge.

The Law of 7 July 1971 on repressive and administrative matters, providing for certified experts, translators, and interpreters, and completing the provisions on the certification of experts, translators, and interpreters, governs the appointment of legal experts and their certification.

Article 14 of the Law of 21 June 1997 contains a provision for proceedings before the administrative courts which gives the court the mission to regulate the form and deadlines within which the expert must proceed on his assignment and commits a member of the court to supervise the investigative measure.

Grand-Ducal Regulation of 23 December 1972 establishing new compensation rates to be allocated in all matters to witnesses, experts, and interpreters, defines the methods for calculating the various categories of experts.

Grand-Ducal Regulation of 14 October 2005 establishing medical rates in cases of requisition by the justice system.

#### ***VII. 2) Expert liability***

Yes (Article 1382 and 1383 of the Civil Code): Liability for gross negligence, negligence, or recklessness in carrying out his mission.

#### ***VII. 3) Mandatory insurance for the expert***

There are no legal texts obliging the expert to take out particular insurance.

### **VIII. The expert's status**

#### ***VIII. 1) Existence of selection criteria (accreditation)***

Yes: degrees, curriculum vitae, as well as the recommendations of the Public Prosecutor and of the Ministry of Higher Education and Research.

#### ***VIII. 2) Classification of skills***

Yes, register established by the Minister of Justice

#### ***VIII. 3) Required qualifications***

YES

#### ***VIII. 4) Grant of accreditation***

By the Ministry of Justice

#### ***VIII. 5) Possibility of accrediting a legal person***

A legal person can be appointed as an expert

#### ***VIII. 6) Validity period for the accreditation***

If the expert is a legal person, its legal representative submits to the judge's approval the name of the natural person or persons who will be in charge of carrying out the assignment.

#### ***VIII. 7) Regular assessment tests***

NO



#### ***VIII. 8) Supervision of the expert's mission***

There is no supervision of the work of legal experts who are referenced on the Ministry of Justice's register.

#### ***VIII. 9) Expert's activity report***

NO

#### ***VIII. 10) Code of ethics***

Code of conduct established by the Chamber of Experts.

#### ***VIII. 11) Good practice***

The appointed expert must accomplish his mission with due care, objectivity and impartiality. He must fulfil his mission personally within the deadlines set by the judge.

In civil matters he must observe the contradictory nature of the expert examination throughout the proceedings, and namely, summon the parties or their representatives in good time for expert analyses, transmit to them all the elements he is basing his report on, allow the parties to make their own observations and claims, and give them the possibility to dispute and contest his opinion.

Experts appointed by the investigating judge must inform the judge in good time of the date, place, and time of their operations; the investigating magistrate in turn informs the expert appointed by the accused, in order to allow him to attend all the expert proceedings.

#### ***VIII. 12) Possibility of penalties***

By the disciplinary commission of the National Chamber of Experts.

In the event that a technician fails to comply with his obligations, the judge can replace him or cancel his report.

If he fails to comply with his legal obligations or in the case of non-observance of professional ethics, or based on other serious grounds, a registered expert can be revoked by the Ministry of Justice on the recommendation of the General State Prosecutor.

#### ***VIII. 13) Laws governing the expert's status***

Aside from the Law of 7 July 1971 on repressive and administrative matters, providing for certified experts, translators, and interpreters, and completing the provisions on the certification of experts, translators, and interpreters, there is no specific text governing the status of the expert.

### **IX. Bibliography**

There are no recent books, nor specialised journals that specifically deal with legal expertise in Luxembourg law.

## **17. MALTA**

**Author**  
**Gilbert MOUTHON, Expert**

### **Other administrative order**

#### **I. Procedural rules in calling for an expert examination**

##### *I. 1) On the initiative of*

In civil matters: at the request of the parties or of the Court (Article 543 – Code of Organization and Civil Procedure)

##### *I.2) Mandatory expert examinations*

UNSPECIFIED

##### *I. 3) Decision-maker*

The judge or the arbitrator

##### *I.4) Is a pre-trial expert examination possible?*

UNSPECIFIED

#### **II. CHOICE AND APPOINTMENT OF THE EXPERT(S)**

##### *II. 1) Register*

Register: Article 89 of the Code of Organization and Civil Procedure: the Minister of Justice appoints the expert groups of the Courts of Malta and Gozo.

The Court can appoint “arbitrators” at the request of one of the parties or of its own motion. The Minister of Justice appoints experts groups within the Courts of Malta and Gozo (the list is published in the *Government Gazette* – these experts perform their duties following an alphabetical listing of their names and on rotation in the Court to which they are attached).

##### *II. 2) Oath*

UNSPECIFIED

##### *II. 3) Choice of the Expert*

UNSPECIFIED

##### *II. 4) Participation by the parties in the appointment process*

If the parties agree, it is the “arbitrator” they have selected that is appointed.  
Otherwise the Court appoints an expert of its own choice.

## ***II. 5) Nationality***

UNSPECIFIED

## ***II. 6) Recusal by the litigant parties***

An “arbitrator” cannot be challenged by either of the parties until he has submitted his report. Challenges must be made substantively during the hearing or by motion. (Recusal seems possible but the document in support of this mentions only the motives for a Judge’s recusal, and not that of an expert or an “arbitrator”).

## ***II. 7) Expert’s withdrawal (refusal of a mission)***

A withdrawal or a recusal seems possible in the event of a family tie, subordination, or involvement in another case.

Challenges must be made during the hearing or by motion.

## ***II. 8) Possibility of adding another expert***

Expert groups are allowed to give temporary assistance to chosen experts.

## ***II. 9) Possibility of being assisted by a colleague***

With the Court’s approval, experts can be assisted by other persons.

# **III. DEFINITION OF THE EXPERT’S MISSION**

## ***III. 1) Who determines the mission?***

UNSPECIFIED

## ***III. 2) Type of mission***

UNSPECIFIED

# **IV. PROGRESS OF THE EXPERT’S MISSION**

## ***IV. 1) Judge supervision***

He must not get involved in the preparation of the expert’s report.

## ***IV. 2) Form of contradictory procedure***

YES

Immediate and permanent

## ***IV. 3) Participation in the hearing***

The Judge may request the appointment of another “arbitrator” (Article 654). In such a case, the Court makes an order to stay proceedings.

## **V. Close of the expert examination**

### *V. 1) Does conciliation put an end to the expert's mission?*

UNSPECIFIED

### *V. 2) Form imposed on the report*

YES

Written report

### *V. 3) Does the report put an end to the expert's mission?*

The proceedings are concluded by a written report. All the documents produced must be annexed to the report signed by the expert or the “arbitrator”.

### *V. 4) Is there an imposed structure for the report?*

UNSPECIFIED

### *V. 5) Is a preliminary report mandatory?*

UNSPECIFIED

### *V. 6) Is the judge bound by the expert's conclusions?*

Articles 681 of the COCP.

The Court is not bound by the “arbitrator's” conclusions against its own conviction. Courts are free to decide whether or not to adopt the expert's findings.

### *V. 7) Possibility of a second opinion*

UNSPECIFIED

## **VI. Funding for the expert examination**

### *VI. 1) Security-Payment*

Articles 644 to 682 of the Code of Organization and Civil Procedure.

The costs are provisionally paid by the claimant.

### *VI. 2) Determining the amount of payment due*

UNSPECIFIED

### *VI. 3) Possibility of additional payment*

UNSPECIFIED

### *VI. 4) Determining fees and costs*

The Court determines the due tax.

**VI. 5) Possibility of contesting the fees**  
UNSPECIFIED

**VII. Expert liability within proceedings**

**VII. 1) Are there any laws governing expert examinations?**  
YES

**VII. 2) Expert liability**  
UNSPECIFIED

**VII. 3) Mandatory insurance for the expert**  
UNSPECIFIED

**VIII. The expert's status**

**VIII. 1) Existence of selection criteria (accreditation)**  
YES  
Laws A644 to 682 of the Code of Organization and Civil Procedure

**VIII. 2) Classification of skills**  
UNSPECIFIED

**VIII. 3) Required qualifications**  
UNSPECIFIED

**VIII. 4) Grant of accreditation**  
UNSPECIFIED

**VIII. 5) Possibility of accrediting a legal person**  
UNSPECIFIED

**VIII. 6) f) Validity period for the accreditation**  
UNSPECIFIED

**VIII. 7) Regular assessment tests**  
UNSPECIFIED

**VIII. 8) Supervision of the expert's mission**  
UNSPECIFIED

***VIII. 9) Expert's activity report***

UNSPECIFIED

***VIII. 10) Code of ethics***

UNSPECIFIED

***VIII. 11) Good practice***

UNSPECIFIED

***VIII. 12) Possibility of penalties***

UNSPECIFIED

***VIII. 13) Laws governing the expert's status***

UNSPECIFIED

**IX. Bibliography**

## **18. NETHERLANDS**

### **Contributing correspondents**

**John A. COSTER VAN VOORHOUT**, *Judge at the Court of Appeal of Arnhem*  
*President of the Netherlands Register of Court Experts (NRGD)*  
**Nienke MULDER**, *Legal Counsel at the NRGD*

### **Author**

**Philippe JACQUEMIN**, *Expert, Vice-president EEEI*

### **Other administrative order**

YES

## **I. Procedural rules in calling for an expert examination**

### ***I. 1) On the initiative of***

The judge or the parties

### ***I.2) Mandatory expert examinations***

Not generally, but in certain very specific cases such as expropriations, the court must appoint one or several experts to estimate the amount of the compensation.

### ***I. 3) Decision-maker***

The judge

### ***I.4) Is a pre-trial expert examination possible?***

YES

## **II. Choice and appointment of the expert(s)**

### ***II. 1) Register***

There is no register of experts yet.

A list of “trained experts” is currently being drawn up, however the details have not yet been finalised.

The Netherlands Register of Court Experts (NRGD), a public administration, evaluates legal experts, but for the moment this only applies in criminal procedures.

In civil law, judges use a list of often-appointed experts, the DIX. It is only internally accessible and does not involve any kind of assessment of the quality of experts’ work.

There is also a “private” register, the LRGD, for legal experts. In order to be listed on this register, experts must have received legal training and belong to a training centre.

In the near future, the NRGD hopes to expand its field of action to include experts working in civil or administrative cases by merging with the LRGD.

## ***II. 2) Oath***

UNSPECIFIED

## ***II. 3) Choice of the Expert***

The judge

## ***II. 4) Participation by the parties in the appointment process***

YES

The judge gives the parties the possibility to suggest experts.

## ***II. 5) Nationality***

Irrelevant

## ***II. 6) Recusal by the litigant parties***

Yes, namely for bias

## ***II. 7) Expert's withdrawal (refusal of a mission)***

YES

## ***II. 8) Possibility of adding another expert***

The court can appoint several experts if it deems it necessary. This remains possible at all stages of the proceedings.

## ***II. 9) Possibility of being assisted by a colleague***

If to carry out his mission the expert is being assisted by other experts, he must do so in compliance with the agreement he made with the party that appointed him. The expert must inform the parties in advance and they can oppose such a move. The expert must ensure that the names of those who helped him carry out his assignment appear in his final report.

# **III. Definition of the expert's mission**

## ***III. 1) Who determines the mission?***

The judge

## ***III. 2) Type of mission***

All

# **IV. Progress of the expert's mission**

## ***IV. 1) Judge supervision***

The judge determines the deadline within which the expert must present his report.

The investigative measures are supervised by the judge (Article 198, section 2 of the Code of Civil Procedure).



Generally the court asks the expert to carry out his task independently.

#### *IV. 2) Form of contradictory procedure*

Deferred

The expert must give the parties the possibility to ask questions and make observations.

#### *IV. 3) Participation in the hearing*

The expert can be summoned to complete his report and reply to the parties' and the judge's questions.

### **V. Close of the expert examination**

#### *V. 1) Does conciliation put an end to the expert's mission?*

If the case is solved, and if the parties ask the court to close the procedure, this also puts an end to the expert's mission.

#### *V. 2) Form imposed on the report*

NO

Written or oral. However Article 198 section 5 of the Code of Civil Procedure specifies that an oral report must be formalised by a statement before the court.

#### *V. 3) Does the report put an end to the expert's mission?*

Generally, the submission of the report marks the end of the expert's mission. However, naturally, if the Court has questions on the content of the report or on the procedural aspects of the investigative measures, the expert must present himself to the Court in order to answer them.

#### *V. 4) Is there an imposed structure for the report?*

The report must describe the investigation that has been carried out and support its findings.

There are guidelines but no imposed structure. The code of conduct provides that the expert will supply substantial information in an intelligible manner.

The report must be understandable by the parties, which means, namely, that very specific terminology should be avoided insofar as is possible.

#### *V. 5) Is a preliminary report mandatory?*

Yes, the expert must allow the parties to comment on the preliminary report.

Indeed, the comments should be reproduced in the final report, and the replies to these comments should also be duly reasoned in the expert's final report.

#### *V. 6) Is the judge bound by the expert's conclusions?*

The judge is not bound by the expert's conclusions but their rejection must be duly reasoned.

#### ***V. 7) Possibility of a second opinion***

YES

### **VI. Funding for the expert examination**

#### ***VI. 1) Security-Payment***

The claimant(s)

The Court decides what party must pay. It is generally the party who bears the burden of proof.

#### ***VI. 2) Determining the amount of payment due***

UNSPECIFIED

#### ***VI. 3) Possibility of additional payment***

YES

#### ***VI. 4) Determining fees and costs***

The judge

The cost of the expert opinion is borne by the unsuccessful party and the deposit restored to the party who made the advance payment.

After having heard the parties, the court estimates the amount. On his invoice, the expert must specifically detail his fees, expenses, and VAT. Costs must be specified for all the actions involved. When detailing his fees, the expert must specify his hourly rate as well as the number of hours needed for the investigation and for writing the report.

#### ***VI. 5) Possibility of contesting the fees***

UNSPECIFIED

### **VII. Expert liability within proceedings**

#### ***VII. 1) Are there any laws governing expert examinations?***

Code of Civil Procedure, Art. 194-199 and 202

#### ***VII. 2) Expert liability***

There is no legal text providing for the expert's particular liability. Thus, according to common law, he must carry out his work to the best of his knowledge and competence and is civilly liable.

#### ***VII. 3) Mandatory insurance for the expert***

NO

The decision is up to the expert.

## VIII. The expert's status

There is no legal provision for the status of experts.

### *VIII. 1) Existence of selection criteria (accreditation)*

NO

### *VIII. 2) Classification of skills*

NO

### *VIII. 3) Required qualifications*

NO

### *VIII. 4) Grant of accreditation*

Not applicable as there are no accreditations.  
Any competent person may be appointed.

### *VIII. 5) Possibility of accrediting a legal person*

NO.

However, it is possible to appoint a legal person.

### *VIII. 6) f) Validity period for the accreditation*

Not applicable as there is no accreditation.

### *VIII. 7) Regular assessment tests*

NO

### *VIII. 8) Supervision of the expert's mission*

NO

### *VIII. 9) Expert's activity report*

NO

### *VIII. 10) Code of ethics*

The expert must undertake to make all his investigations with impartiality and to the best of his competences.

### *VIII. 11) Good practice*

There are written, published rules that are not mandatory, such as the Code of Conduct and Guidelines for experts before civil jurisdictions.

### *VIII. 12) Possibility of penalties*

An expert can be replaced by another expert or his rates decreased at the end of his mission.

### ***VIII. 13) Laws governing the expert's status***

NO

### **IX. Bibliography**

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## **19. POLAND**

### **Contributing correspondents**

**Stanislas DABROWSKI**, *First President of the Supreme Court*

**Wasek WIADEREK**, *Supreme Court*

### **Authors**

**Christian EMORINE**, *Consultant*

**Béatrice DESHAYES**, *Avocat & Rechtsanwältin Partner- HW&H*

### **Other administrative order**

YES

## **I. Procedural rules in calling for an expert examination**

### ***I. 1) On the initiative of***

The Court appoints an expert at the request of one of the parties or on its own motion if it deems it necessary.

### ***I.2) Mandatory expert examinations***

Yes, in certain cases: for example in cases dealing with disabled persons, in the division of a joint agricultural property, or in matters of inheritance related to an estate that comprises an agricultural holding.

### ***I. 3) Decision-maker***

The judge

### ***I.4) Is a pre-trial expert examination possible?***

NO

## **II. Choice and appointment of the expert(s)**

### ***II. 1) Register***

Each Regional Court has a register of experts listed for a period of 5 years.

In order to be registered, an expert must be in full possession of his citizens' rights and be at least 25 years old. He must furthermore prove he has the necessary competence in his field of expertise (a requirement that is at the discretionary appreciation of the President of the Regional Court) and guarantee the diligent execution of his missions as well as expressly accept his registration as an expert.

### ***II. 2) Oath***

An expert that is thus registered is sworn in once - this is valid for the entire duration of his registration: the oath is not renewed every time the Court is seised. If the need arises, the Court may appoint an "ad hoc" expert who is not registered and who will swear an oath when he is heard by the Court.

### ***II. 3) Choice of the Expert***

The judge alone decides, although the parties can suggest the number and names of the experts. The judge is not bound by the parties' requests.

A report by a party-appointed expert is but one element among others that can be produced in support of the party's thesis.

### ***II. 4) Participation by the parties in the appointment process***

YES

### ***II. 5) Nationality***

Irrelevant

### ***II. 6) Recusal by the litigant parties***

A judicial expert can be recused by a party on the same grounds as a judge, and more generally when there are duly proven facts that may lead to doubts on his impartiality.

After the start of the expert examination, recusal is only possible if the party calling for it proves that the alleged motive was born after the beginning of the proceedings or that it was unaware of it when the expert was appointed.

### ***II. 7) Expert's withdrawal (refusal of a mission)***

The appointed expert can withdraw on the same grounds as a witness (including in civil proceedings) or because of a material impossibility to carry out the mission.

### ***II. 8) Possibility of adding another expert***

The judge can decide to call in several experts, including in identical fields. The expert report must then be signed jointly by all the appointed experts.

### ***II. 9) Possibility of being assisted by a colleague***

There is no provision for this particular procedure.

## **III. DEFINITION OF THE EXPERT'S MISSION**

### ***III. 1) Who determines the mission?***

The mission is set out by the judge and the expert must conform to it.

### ***III. 2) Type of mission***

The judge can modify the terms of the on-going mission and extend the deadline.

## **IV. PROGRESS OF THE EXPERT'S MISSION**

### ***IV. 1) Judge supervision***

The judge supervises the progress of the expert's mission and may participate in it. He sets the time limits and can order the disclosure of elements related to the proceedings that will help the expert carry out his mission.

#### **IV. 2) Form of contradictory procedure**

This depends on the type of mission assigned by the judge.

“Deferred” contradictory procedure, *ex-post*, by the expert’s presence at the hearing in order to enable the parties to question him.

#### **IV. 3) Participation in the hearing**

The expert is summoned to the court hearing to be questioned by the parties.

### **V. Close of the expert examination**

#### **V. 1) Does conciliation put an end to the expert’s mission?**

Yes, as it puts an end to the civil suit and renders the expert’s mission null.

#### **V. 2) Form imposed on the report**

The expert submits a report – the judge decides whether this report is to be written or verbal.

The report must support the expert’s findings.

#### **V. 3) Does the report put an end to the expert’s mission?**

No, as he must present himself to the hearing to be questioned by the parties.

#### **V. 4) Is there an imposed structure for the report?**

UNSPECIFIED

#### **V. 5) Is a preliminary report mandatory?**

NO

#### **V. 6) Is the judge bound by the expert’s conclusions?**

The court is not bound by the expert’s opinion. Case law provides that the judge cannot assess the expert report in fields that are not of his competence but that he must evaluate its degree of persuasiveness by the clear and rational analysis it develops.

#### **V. 7) Possibility of a second opinion**

The judge can ask for a second opinion- namely by appointing another expert to this end.

### **VI. Funding for the expert examination**

#### **VI. 1) Security-Payment**

If the Court has appointed an expert *ex officio*, advance payment is temporarily made by the Public Treasury. If the expert is appointed by one of the parties, they must pay the advance determined by the judge (maximum time frame is two weeks, Article 130, Code of Civil Procedure).

## ***VI. 2) Determining the amount of payment due***

By the judge

## ***VI. 3) Possibility of additional payment***

YES

## ***VI. 4) Determining fees and costs***

The Court determines the payment based on rates set out by law.

As a general rule, the unsuccessful party bears the burden of legal costs, including the expert's fees.

## ***VI. 5) Possibility of contesting the fees***

YES

# **VII. Expert liability within proceedings**

## ***VII. 1) Are there any laws governing expert examinations?***

Code of Civil Procedure

Law of 27<sup>th</sup> July 2001 on judicial organisation (Art.157).

Ministry of Justice Decree of 23<sup>rd</sup> February 2007, on the rules governing ordinary jurisdictions.

Ministry of Justice Decree of 24<sup>th</sup> January 2005, on Legal Experts.

Ministry of Justice Decree of 9<sup>th</sup> March 1968, on the fees for bailiffs (Art. 46-48).

Ministry of Health Decree of 27<sup>th</sup> December 2007, on Experts in the field of alcoholism.

Decree of 26<sup>th</sup> October 1950 on the fees for witnesses, experts, and parties in judicial procedures.

Ministry of Justice Decree of 18<sup>th</sup> December 1975, on expert fees in judicial proceedings.

Law of 28<sup>th</sup> July 2005 on legal fees in civil matters.

There is no representative institutional structure for legal experts as such, but there are private bodies.

## ***VII. 2) Expert liability***

The expert is liable for negligence in accordance with ordinary law.

A sworn expert who has voluntarily failed to comply with the rule of sincerity can face criminal charges (with a maximum prison term of three years).

The expert can be fined if he withdraws on no justifiable grounds, if he does not fulfil his mission or is late with no justifiable cause.

## ***VII. 3) Mandatory insurance for the expert***

NO

# **VIII. The expert's status**

## ***VIII. 1) Existence of selection criteria (accreditation)***

YES



**VIII. 2) Classification of skills**  
UNSPECIFIED

**VIII. 3) Required qualifications**  
Accreditation

**VIII. 4) Grant of accreditation**  
Justice

**VIII. 5) Possibility of accrediting a legal person**  
A qualified legal person can be summoned as an expert. In this case, one or several representatives are appointed to carry out the mission, and will all sign the expert's report.

**VIII. 6) Validity period for the accreditation**  
5 years

**VIII. 7) Regular assessment tests**  
No, but when applying for a renewal of accreditation, the expert must prove that he has improved/maintained his technical competence.

**VIII. 8) Supervision of the expert's mission**  
NO

**VIII. 9) Expert's activity report**  
NO

**VIII. 10) Code of ethics**  
No general code, but expert organisations in each field of competence lay down their own ethical rules. Breaching these rules can lead to a withdrawal of the expert's accreditation.

**VIII. 11) Good practice**  
UNSPECIFIED

**VIII. 12) Possibility of penalties**  
YES

**VIII. 13) Laws governing the expert's status**  
Code of Civil Procedure (Art. 193-1 & following) + Law of 27<sup>th</sup> July 2001 on judicial organisation (Art. 157).

**IX. Bibliography**

*The answer comprises 18 references, of which only the ones concerning civil procedure have been reproduced below:*

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J.Turek, Rola biegłego we współczesnym procesie (*The Expert's Role in Current Procedures*), Varsovie, 2002.

### **Major specialist journals and periodicals concerning the work of experts:**

- ☐ Archiwum Medycyny Sądowej i Kryminologii [Forensic Medicine & Criminology Archive];
- ☐ Paragraf na drodze [Article on the Road];
- ☐ Prawo i Medycyna [Law & Medicine];
- ☐ Problems of Forensic Sciences;
- ☐ Problemy Kryminalistyki [Problems of Criminalistics];
- ☐ Prokuratura i Prawo [Prosecution Service & Law].

### **List of selected recent publications on experts:**

1. Bucoń G., Dopuszczalność «opinii prywatnej» w procesie karnym [The Admissibility of a "Private Expert Report" in Criminal Proceedings], Państwo i Prawo [The State & Law] 2009, No. 3;
2. Całkiewicz M., Wykorzystanie opinii biegłego w polskim procesie karnym [The Use of Expert Report in Polish Criminal Proceedings], Problemy Kryminalistyki [Problems of Criminalistics] 2008, No. 259;
3. Gaberle A., Dowody w sądowym procesie karnym, Teoria i praktyka [Evidence in Criminal Proceedings, Theory & Practice], Warsaw 2010;
4. Grzeszczyk W., Rola opinii biegłego w postępowaniu karnym [The Role of Expert Reports in Criminal Proceedings], Prokuratura i Prawo [Prosecution Service & Law] 2005, No. 6;
5. Gurgul J., Jeszcze w sprawie roli biegłego w postępowaniu karnym [Some More Words About the Role of an Expert in Criminal Proceedings], Prokuratura i Prawo [Prosecution Service & Law] 2006, No. 2;
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7. R. Cisek R., Czapigo A., Rola biegłego a rola specjalisty w procesie karnym - aspekty praktyczne na tle rozważań modelowych [The Role of an Expert vs. the Role of a Specialist in Criminal Proceedings: Practical Aspects Against the Background of Model Deliberations], Prokuratura i Prawo [Prosecution Service & Law] 2000, No. 9;
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## **20. PORTUGAL**

### **Contributing correspondent**

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### **Authors**

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### **Other administrative order**

UNSPECIFIED

## **I. Procedural rules in calling for an expert examination**

### ***I. 1) On the initiative of***

The expert examination is called for on the initiative of a party or of a judge.

When it is requested by a party, the party must define the factual elements on which the expert will have to give an opinion.

If the judge believes the expert's opinion will be useful he must hear the other party first. The expert examination can be based on facts put forward by both parties.

### ***I.2) Mandatory expert examinations***

### ***I. 3) Decision-maker***

The judge

### ***I.4) Is a pre-trial expert examination possible?***

UNSPECIFIED

## **II. Choice and appointment of the expert(s)**

### ***II. 1) Register***

The judge gives priority to appointing an establishment, a laboratory, or a public service, failing which he appoints an expert among people reputed competent in the applicable field.

If it is necessary to call for experts in various specialisations, the judge appoints the experts.

Forensic reports are drawn up by forensic laboratories or expert doctors. Expert opinions related to other specialisations are carried out by laboratory experts or official services.

Magistrates and diplomats cannot be appointed as experts.

## ***II. 2) Oath***

UNSPECIFIED

## ***II. 3) Choice of the Expert***

The judge asks the competent authority to suggest experts according to the needs of the case.

## ***II. 4) Participation by the parties in the appointment process***

If only one expert is to be appointed, the judge must ask the parties' opinion (they can suggest an expert). If the parties agree on an expert, the judge must appoint said expert unless there is sufficient reason to doubt he is fit or competent for the task.

If one of the parties asks for a panel of experts to be appointed, and if the parties agree on the names of the experts, the judge must appoint them unless there is sufficient reason to doubt they are fit or competent for the task. If the litigants do not agree on the experts, each party as well as the judge must select one. If there are more than 2 parties, the majority of the parties decides. If they cannot reach a majority, the judge decides.

## ***II. 5) Nationality***

UNSPECIFIED

## ***II. 6) Recusal by the litigant parties***

Experts are subject to the same rules as judges.

## ***II. 7) Expert's withdrawal (refusal of a mission)***

Persons who are called upon may refuse to act as experts for personal reasons.

## ***II. 8) Possibility of adding another expert***

The expert opinion may be given by 1 to 3 experts who may work together or separately, or by assigned topics. The expert examination is carried out by a panel if it is too complex, if it involves several specialities or if one of the parties requests it.

## ***II. 9) Possibility of being assisted by a colleague***

The expert may request all the necessary means for the fulfilment of his mission – for example medical or other examinations.

# **III. DEFINITION OF THE EXPERT'S MISSION**

## ***III. 1) Who determines the mission?***

The judge determines the subject of the expert examination.

## ***III. 2) Type of mission***

UNSPECIFIED

## **IV. PROGRESS OF THE EXPERT'S MISSION**

### ***IV. 1) Judge supervision***

UNSPECIFIED

### ***IV. 2) Form of contradictory procedure***

The expert must advise the parties as to the dates and hours at which the expert meetings will take place if they can legally participate in these meetings.

The parties can participate in the expert examination and be assisted by a technician unless said technician has a higher level of expertise than the appointed expert or if he can compromise a secret protected by one of the parties.

The parties must reply to the expert's questions and can make all the observations they deem useful.

### ***IV. 3) Participation in the hearing***

The parties or the judge can ask the expert to participate in a hearing. In this case, experts that belong to a public body are heard by video conference from their workplace.

The experts must be present at the final hearing if one of the parties or the judge has requested their presence, and they must then give their testimony under oath. In this case, experts that belong to a public body are heard by video conference from their workplace.

## **V. Close of the expert examination**

### ***V. 1) Does conciliation put an end to the expert's mission?***

UNSPECIFIED

### ***V. 2) Form imposed on the report***

The result of the expert examination is finalised in the expert's report. If there are several experts and they do not agree, they must provide reasons for their disagreement.

The judge does not play any part in the expert's written report.

### ***V. 3) Does the report put an end to the expert's mission?***

If the expert opinion cannot be concluded with the submittal of the report, the judge sets a time limit of no more than 30 days. This deadline must be duly reasoned and can only be renewed once.

### ***V. 4) Is there an imposed structure for the report?***

UNSPECIFIED

### ***V. 5) Is a preliminary report mandatory?***

UNSPECIFIED

### ***V. 6) Is the judge bound by the expert's conclusions?***

NO

### ***V. 7) Possibility of a second opinion***

When the final report has been submitted, the parties can file a complaint if they consider that there has been a lack of due diligence, if they believe that the report is unclear or contradictory on certain points or if the expert's findings are not supported by enough facts. If the claims are valid or if the judge himself deems it necessary, the judge will ask the expert to complete, clarify or better justify his report.

## **VI. Funding for the expert examination**

### ***VI. 1) Security-Payment***

UNSPECIFIED

### ***VI. 2) Determining the amount of payment due***

UNSPECIFIED

### ***VI. 3) Possibility of additional payment***

UNSPECIFIED

### ***VI. 4) Determining fees and costs***

The expert's fees are determined by the judge within the limits provided for by law and are paid by the party who requested the expert's opinion. The cost of the expert's mission is borne by all the parties if they all have an interest in it or if they will all benefit from it or if it is impossible to determine in whose best interest it is to carry out the examination.

### ***VI. 5) Possibility of contesting the fees***

UNSPECIFIED

## **VII. Expert liability within proceedings**

### ***VII. 1) Are there any laws governing expert examinations?***

The Civil Code, the Code of Civil Procedure and the Regulation on legal costs.

The expert must accomplish his mission in an efficient way. He can request all the necessary means to complete his task successfully and all the elements pertaining to the legal proceedings. If in order to fulfil his mission the expert must destroy or modify an object, he must first ask the judge for permission to do so. If this is the case, the proceedings must contain a description and if possible a photograph of the object. If the object is a document, the proceedings must keep a certified copy of it.

### ***VII. 2) Expert liability***

An expert can be fined if he does not cooperate with the Court. The judge can recuse him if he does not complete his examination and submit his report within the set time limits.

### ***VII. 3) Mandatory insurance for the expert***

UNSPECIFIED

## **VIII. The expert's status**

*There are no expert associations.*

### *VIII. 1) Existence of selection criteria (accreditation)*

UNSPECIFIED

### *VIII. 2) Classification of skills*

UNSPECIFIED

### *VIII. 3) Required qualifications*

UNSPECIFIED

### *VIII. 4) Grant of accreditation*

UNSPECIFIED

### *VIII. 5) Possibility of accrediting a legal person*

The expert can be a legal person.

### *VIII. 6) f) Validity period for the accreditation*

UNSPECIFIED

### *VIII. 7) Regular assessment tests*

UNSPECIFIED

### *VIII. 8) Supervision of the expert's mission*

UNSPECIFIED

### *VIII. 9) Expert's activity report*

UNSPECIFIED

### *VIII. 10) Code of ethics*

UNSPECIFIED

### *VIII. 11) Good practice*

UNSPECIFIED

### *VIII. 12) Possibility of penalties*

UNSPECIFIED

### *VIII. 13) Laws governing the expert's status*

UNSPECIFIED

## **X. Bibliography**



## **21. CZECH REPUBLIC**

### **Contributing correspondents**

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**Daniel CHABANOL**, *Honorary (French) State Councilor*

**Alain NUEE**, *First President of the Court of Appeal of Versailles (France)*

**Patricia GRANDJEAN**, *Councilor at the Court of Appeal of Versailles (France)*

### **Other administrative order**

YES

## **I. Procedural rules in calling for an expert examination**

### ***I. 1) On the initiative of***

According to law, the decision lies exclusively with the judge when a particular knowledge is needed in order to determine the facts of the case.

It is only when the case is more complex that an expert is appointed and this appointment usually takes place before the beginning of the trial before the judge.

### ***I.2) Mandatory expert examinations***

An expert opinion is mandatory in the event of a death and subsequent autopsy (nb: autopsies are very commonly practiced in the Czech Republic).

### ***I. 3) Decision-maker***

The judge

### ***I.4) Is a pre-trial expert examination possible?***

Unspecified

## **II. Choice and appointment of the expert(s)**

### ***II. 1) Register***

Experts must be registered on lists established by regional courts. The Ministry of Justice has a national register of 10,372 individual experts.

There is a separate register of 442 public or legal persons who are especially entitled to carry out expert missions.

However, the judge may appoint an unregistered expert if there is none in the required specialist field or in extremely complex disputes that demand highly specialised skills (i.e. universities, clinics etc.)

## ***II. 2) Oath***

Experts take an oath once only, when they are first registered.

## ***II. 3) Choice of the Expert***

The parties or the judge

## ***II. 4) Participation by the parties in the appointment process***

Within the production of evidence, the parties can bring forward the opinion of experts of their choice.

## ***II. 5) Nationality***

Experts are of Czech nationality save some exceptions.

## ***II. 6) Recusal by the litigant parties***

The parties can call for the expert's recusal if they consider that he is biased, but the decision belongs to the judge.

## ***II. 7) Expert's withdrawal (refusal of a mission)***

The expert cannot give his opinion if he has a doubt as to his independence or his impartiality as regards the disputes, the parties to the trial, their representatives or any other person involved in the litigation.

## ***II. 8) Possibility of adding another expert***

With the judge's authorisation it is possible for the expert to be assisted by another expert.

A specialist advisor can be called in to fulfil part of the examination for reasons that must be substantiated in the report. A specialist advisor's involvement does not modify the expert's liability and the advisor's fees can be taken into account only if his involvement was authorised by the jurisdiction.

## **II. 9) Possibility of being assisted by a colleague**

The expert can be assisted by persons without whom his mission could not be carried out. They are paid in accordance with the law.

# **III. Definition of the expert's mission**

## ***III. 1) Who determines the mission?***

The judge determines the complete mission and asks specific questions. He can ask the expert to make a mere statement of facts. The parties have the right to ask questions, generally through their lawyers, but the judge decides whether the answer is necessary as to the substance of the case.

## ***III. 2) Type of mission***

All

## **IV. PROGRESS OF THE EXPERT'S MISSION**

### ***IV. 1) Judge supervision***

The expert is the sole person responsible for the fulfilment of his mission but he must answer the judge's questions and respect the deadlines for his report. The courts control the proportionality and amount of experts' fees.

### ***IV. 2) Form of contradictory procedure***

The contradictory procedure is not mandatory.

However the parties to the trial and third parties can be called upon to cooperate with the expert in order to facilitate his work.

### ***IV. 3) Participation in the hearing***

When summoned by the judge, the expert presents his report at the hearing.

## **Y. Close of the expert examination**

### ***V. 1) Does conciliation put an end to the expert's mission?***

UNSPECIFIED

### ***V. 2) Form imposed on the report***

The judge usually summons the expert to present his written report in verbal form although this is not mandatory.

### ***V. 3) Does the report put an end to the expert's mission?***

Usually the mission ends when the expert is heard by the court and possibly questioned by the parties based on their right to contest the evidence.

### ***V. 4) Is there an imposed structure for the report?***

When a public institution has been appointed to carry out an expert examination, the written report shows the name of the expert who carried out the mission and the name of the person in charge of representing the institution during the hearing.

### ***V. 5) Is a preliminary report mandatory?***

It is not standard practice to make preliminary reports.

### ***V. 6) Is the judge bound by the expert's conclusions?***

As regards the law, the expert's opinion is an element of proof. The judge assesses the intrinsic value of each piece of evidence and their global value as related to each other. This principle applies fully to expert opinions. The judge is not bound by the expert's findings but he must give due reason not to rely on the conclusions or, on the contrary, explain why he believes they are sufficient evidence.

### ***V. 7) Possibility of a second opinion***

The parties have the right to criticise the expert examination as they do any other piece of evidence.

They can rely on their own expert examination which will be considered as another form of written evidence. The judge must decide on the credibility of the expert's opinion and of its value as proof. If necessary, the judge can ask for a counter-examination.

## **VI. Funding for the expert examination**

### ***VI. 1) Security-Payment***

The claimant and possibly the other parties must pay an advance on the expert's fees. The deposit is determined by the judge and lodged with the court. The total amount of the expert's fees is determined after the report has been submitted. All the trial costs including the expert's fees are borne by the unsuccessful party.

The State only pays the expert's fees in exceptional cases, for example if one of the parties is a public body or within the context of legal aid.

### ***VI. 2) Determining the amount of payment due***

The judge

### ***VI. 3) Possibility of additional payment***

YES

### ***VI. 4) Determining fees and costs***

Payment is ensured based on a legal scale established by the Ministry of Finance. It varies according to the required level of specialisation for the fulfilment of the mission, the time spent and the difficulty of the question asked. The hourly rate varies between 100 and 350 crown plus additional expenses.

The total amount of the expert's pay is determined after the report has been submitted. All the trial costs including the expert's fees are borne by the unsuccessful party.

The State only pays the expert's fees in exceptional cases, for example if one of the parties is a public body or within the context of legal aid.

### ***VI. 5) Possibility of contesting the fees***

UNSPECIFIED

## **VII. Expert liability within proceedings**

### ***VII. 1) Are there any laws governing expert examinations?***

Expert missions are governed by the law of evidence. Some of the expert's duties are defined by the Code of Civil Procedure and the role of experts and interpreters is defined by a Law (36/1967). All experts, whether they are private or legal persons, must be listed on a register drawn up by the regional courts.

### ***VII. 2) Expert liability***

The Code of Civil Procedure grants the parties the right to prosecute the expert for the same damages

as can be claimed against a judge.

The judge can also order a counter-examination which will be entrusted to another expert.

### ***VII. 3) Mandatory insurance for the expert***

Court experts must be insured.

## **VIII. The expert's status**

### ***VIII. 1) Existence of selection criteria (accreditation)***

All the experts, whether they are natural or legal persons, must be listed on a register drawn up by the regional courts.

After ensuring the required qualifications have been met, the judge delivers the Accreditation to the expert (natural person only).

### ***VIII. 2) Classification of skills***

Experts are classified according to their field of expertise and their specialisation, which corresponds to two levels of classification (ex: in the field of transportation, they are listed as air, maritime, rail, road, urban, warehousing, and trans-shipment).

### ***VIII. 3) Required qualifications***

Assessment of knowledge

### ***VIII. 4) Grant of accreditation***

Jurisdictions

### ***VIII. 5) Possibility of accrediting a legal person***

YES

### ***VIII. 6) f) Validity period for the accreditation***

Permanent

### ***VIII. 7) Regular assessment tests***

The expert's competence is tested every four years by the civil court when the register is renewed, and his activity is monitored qualitatively and quantitatively.

### ***VIII. 8) Supervision of the expert's mission***

Qualitative and quantitative

### ***VIII. 9) Expert's activity report***

YES

### VIII. 10) Code of ethics

According to the above-mentioned Law 36/1967, the expert has the following obligations:

- carry out his examination with diligence and within the set time-limits.
- personally carry out the examination process.
- attend the hearing at the judge's request and present his report orally.
- promptly make the reasons known for which he would be allowed not to submit his report (withdrawal).
- keep the archives of his reports.
- if there is no reason preventing him from presenting the report, he is obligated to do so. He must follow the judge's instructions. He must also sign the written report and authenticate it with a seal.

### VIII. 11) Good practice

YES

### VIII. 12) Possibility of penalties

The following penalties can be imposed on an expert:

- warning if he does not fulfil his obligations,
- dismissal and striking off from the Register of experts if he fails to meet his obligations after a warning,
- procedural fine imposed by the judge ruling on ordinary issues if the expert does not submit his report in due time or fails to meet one of his obligations.
- two-year prison sentence and prohibition to practice if his conduct constitutes perjury or the presentation of false (grossly deceitful or incomplete) testimony.

An amendment to the law on experts and interpreters is currently being drafted. This law could impose specific administrative infringements and financial penalties that would relate specifically to experts.

### VIII. 13) Laws governing the expert's status

Experts are grouped in various associations (Chamber of Experts of the Czech Republic, of Moravia, and of Silesia) that are common law organisations which experts have no obligation to join.

## IX. Bibliography

The newest publications in the field are from 2009 (one being a commented text of Act No. 36/1967 Col. *on experts and interpreters*, the other dealing with the position of judicial experts in criminal proceedings), otherwise there is no significant publication activity in the field:

DÖRFL, Luboš. *Zákon o znalcích a tlumočnících: komentář*. Vyd. 1. Praha : C.H. Beck, 2009. 191 s. ISBN 9788074001482.

FRYŠTÁK, Marek; KREJČÍ, Zdeněk. *Postavení znalce v trestním řízení*. 1. vyd. Brno : Masarykova univerzita, 2009. 167 s. ISBN 9788021049550

The Chamber of Judicial Experts of the Czech Republic publishes an internal journal *Expert*, which is available only for the members of the Chamber

## **22. ROMANIA**

### **Contributing correspondent**

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### **Authors**

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**Alix Loubeyre**, *Doctoral student*

### **Other administrative order**

There is no separate administrative jurisdiction; administrative proceedings are identical to ordinary proceedings.

### **i. procedural rules in calling for an expert examination**

#### *I. 1) On the initiative of*

Claimant.

#### *I.2) Mandatory expert examinations*

Not in civil law

#### *I. 3) Decision-maker*

The judge

In civil matters, the parties have the right to choose the experts, and if they do not agree, they ask the judge to appoint one. The parties can agree on the choice of expert. If the expert is appointed by the judge, the appointment is made on the recommendation of the local office for expertise, among the persons who are referenced on the Nominal Chart of Experts, drafted by the Ministry of Justice.

#### *I.4) Is a pre-trial expert examination possible?*

Only a “private” expert opinion, at the parties’ request, is possible. This is an extrajudicial expert examination and it can allow the launch of an *in futurum* lawsuit.

A pre-trial expert examination is not possible.

## **II. Choice and appointment of the expert(s)**

### *II. 1) Register*

*The expert can be either a civil servant or a private person.*

Index of experts: dates of identification and specialisation of each expert.

Capacity as judicial expert granted by the Ministry of Justice on examination or interview and registration on a regional chart by specialisation.

## ***II. 2) Oath***

Yes, the expert must swear an oath before being heard in court.

## ***II. 3) Choice of the Expert***

If the parties cannot agree, the expert is appointed by the court in public proceedings by random draw from the register established and published by the local expertise office.

## ***II. 4) Participation by the parties in the appointment process***

YES

## ***II. 5) Nationality***

The law requires experts to be a Romanian national, or a national of an EU country, or a member of the European Economic Area, or a national from the Swiss Confederation.

## ***II. 6) Recusal by the litigant parties***

The expert can be recused for the same reasons as the judge:

1. when the expert has an interest in the judgement of the case or when s/he is the spouse, a parent or relative up to the 4<sup>th</sup> degree of one of the parties;
2. when the expert is the spouse, a parent or relative in direct or indirect line up to and including the fourth degree of one of the parties' lawyers or representatives or if married to the brother or sister of one the lawyers or representatives;
3. when the expert is the spouse, parent or relative of one of the parties including up to the fourth degree;
4. if the expert, his/her spouse or their relatives up to the fourth degree have a case similar to that which is being judged or if they have a case at court in which one of the parties is judge;
5. if in the five years prior to the challenge there has been a criminal trial between the same person and one of the parties;
6. if the expert is guardian or trustee to one of the parties;
7. if the expert has expressed an opinion on the case being judged;
8. if the expert has received gifts/ liberalities from one of the parties or a promise of such gifts or other exchange;
9. if there is enmity between the expert, his spouse or one of his relatives up to the fourth degree and one of their spouses, relatives up to the third degree included.

## ***II. 7) Expert's withdrawal (refusal of a mission)***

Yes, if he withdraws and the withdrawal is accepted by the judge, or if he is barred from the register.

## ***II. 8) Possibility of adding another expert***

The expert can request a technical consultation / be assisted by another expert, with the judge's authorisation.

Each of the parties has the right to request the appointment of an expert of their choice to participate in the expert examination.



## ***II. 9) Possibility of being assisted by a colleague***

YES

## **III. DEFINITION OF THE EXPERT'S MISSION**

### ***III. 1) Who determines the mission?***

The judge sets the time limits and determines the questions that must be answered in the expert's report.

The parties may make observations on the questions and may ask for them to be modified.

### ***III. 2) Type of mission***

Fixed mission. The expert cannot answer outside the scope of the examination but he can clarify it with additional information.

## **IV. PROGRESS OF THE EXPERT'S MISSION**

### ***IV. 1) Judge supervision***

Yes, the judge sets the time limits and determines the questions that must be answered in the expert's report.

### ***IV. 2) Form of contradictory procedure***

The contradictory procedure is mandatory.

### ***IV. 3) Participation in the hearing***

Yes, if ordered by the judge.

## **V. close of the expert examination**

### ***V. 1) Does conciliation put an end to the expert's mission?***

YES

### ***V. 2) Form imposed on the report***

The expert's mission ends when he presents his written report unless additional written explanations are needed or the expert is summoned to give further, verbal explanations on the expert report.

### ***V. 3) Does the report put an end to the expert's mission?***

Yes but clarifications can be requested in written form or by summons to the hearing for oral explanations.

***V. 4) Is there an imposed structure for the report?***

Yes, the report must respect the elements of content defined by law.

***V. 5) Is a preliminary report mandatory?***

No, it is not mandatory.

***V. 6) Is the judge bound by the expert's conclusions?***

The judge must confirm the report with other evidence, and the law does not provide for a predominant value of the expert report (expert opinions are not proof positive). If he has doubts as to the accurateness of the findings, he may order a new expert examination.

***V. 7) Possibility of a second opinion***

YES

## **VI. Funding for the expert examination**

***VI. 1) Security-Payment***

Experts' fees are determined by the court depending on how complex the work is, how much time it will take, and on the expert or the specialist's professional or scientific rank. The judge informs the parties on the amount to be paid. The parties pay the expert with an advance deposit and settlement, within 5 days from the notification at the local expertise office. Private experts are also paid by the parties.

***VI. 2) Determining the amount of payment due***

By the judge

***VI. 3) Possibility of additional payment***

Yes, if the judge considers it is justified.

***VI. 4) Determining fees and costs***

Experts' fees are determined by the court depending on how complex the work is, how much time it will take, and on the expert or the specialist's professional or scientific rank.

***VI. 5) Possibility of contesting the fees***

Yes, the parties can contest the amount of the payment; there is a list with the maximum fees applicable.

## **VII. Expert liability within proceedings**

***VII. 1) Are there any laws governing expert examinations?***

The status of legal experts is regulated by Government Ordinance N° 2/2000 on the organisation of judicial and extrajudicial technical expertise with ulterior changes and completions and by Regulation N° 1322/2000 on the acquisition of the capacity as technical expert and specialist, with the ulterior

changes and completions.

Expert examination is provided for in Articles 201-214, in Article 241<sup>13</sup> of the Code of Civil Procedure, and in Articles 116-125 of the Code of Criminal Procedure.

There are no regional or linguistic specificities, as Romania is a national State, unitary and indivisible, and its official language is Romanian.

#### ***VII. 2) Expert liability***

Yes, there is disciplinary and criminal liability.

There are three disciplinary penalties: a written warning, a suspension of the right to carry out an expert examination for a period of three months to one year, and a withdrawal of the capacity as legal technical expert.

#### ***VII. 3) Mandatory insurance for the expert***

NO

### **VIII. The expert's status**

#### ***VIII. 1) Existence of selection criteria (accreditation)***

The Ministry of Justice grants the capacity as legal expert and the capacity as extrajudicial expert on the basis of an *examination* or interview. Any person who acquires this capacity and is referenced in the nominal chart of technical and legal experts - based on professional specialisations, on departments, and the municipalities of Bucharest - is a legal expert.

#### ***VIII. 2) Classification of skills***

The nominal chart of experts, issued by the Central Office of the Ministry of Justice, includes the identification dates and specialisations of each expert.

#### ***VIII. 3) Required qualifications***

Within the Ministry of Justice, there is the *Central Office for technical and legal expertise*, and in courts, there are local offices for technical expertise and accounting (Article 4 of the Government Ordinance N° 2/2000 on the organisation of judicial and extrajudicial technical expert work).

The examination for legal experts is organised by the Ministry of Justice and aims to verify *the knowledge of future experts in the field for which they are going to apply, the level of assimilation of these normative acts as regards their field of specialisation, their understanding of the provisions of the codes of civil and criminal procedure on expert examination and other normative acts that regulate expertise and the rights and obligations of experts.*

#### ***VIII. 4) Grant of accreditation***

The capacity as legal expert and his specialty are proven by means of an expert card issued by the Central Office for technical and legal expertise.

The nominal chart for legal experts includes identification data according to specialisations and departments and depending on the expert's place of residence. It is published every year in the Official Journal of Romania, Section IV, and is sent to the local offices for the courts' legal expertise

(Article 11, subparagraph 3 of the Government Ordinance N° 2/2000 cited above).

#### **VIII. 5) Possibility of accrediting a legal person**

A legal person can be appointed as an expert.

#### **VIII. 6) Validity period for the accreditation**

Enrolment on the register is definite, without any validity period. Experts can ask to be withdrawn from the register.

#### **VIII. 7) Regular assessment tests**

Expert competences are reviewed by order of the Ministry of Justice, who approves the *Regulation on the organisation and implementation procedure of exams for the award of the capacity as legal expert and of the review and examination of specialists*. For example, these competences were modified in 2010 by Order N° 203/2010, published in Official Journal N° 83 of 8<sup>th</sup> February 2010.

Classes, symposiums, and conferences are regularly organised.

#### **VIII. 8) Supervision of the expert's mission**

Not answered

#### **VIII. 9) Expert's activity report**

NO

#### **VIII. 10) Code of ethics**

The expert is subject to a general obligation of conscientiousness, loyalty, and impartiality, and must respect professional secrecy. He must also conform to all the rules and principles of the development of the trial.

#### **VIII. 11) Good practice**

NO

#### **VIII. 12) Possibility of penalties**

Penalties may be imposed on the judicial expert:

There are three disciplinary measures: a written warning, the suspension of the right to perform expert examinations for a period of 3 months to 1 year, and the withdrawal of the capacity as legal technical expert.

#### **VIII. 13) Laws governing the expert's status**

Experts can form professional associations. The status of legal experts is regulated by Government Ordinance no. 2/2000 on the organisation of judicial and extrajudicial technical expertise and by Regulation no. 1322/2000 on the acquisition of the capacity as technical expert and specialist.

Expert examinations are provided for in Articles 201-214 and Art. 241<sup>13</sup> of the Code of Civil Procedure.

There are no regional or linguistic specificities, as Romania is a national State, unitary and indivisible, and its official language is Romanian.

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## **23. SLOVAKIA**

**Contributing correspondent**

**Barbora KOVACIKOVA**, *Division of expert interpreters-translators at the Ministry of Justice*

**Author**

**Alix Loubeyre**, *Doctoral student*

### **Other administrative order**

Yes

### **I. Procedural rules in calling for an expert examination**

#### *I. 1) On the initiative of*

The judge, after hearing the parties.

#### *I.2) Mandatory expert examinations*

Not in civil matters

#### *I. 3) Decision-maker*

The judge

#### *I.4) Is a pre-trial expert examination possible?*

UNSPECIFIED

### **II. Choice and appointment of the expert(s)**

#### *II. 1) Register*

YES

#### *II. 2) Oath*

YES

#### *II. 3) Choice of the Expert*

The judge chooses an expert from the register managed by the Ministry of Justice but may also appoint an expert who is not registered if circumstances require it.

#### *II. 4) Participation by the parties in the appointment process*

YES

#### *II. 5) Nationality*

All

#### *II. 6) Recusal by the litigant parties*

Possible if the parties consider that the expert lacks impartiality.  
However, the decision lies with the judge.



## ***II. 7) Expert's withdrawal (refusal of a mission)***

Yes, if there is a risk of conflict of interests or a doubt on the expert's independence and impartiality.

## ***II. 8) Possibility of adding another expert***

Yes, but the expert must give due reason of his request for an additional expert

## ***II. 9) Possibility of being assisted by a colleague***

YES

# **III. DEFINITION OF THE EXPERT'S MISSION**

## ***III. 1) Who determines the mission?***

The judge, who asks the expert all the questions he must answer

## ***III. 2) Type of mission***

All

# **IV. PROGRESS OF THE EXPERT'S MISSION**

## ***IV. 1) Judge supervision***

Yes, the judge can oblige the parties to cooperate with the expert, if this is necessary for him to accomplish his mission.

## ***IV. 2) Form of contradictory procedure***

Deferred. The parties can ask questions based on the expert's report.

## ***IV. 3) Participation in the hearing***

On request - it sometimes depends on the type of mission involved.

# **V. Close of the expert examination**

## ***V. 1) Does conciliation put an end to the expert's mission?***

UNSPECIFIED

## ***V. 2) Form imposed on the report***

Written report

## ***V. 3) Does the report put an end to the expert's mission?***

Generally yes, but the expert can also be summoned to the hearing.

## ***V. 4) Is there an imposed structure for the report?***

Provision is made in Law N° 382/2004 and Ordinance N° 490/2004 of the formal requirements regarding the structure of the report.

## ***V. 5) Is a preliminary report mandatory?***

NO



***V. 6) Is the judge bound by the expert's conclusions?***

No, but the judge must give due reason as to why he has not followed the expert's recommendations.

***V. 7) Possibility of a second opinion***

YES

**VI. Funding for the expert examination**

***VI. 1) Security-Payment***

UNSPECIFIED

***VI. 2) Determining the amount of payment due***

UNSPECIFIED

***VI. 3) Possibility of additional payment***

YES

***VI. 4) Determining fees and costs***

Agreement between the judge and the expert, or can be determined according to various methods: hourly rate, payment of the different acts involved in the expert examination.

***VI. 5) Possibility of contesting the fees***

UNSPECIFIED

**VII. Expert liability within proceedings**

***VII. 1) Are there any laws governing expert examinations?***

Yes, Law N° 382/2004 stipulates that in order to be registered, experts must swear an oath before the Ministry of Justice and swear to respect the constitution, the law, and more generally all the mandatory rules and ethical principles (moral and ethical) of expertise.

***VII. 2) Expert liability***

Civil liability

***VII. 3) Mandatory insurance for the expert***

Yes, henceforth experts must have professional insurance covering damages up to 33193 euros.

**VIII. The expert's status**

***VIII. 1) Existence of selection criteria (accreditation)***

Yes, criteria provided for by law and evaluation by the Ministry of Justice. Refusals of registration can be appealed.

***VIII. 2) Classification of skills***

Yes, under Law N° 382/2004 on experts, interpreters and translators, legal experts are classified in 51 fields, including sectors specified by Ministry of Justice Directive N° 7/2009 on the organisation of

the work of experts, interpreters, and translators.

### ***VIII. 3) Required qualifications***

- Training/diploma in the expert's chosen field
- Successful completion of the expert's approval exam
- Successful completion of the exam on legislation/rules of procedure applicable to expert examinations

### ***VIII. 4) Grant of accreditation***

Ministry of Justice

### ***VIII. 5) Possibility of accrediting a legal person***

YES

### ***VIII. 6) f) Validity period for the accreditation***

Life

### ***VIII. 7) Regular assessment tests***

Generally every five years, includes verification of the expert's activity reports.

### ***VIII. 8) Supervision of the expert's mission***

YES

### ***VIII. 9) Expert's activity report***

Yes, twice a year

### ***VIII. 10) Code of ethics***

YES

### ***VIII. 11) Good practice***

YES

### ***VIII. 12) Possibility of penalties***

Yes, depends on the importance of what the expert is accused of.

- Written warning
- Fine
- Prohibition to practice for a maximum period of one year
- Removal from the register

### ***VIII. 13) Laws governing the expert's status***

Yes

- Law 382/2004 on experts, interpreters, and translators
- Ordinance 490/2004
- Ordinance 491/2004 on the payment of experts
- Ordinance 492/2004
- Law N° 99/1963 Code of Civil Procedure
- Law N° 372/1992

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## **24. SLOVENIA**

**Contributing correspondents**  
**Dr. Mateja KONČINA PETERNEL**, *Supreme Court*

**Author**  
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### **Other Administrative order** YES

#### **I. Procedural rules in calling for an expert examination**

*I. 1) On the initiative of*  
The judge, after asking the parties' opinion.

*I.2) Mandatory expert examinations*  
YES

*I. 3) Decision-maker*  
The judge

*I.4) Is a pre-trial expert examination possible?*  
UNSPECIFIED

#### **II. Choice and appointment of the expert(s)**

*II. 1) Register*  
List established and administered by the Ministry of Justice.

*II. 2) Oath*  
Yes, before the Minister of Justice

*II. 3) Choice of the Expert*  
The judge

*II. 4) Participation by the parties in the appointment process*  
YES

## ***II. 5) Nationality***

EU or EEA – Slovenian speakers

## ***II. 6) Recusal by the litigant parties***

YES, for the same reasons as for judges: ties to the parties, previous expert examination in the same case before a lower court, or if other circumstances make his impartiality uncertain.

The move for recusal must be made when the judge hears the parties to decide on the expert's appointment or at the latest before the expert report has been submitted.

## ***II. 7) Expert's withdrawal (refusal of a mission)***

Yes, but must be justified.

## ***II. 8) Possibility of adding another expert***

YES for extremely complex missions.

## ***II. 9) Possibility of being assisted by a colleague***

No, since all the experts who participate in the mission must be appointed by the judge in order to allow for the parties to be able to recuse them.

# **III. DEFINITION OF THE EXPERT'S MISSION**

## ***III. 1) Who determines the mission?***

The judge - he determines the object of the report and the questions to be answered, and if necessary he asks the expert complementary questions.

## ***III. 2) Type of mission***

All types

# **IV. PROGRESS OF THE EXPERT'S MISSION**

## ***IV. 1) Judge supervision***

NO

The expert can ask for clarifications on certain points or to be able to consult files pertaining to the case. He can also ask for necessary additional elements.

## ***IV. 2) Form of contradictory procedure***

Insofar as is possible, the judge transmits the expert's findings before the hearing (Art. 253 CPC).

The judge also transmits the preliminary report with a deadline before which the parties can make their own observations.

#### ***IV. 3) Participation in the hearing***

At the judge's request

### **v. close of the expert examination**

#### ***V. 1) Does conciliation put an end to the expert's mission?***

YES

#### ***V. 2) Form imposed on the report***

Written

#### ***V. 3) Does the report put an end to the expert's mission?***

YES

#### ***V. 4) Is there an imposed structure for the report?***

There are non-official standards prepared by legal expert associations in each field of specialisation.

#### ***V. 5) Is a preliminary report mandatory?***

YES

#### ***V. 6) Is the judge bound by the expert's conclusions?***

NO – based on the principle of free assessment of evidence by the judge (Art. 8 CPC)

#### ***V. 7) Possibility of a second opinion***

YES if the expert's findings are incomplete or if they contradict themselves on various points

### **VI. Funding for the expert examination**

#### ***VI. 1) Security-Payment***

Yes, the party having requested the expert opinion pays, or the Court itself if it has decided that the expert opinion is necessary - for example in family law in the best interests of the child. The unsuccessful litigant reimburses the trial costs, including the expert examination.

#### ***VI. 2) Determining the amount of payment due***

The judge

#### ***VI. 3) Possibility of additional payment***

Yes, but rarely

#### **VI. 4) Determining fees and costs**

The fees are officially set in the “Rules on court experts and court valuers”.

Transport, accommodation and food expenses, as well as loss of earnings must be reimbursed to the expert.

#### **VI. 5) Possibility of contesting the fees**

YES

### **VII. Expert liability within proceedings**

#### **VII. 1) Are there any laws governing expert examinations?**

YES

Civil Procedure Act:

Rules on Court Experts and Court Valuers

See Bibliography

#### **VII. 2) Expert liability**

Yes, the expert’s civil liability can be incurred if the general conditions of professional liability are filled, that is to say, if breaching these professional standards has caused damage to a third party.

#### **VII. 3) Mandatory insurance for the expert**

NO

### **VIII. The expert’s status**

#### **VIII. 1) Existence of selection criteria (accreditation)**

YES, defined in the Code of Civil Procedure and specific texts on experts.

Provides for general criteria, a written test of knowledge and competence, and an oath taken before the Minister of Justice.

#### **VIII. 2) Classification of skills**

YES, by the Ministry, on the recommendations of specialised bodies.

#### **VIII. 3) Required qualifications**

YES

#### **VIII. 4) Grant of accreditation**

By the Ministry of Justice after consultation with a commission of experts in the same field whose members must be at least as qualified as the applicant (professional organisation / public body), and a written exam.

#### ***VIII. 5) Possibility of accrediting a legal person***

Yes, namely scientific bodies (hospitals, laboratories, universities...)

There are specialised public bodies in certain fields (counterfeit currency, graphology, fingerprinting...) In these cases, they are automatically appointed to do the work.

#### ***VIII. 6) f) Validity period for the accreditation***

Subject to compliance with the obligation of continuous training.

#### ***VIII. 7) Regular assessment tests***

YES tests may be made mandatory by the Ministry with an aim to ensure that experts in specific specialisations are up-to-date in the new methods or technologies developed in their respective fields.

#### ***VIII. 8) Supervision of the expert's mission***

YES

#### ***VIII. 9) Expert's activity report***

NO

#### ***VIII. 10) Code of ethics***

YES, general rules of the Code of Civil Procedure (Article 251)

The expert must respect the rules of the CPC, and commits to testifying and delivering all his findings and his opinion.

He must give a detailed account of all his discoveries and is informed of the consequences of perjury.

#### ***VIII. 11) Good practice***

Yes, experts learn about "good practice" during training courses organised by expert associations in each field of specialisation.

#### ***VIII. 12) Possibility of penalties***

YES. A fine that cannot exceed 1300 euros if the expert does not present himself before the court without any justification after having been officially invited to do so or if he refuses to carry out the examination without giving any explanation for his withdrawal.

On request of one of the parties, the judge can order the expert to reimburse the costs brought about by his unjustified absence, his refusal to hand in his report, or his delay in submitting said report.

#### ***VIII. 13) Laws governing the expert's status***

YES

Even the duration of the expert examination is codified: normally 30 days with a possible extension to 60 days.

Once he has been instructed by the judge, the expert has 15 days to inform the Court if he believes he will be unable to submit his report within the deadline.

In this event and if so required by exceptional circumstances, the Court can extend the deadline.

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### **Rules on Court Experts and Court Valuers**

Official Gazette of the Republic of Slovenia, no. 88/2010 (Pravilnik o sodnih izvedencih in sodnih cenilcih).



## **25. SPAIN**

### **Authors**

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### **Other administrative order**

YES

### **I. Procedural rules in calling for an expert examination**

#### ***I. 1) On the initiative of***

It is up to the parties in a civil trial to add expert examinations to their grievances when scientific, artistic, technical or practical knowledge is necessary to evaluate relevant facts or circumstances on the case or to establish certainties from them.

In exceptional cases the law provides that the civil judge can appoint the expert: legal aid, procedure of parentage, paternity, maternity, disability, or when the parties jointly decide to ask the judge to appoint an expert.

#### ***I.2) Mandatory expert examinations***

In disability trials, Article 759 LEC *in fine* does not allow the judge to render a decision without calling for medical expertise. The judge must request a medical expert's opinion whether or not the parties have appointed their own experts.

#### ***I. 3) Decision-maker***

It is possible for expert examinations not to be taken into account by the judge if they are neither useful nor relevant nor necessary for the resolution of the trial in which they were included. However the parties (lawyers) decide whether or not to present the expert's opinion with their initial court arguments.

#### ***I.4) Is a pre-trial expert examination possible?***

The parties can ask the judge for a new deadline in which to present their report when there are new allegations by one party and the other considers that an expert examination is necessary based on new evidence.

In the same way, if within the deadline one of the parties has been unable to present its expert report, it can ask the judge for an extension, which is usually granted.

## **II. Choice and appointment of the expert(s)**

### ***II. 1) Register***

For private expert opinions (most cases in civil law), there are no registers of legal experts, and lawyers can appoint experts registered on professional orders or in expert companies or associations.

For court appointments, in January of each year, specialised professional organisations (official orders or “colegios” of doctors, architects, etc. and private expert companies or associations as well as academic institutions) draw up a register of at least five members who have stated that they accept to be appointed as experts.

A first legal expert is appointed by random lottery from one of these registers (unless none of them corresponds to the necessary technical skill). Then the following experts are appointed by alphabetical order.

If there is no adequate official register, the court can appoint an unregistered expert. If need be, an expert can be appointed, even if he does not have a formal professional title, if all the litigants unanimously agree.

A civil servant can be appointed as expert, such as a university professor enrolled on his institution's register.

A legal person can be an expert if its competence corresponds to the required specialty, such as a laboratory or a university department. It will have to appoint a liable person from among its members who will sign the report.

It is possible to have a corporate expert examination.

### ***II. 2) Oath***

Court-appointed experts take a written oath before the court registrar at the start of each mission. In private expert examinations, experts will have to take these oaths at the beginning of each hearing, and swear he will tell the whole truth, that he has acted or, if need be, will act, with the greatest possible objectivity, taking into account not only what could favour one of the parties as much as that which could harm them, and that he knows the penalties he could incur should he fail to accomplish his mission as an expert.

### ***II. 3) Choice of the Expert***

The parties choose the expert who will carry out the mission in support of their claims. If the expert is court-appointed, the judge must forward the request to the Court in charge of expertise (*Juzgado Decano*) for it to select a sworn expert from the register.

### ***II. 4) Participation by the parties in the appointment process***

In exceptional cases (Article 339.3 LEC), the parties can agree to ask the judge to call for a court-appointed expert because of additional allegations or claims permitted at the hearing. The judge considers the relevance of this request and its usefulness for the trial.

## ***II. 5) Nationality***

Most official orders allow for the integration of a foreign professional. There is no legal basis to his registration with the order he belongs to.

## ***II. 6) Recusal by the litigant parties***

Legal experts can be recused by a litigant if there are duly proven facts which could nurture doubt about his sincerity or objectivity. A testimony is accepted as form of evidence. The recusal is at the court's discretion.

Let us note that a litigant's expert cannot be recused, but can be contested by another litigant for the same reasons, which can divest his report of its probative value. The court rules over the rationale behind this contestation. Contrary to the legal expert's recusal, a litigant's expert recusal cannot rely on testimony.

The guarantee of the expert's impartiality are the oath sworn to tell the truth, the possibility of recusal when the the expert examination is ordered by a judge, and default for a party-appointed expert.

## ***II. 7) Expert's withdrawal (refusal of a mission)***

After being appointed by the court, the expert is notified very shortly (Article 342 LEC) and has two days to signify his acceptance or his refusal of the mission. The refusal should be motivated by a just cause, including if he is materially unable to carry it out.

## ***II. 8) Possibility of adding another expert***

There is no provision for a procedure to add another expert to assist or collaborate in an expert examination.

## ***II. 9) Possibility of being assisted by a colleague***

There is no provision for a procedure to add another expert to assist in an expert examination although if the expert considers he must be helped by a colleague, he can be, as long as his request is duly reasoned (chemical analyses of construction materials in an architect's expert examination, for example).

# **III. Definition of the expert's mission**

## ***III. 1) Who determines the mission?***

The mission is determined by the party who has appointed him and by the judge. The expert must abide by it.

There is no text preventing the intervention of another expert, but the appointed expert is the only one liable for the good progress of his mission.

## ***III. 2) Type of mission***

All

## **IV. Progress of the expert's mission**

### ***IV. 1) Judge supervision***

The judge supervises the good progress of the expert's mission, can set deadline and order expert examination measures.

### ***IV. 2) Form of contradictory procedure***

The expert must respect the contradictory procedure by telling the litigants of his proceedings according to procedures which will preserve their rights.

However, he does not have to call on the litigants for all his operations, unless they request it of the court, and it grants this request.

If a litigant hinders the good progress of the expert's mission, the judge can order him to end his obstruction.

The parties can intervene in the expert's proceedings (Article 345 LEC).

### ***IV. 3) Participation in the hearing***

The expert can be called in for a hearing by the court, confronted with the litigants' questions and with other experts, especially the litigants' experts.

## **V. Close of the expert examination**

### ***V. 1) Does conciliation put an end to the expert's mission?***

UNSPECIFIED

### ***V. 2) Form imposed on the report***

Procedural law does not provide that the report be in a specific format. It must be submitted in written form and written in Castilian Spanish or in the language of the Autonomous Community of the jurisdiction in which the affair is being held.

It must include all the necessary intellectual and material elements necessary to the court's good understanding and the discussion with the litigants.

### ***V. 3) Does the report put an end to the expert's mission?***

The expert submits a written report which does not necessarily put an end to his mission. In any event, if the parties request it, the expert will have to go to the hearing to confirm and explain the content of his report (Article 347 LEC).

### ***V. 4) Is there an imposed structure for the report?***

NO

### ***V. 5) Is a preliminary report mandatory?***

NO

#### ***V. 6) Is the judge bound by the expert's conclusions?***

The court is not bound by the expert's opinion, but must always argue any total or partial rejection of his conclusions. In order to follow or disregard an expert's findings, the judge must base himself on the principle of "healthy criticism" provided for in Article 348 LEC and duly reason his decision, most notably if there are several experts with the same opinion. "Healthy criticism" does not mean free or discretionary evaluation by the judge, but it does imply a duly motivated evaluation.

#### ***V. 7) Possibility of a second opinion***

YES

### **VI. Funding for the expert examination**

#### ***VI. 1) Security-Payment***

Paid by the person requesting the expert examination. The expert requests a large part of his total final fees when he accepts a mission. If within 5 days the party requesting the judge for an expert opinion has not deposited the amount requested by the expert, the expert remains free from having to do his report (Article 342.3 LEC).

#### ***VI. 2) Determining the amount of payment due***

The expert decides the amount of this initial payment and the court can later rule on the correction of this payment (in practice the Court hardly ever contests the expert's fees unless the amount is really excessively high). The Court can in certain cases increase the payment if the expert proves that new acts need to be carried out. The initial deposit is an advance on the final payment.

#### ***VI. 3) Possibility of additional payment***

Yes, if the mission must be extended to include other issues.

#### ***VI. 4) Determining fees and costs***

Fees are set by the expert and paid by the litigant who requested the expert's appointment.

When issuing its judgement, the court usually burdens the unsuccessful litigant with the fees, as long as the expert's intervention was considered useful, and within the limit of a third of the quantum of the damage for which compensation is attributed.

#### ***VI. 5) Possibility of contesting the fees***

YES

### **VII. Expert liability within proceedings**

#### ***VII. 1) Are there any laws governing expert examinations?***

Civil procedure law of January 7 2000 (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil ou « LEC »), art. 335 à 352.

The expert must respect the professional rules which regulate his specialty.

He must be honest and objective, which implies the absence of personal or economic ties to any of the litigants, which would compromise his impartiality and his independence.

There is no representative structure for legal experts as such.

The expert takes a written oath for each appointment and includes the corresponding formula into his report.

#### ***VII. 2) Expert liability***

The expert may be held civilly liable in conditions of common law: existence of misconduct, prejudice, and causal tie between one and the other.

Intentional breach of the rule of honesty on the expert's part, when he has taken an oath, can lead to criminal penalty, which can also be complemented by a temporary disqualification of his professional title.

#### ***VII. 3) Mandatory insurance for the expert***

No, although each order or association can oblige experts to take out civil liability insurance.

### **VIII. The expert's status**

#### ***VIII. 1) Existence of selection criteria (accreditation)***

NO

Automatic when one belongs to an institution or expert association.

#### ***VIII. 2) Classification of skills***

Set by the institution to which the expert belongs.

#### ***VIII. 3) Required qualifications***

Required qualifications, or  
in-depth knowledge when there is no specific academic title that validates the profession (Article 340 LEC).

Set by the institution to which the expert belongs or by the universities.

#### ***VIII. 4) Grant of accreditation***

Automatically results from belonging to an expert institution or association.

#### ***VIII. 5) Possibility of accrediting a legal person***

YES, possible appointment of a legal person but with a preference for renowned universities and / or scientific establishments.

**VIII. 6) Validity period for the accreditation**

Set by the institution to which the expert belongs.

**VIII. 7) Regular assessment tests**

NO

**VIII. 8) Supervision of the expert's mission**

There is no specific disposition for this case.

**VIII. 9) Expert's activity report**

NO

**VIII. 10) Code of ethics**

Yes, they are set by the institution to which the expert belongs.

**VIII. 11) Good practice**

Yes, set by the institution to which the expert belongs.

**VIII. 12) Possibility of penalties**

No, only by the institution to which the expert belongs.

Disciplinary penalties by the Court.

**VIII. 13) Laws governing the expert's status**

Civil procedure law of January 7 2000 (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil ou « LEC »), art. 335 à 352.

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Sonia Monserrate Gutiérrez Muñoz, *La prueba pericial en el proceso civil*, Ed. Bosch, Biblioteca bàsica de pràctica procesal n° 121, 2009 (with CD-rom and a significant bibliography as an appendix to this book).

[www.cogiti.es](http://www.cogiti.es) = General Council of the Official Colleges of Industrial Technique Experts and Engineers

[www.cscae.com/uapfe](http://www.cscae.com/uapfe) = Union of the Legal Expert Architects of Spain

[www.cgcom.org](http://www.cgcom.org) = General Council of the Official Colleges of Medical Doctors

[www.refor.org](http://www.refor.org) = Register of Legal Expert Economists

## **26. SWEDEN**

**Contributing correspondent**  
**Kerstin NORMAN**, *Supreme Court*

**Author**  
**Gilbert MOUTHON**, *Expert*

### **Other administrative order**

UNSPECIFIED

### **I. procedural rules in calling for an expert examination**

#### *I. 1) On the initiative of*

Generally the judge appoints an expert at the request of one of the parties and not of his own motion.

#### *I.2) Mandatory expert examinations*

In civil cases that are not part of a conciliation procedure, for example in child custody cases, an expert is generally appointed by the judge.

#### *I. 3) Decision-maker*

The judge

#### *I.4) Is a pre-trial expert examination possible?*

UNSPECIFIED

### **II. choice and appointment of the expert(s)**

#### *II. 1) Register*

There is no official register.

Selection depends on the person's experience, competence, and reputation.

He must take an oath before the court when summoned to give his testimony.

#### *II. 2) Oath*

Yes, experts who give oral testimony must also take an oath.

#### *II. 3) Choice of the Expert*

When the judge chooses an expert, he often consults a government body to find a person with the required qualifications.

Sometimes the Court deems it necessary to submit its question to a trade or industrial association.

#### *II. 4) Participation by the parties in the appointment process*

The judge and the parties are entirely free in selecting an expert.



The judge and the parties themselves can appoint experts but it is however more frequent for the parties to appoint a private expert.

Civil servants can be legally appointed as experts.

In civil cases that are not part of a conciliation procedure, it is common for experts to be chosen among persons belonging to a regulated profession.

Before the expert is appointed by the Court, the parties have the possibility to give their opinion on the proposed expert.

## ***II. 5) Nationality***

UNSPECIFIED

## ***II. 6) Recusal by the litigant parties***

Recusal of an expert is admissible even when it is not explicit.

The Code of Procedure sets out the rules guaranteeing experts' impartiality. There is a law regulating recusal for judges and it is generally admitted that experts can be recused by the parties based on the same grounds as those for judges.

## ***II. 7) Expert's withdrawal (refusal of a mission)***

See above

Legal documents governing experts are in Chapter 40 of the Code of Procedure.

## ***II. 8) Possibility of adding another expert***

An expert can be assisted by another expert. Depending on the circumstances, an agreement by the parties or the judge who appointed the expert may be needed.

## ***II. 9) Possibility of being assisted by a colleague***

UNSPECIFIED

# **III. DEFINITION OF THE EXPERT'S MISSION**

## ***III. 1) Who determines the mission?***

The judge

The expert prepares his report completely independently.

He must follow the time limits set by the judge.

If necessary, the judge can ask the expert additional questions.

## ***III. 2) Type of mission***

UNSPECIFIED

# **IV. PROGRESS OF THE EXPERT'S MISSION**

## ***IV. 1) Judge supervision***

The expert prepares his report completely independently.

He must conform to the time limits set by the judge.

In certain cases, the judge can also provide the expert with detailed instructions as to how to carry out his mission: for example, the judge can ask the expert to carry out an inspection in the presence of the parties.

#### *IV. 2) Form of contradictory procedure*

Unspecified

#### *IV. 3) Participation in the hearing*

On request

### **VI. Close of the expert examination**

#### *V. 1) Does conciliation put an end to the expert's mission?*

UNSPECIFIED

#### *V. 2) Form imposed on the report*

Unless otherwise stated, experts submit a written report to the Court or to the parties. The parties who have appointed a private expert can decide whether or not they need the expert's conclusions during the proceedings.

#### *V. 3) Does the report put an end to the expert's mission?*

Having lodged a written report with the court, the expert can also present an oral report at the parties' or the judge's request.

#### *V. 4) Is there an imposed structure for the report?*

UNSPECIFIED

#### *V. 5) Is a preliminary report mandatory?*

UNSPECIFIED

#### *V. 6) Is the judge bound by the expert's conclusions?*

Judges are not bound by the expert's conclusions.

#### *V. 7) Possibility of a second opinion*

UNSPECIFIED

### **VI. Funding for the expert examination**

#### *VI. 1) Security-Payment*

UNSPECIFIED

**VI. 2) *Determining the amount of payment due***  
UNSPECIFIED

**VI. 3) *Possibility of additional payment***  
UNSPECIFIED

**VI. 4) *Determining fees and costs***

In civil cases where settlements are possible, experts appointed by the parties are paid by the parties themselves. In other cases, the expert's fees are borne by the State.

**VI. 5) *Possibility of contesting the fees***  
UNSPECIFIED

**VII. Expert liability within proceedings**

**VII. 1) *Are there any laws governing expert examinations?***

The legal texts governing experts are in Chapter 40 of the Code of Procedure.

**VII. 2) *Expert liability***

Civil and criminal liability

**VII. 3) *Mandatory insurance for the expert***

UNSPECIFIED

**VIII. The expert's status**

**VIII. 1) *Existence of selection criteria (accreditation)***

UNSPECIFIED

**VIII. 2) *Classification of skills***

UNSPECIFIED

**VIII. 3) *Required qualifications***

UNSPECIFIED

**VIII. 4) *Grant of accreditation***

UNSPECIFIED

**VIII. 5) *Possibility of accrediting a legal person***

A legal person can be appointed as an expert.

**VIII. 6) f) Validity period for the accreditation**

UNSPECIFIED

**VIII. 7) Regular assessment tests**

UNSPECIFIED

**VIII. 8) Supervision of the expert's mission**

UNSPECIFIED

**VIII. 9) Expert's activity report**

UNSPECIFIED

**VIII. 10) Code of ethics**

The appointed expert must respect his duty as judicial expert.

There is a difference between a private expert and a court-appointed expert.

**VIII. 11) Good practice**

UNSPECIFIED

**VIII. 12) Possibility of penalties**

Penalties can be imposed on judicial experts: the court can impose a suspended fine on an expert who has not respected the Code of Procedure. In certain circumstances, the expert can also bear the costs of the legal procedure.

For civil servants, disciplinary penalties can be applied for 10 severe cases.

**VIII. 13) Laws governing the expert's status**

YES

The legal texts governing experts are in Chapter 40 of the Code of Procedure.

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## **27.1. UNITED KINGDOM - ENGLAND**

### **Contributing correspondents**

**Lord Phillips of WORTH MATRAVERS**, *First President of the Supreme Court*

### **Authors**

**Patrice HUVER**, *Expert*

**Christian EMORINE**, *Consultant*

### **Other administrative order**

NO

### **I. Procedural rules in calling for an expert examination**

As a preamble: when an expert's opinion is requested in judicial proceedings he is generally mandated by a party rather than by the judge. So the term "judicial expert" is slightly inaccurate in the context of English courts.

#### ***I. 1) On the initiative of***

The judge's decision is mainly based on the elements of evidence submitted to him by the parties. The parties have the burden of proof and thus decide to call for experts in order to express their opinion in a case.

In civil procedures, calling for an expert opinion is only possible with the prior permission of the court. In a criminal proceeding, an expert opinion can be given if all the parties have agreed to it, or with permission from the court.

#### ***I.2) Mandatory expert examinations***

NO

#### ***I. 3) Decision-maker***

The judge, whose agreement is mandatory.

#### ***I.4) Is a pre-trial expert examination possible?***

YES

### **ii. choice and appointment of the expert(s)**

#### ***II. 1) Register***

There is no register of experts, but they are listed within two organisations - the Academy of Experts and the Expert Witness Institute. The expert is above all the parties' technical counsel.

## ***II. 2) Oath***

UNSPECIFIED

## ***II. 3) Choice of the Expert***

The parties alone.

## ***II. 4) Participation by the parties in the appointment process***

The parties select the expert of their choice. The expert can be a civil servant. There is no register of experts, but they are listed within two organisations - the Academy of Experts and the Expert Witness Institute.

When two or several parties request an expert opinion on a specific issue, the judge may order the appointment of a jointly-named expert. If the parties cannot agree on the expert, the court may select one, but it is important to note that even in this case the expert is not considered court-appointed.

If they deem it necessary, the judges in civil trials reserve the right to call for one or more expert assistants of the court. Their pay is determined by the court, who can ask for it to be paid by one or several parties. In this context the expert has a real judicial role (to advise the judge) and is not considered as an expert witness: he cannot be counter-examined by the parties.

The court seeks to avoid hearing experts in the same field, but if necessary it can authorise a party to appoint several experts, including experts in the same field.

## ***II. 5) Nationality***

Irrelevant

## ***II. 6) Recusal by the litigant parties***

NO

## ***II. 7) Expert's withdrawal (refusal of a mission)***

An expert must not accept a mission if there is a conflict of interest that would appear to make him impartial. He must present objective proof and can be the subject of a complaint by a claimant if his opinion is founded solely on his beliefs.

## ***II. 8) Possibility of adding another expert***

The court seeks to avoid hearing experts in the same field, but if necessary it can authorise a party to appoint several experts, including experts in the same field. Moreover, should two or several parties request an expert opinion on a specific issue, the judge may order the appointment of a jointly-named expert. If the parties cannot agree on the expert, the court may select one, but it is important to note that even in this case the expert is not considered court-appointed.

## ***II. 9) Possibility of being assisted by a colleague***

YES

### III. DEFINITION OF THE EXPERT'S MISSION

#### *III. 1) Who determines the mission?*

The expert's mission is to provide the judge with his expert opinion and to clarify his approach and his findings, so as to enable the judge or jury to make up their own minds.

#### *III. 2) Type of mission*

All

### IV. PROGRESS OF THE EXPERT'S MISSION

#### *IV. 1) Judge supervision*

The expert must be able to carry out his mission without being influenced by the pressure of the dispute.

The judge does not get involved in the expert's work. However, he does play a preventive role in limiting the conflicts that could arise during or following the expert mission:

By ensuring equal access to data for the parties' experts

By demanding discussion and exchanges between the experts

By allowing the appointment of only one expert named jointly with the court's assistant expert

The court can intervene when the considered expert missions could generate disproportionate costs.

#### *IV. 2) Form of contradictory procedure*

Not mandatory

#### *IV. 3) Participation in the hearing*

In complex cases and with the court's permission experts can be called to bear oral testimony at the trial.

### V. Close of the expert examination

#### *V. 1) Does conciliation put an end to the expert's mission?*

YES

#### *V. 2) Form imposed on the report*

In civil cases, barring particular exceptions, the product of the expert mission must be submitted in written form. The report is communicated to all the parties, who then have the right to ask questions, also in written form. The replies to these questions are an integral part of the report.

*V. 3) Does the report put an end to the expert's mission?*

NO

*V. 4) Is there an imposed structure for the report?*

NO

*V. 5) Is a preliminary report mandatory?*

NO

*V. 6) Is the judge bound by the expert's conclusions?*

NO

*V. 7) Possibility of a second opinion*

YES

## **VI. Funding for the expert examination**

*VI. 1) Security-Payment*

By the parties

*VI. 2) Determining the amount of payment due*

By the parties

*VI. 3) Possibility of additional payment*

YES

The expert's fees are paid by the party that sought his involvement, through the party's lawyer.

*VI. 4) Determining fees and costs*

The expert's fees are paid by the party that sought his involvement, through the party's lawyer. In trial judgements, the fees can be borne by the unsuccessful party.

*VI. 5) Possibility of contesting the fees*

NO

## **VII. Expert liability within proceedings**

*VII. 1) Are there any laws governing expert examinations?*

YES

Civil Procedure Rules and Civil Evidence Act 1972.

*VII. 2) Expert liability*

UNSPECIFIED. However, a case is currently being examined by the Supreme Court concerning the



possibility of waiving the immunity from liability for civil pursuits as regards expert examinations.

### *VII. 3) Mandatory insurance for the expert*

## **VIII. The expert's status**

### *VIII. 1) Existence of selection criteria (accreditation)*

NO

### *VIII. 2) Classification of skills*

NO

### *VIII. 3) Required qualifications*

NO

### *VIII. 4) Grant of accreditation*

No accreditation

### *VIII. 5) Possibility of accrediting a legal person*

NO

### *VIII. 6) f) Validity period for the accreditation*

No accreditation

### *VIII. 7) Regular assessment tests*

NO

### *VIII. 8) Supervision of the expert's mission*

NO

### *VIII. 9) Expert's activity report*

NO

### *VIII. 10) Code of ethics*

YES

Professional organisations (Academy of Experts...) publish guides to this effect.

### *VIII. 11) Good practice*

YES

Professional organisations (Academy of Experts...) publish guides to this effect.

### **VIII. 12) Possibility of penalties**

The court can also instruct a report for the professional organisations to launch a possible disciplinary procedure. Lastly, a case is currently being examined by the Supreme Court concerning the possibility of waiving the immunity from liability for civil pursuits as regards expert examinations.

### **VIII. 13) Laws governing the expert's status**

YES

## **IX. Bibliography**

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The Criminal Procedure Rules 2010

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## **27.2. UNITED KINGDOM - SCOTLAND**

### **Contributing correspondents**

**Hon. Lord BRACADALE**, *Judge at the Supreme Court*

**Hon. Lord HODGE**, *Judge at the Supreme Court*

### **Authors**

**Alix Loubeyre**, doctoral student

### **Other administrative order**

NO

#### **i. procedural rules in calling for an expert examination**

##### ***I. 1) On the initiative of***

The judge can suggest to the parties that the Court would like to have the opinion of an expert on a particular subject.

He can also decide that a particular question should be “remit to a man of skill”.

The judge can also appoint an assessor to sit with him and counsel him on technical questions but this possibility is rarely used.

##### ***I.2) Mandatory expert examinations***

NO

##### ***I. 3) Decision-maker***

The judge or the parties.

##### ***I.4) Is a pre-trial expert examination possible?***

Yes, in some cases and with the parties' agreement, the judge can get explanations from an expert before ruling on technical issues in a dispute.

This enables the judge to understand the technical framework without addressing questions that are particular to the dispute and will be treated by the parties' experts.

## **II. Choice and appointment of the expert(s)**

### ***II. 1) Register***

There is no register of experts, as experts are above all technical counsels for the parties.

Each year however the Law Society of Scotland does publish a directory of experts, in which enrolment is obtained by application supported by 2 recommendations or on accreditation by another

professional body.

## ***II. 2) Oath***

Each time the expert testifies before the Court.

## ***II. 3) Choice of the Expert***

The parties alone in most cases.

If the judge decides to call for an expert, he appoints him.

## ***II. 4) Participation by the parties in the appointment process***

When the judge appoints an expert he generally discusses his choice with the parties.

## ***II. 5) Nationality***

Irrelevant

## ***II. 6) Recusal by the litigant parties***

A party can question the relevance of the expert's findings or his independence.

## ***II. 7) Expert's withdrawal (refusal of a mission)***

An expert can refuse a mission for the parties or for the Court.

## ***II. 8) Possibility of adding another expert***

If the judge names an assessor to sit with him, he must give his authorisation if the assessor needs the assistance of another expert.

If the expert is appointed by the parties, it depends of their private agreement.

## ***II. 9) Possibility of being assisted by a colleague***

YES

# **III. DEFINITION OF THE EXPERT'S MISSION**

## ***III. 1) Who determines the mission?***

If the expert is court-appointed, the court will determine the questions he must reply to, after consulting the parties.

## ***III. 2) Type of mission***

All

## **IV. PROGRESS OF THE EXPERT'S MISSION**

### *IV. 1) Judge supervision*

NO

### *IV. 2) Form of contradictory procedure*

Deferred. The expert's report is submitted to the parties. If they contest it, the expert will have to bear testimony in court and will be cross-examined by the parties and the judge.

### *IV. 3) Participation in the hearing*

*Yes, if needed*

## **V. Close of the expert examination**

### *V. 1) Does conciliation put an end to the expert's mission?*

YES

### *V. 2) Form imposed on the report*

No, but the Academy of Experts publishes models of standard reports and declarations.

### *V. 3) Does the report put an end to the expert's mission?*

No, if the parties contest the report, the expert must attend the hearing.

The assessor who assists the judge sits with him to hear the parties' arguments and discuss the means of evidence with the judge during deliberations.

### *V. 4) Is there an imposed structure for the report?*

NO

### *V. 5) Is a preliminary report mandatory?*

NO

### *V. 6) Is the judge bound by the expert's conclusions?*

NO

### *V. 7) Possibility of a second opinion*

YES

## **VI. Funding for the expert examination**

### *VI. 1) Security-Payment*

No, the norm is that the experts are paid after handing in their report.

#### ***VI. 2) Determining the amount of payment due***

Not applicable

#### ***VI. 3) Possibility of additional payment***

Not applicable

#### ***VI. 4) Determining fees and costs***

The expert's fees are negotiated between the expert and the party that sought his involvement and who pays him.

They can be borne, in part or in whole, by the unsuccessful party to the proceedings.

#### ***VI. 5) Possibility of contesting the fees***

Not applicable

### **VII. Expert liability within proceedings**

#### ***VII. 1) Are there any laws governing expert examinations?***

Scottish courts have no written, official rules on expert examinations. However, there is a convention according to which experts have a duty towards the judge in the finding of evidence and have a mission of assistance; they must hold no financial interest in the dispute and have no conflict of interests that could be detrimental to their mission towards the court.

The English practice according to which experts must certify in their report that they have respected certain obligations is not mandatory in Scotland but experts do however also have to respect these obligations.

This kind of declaration is in fact increasingly common in Scottish courts.

#### ***VII. 2) Expert liability***

An expert who knowingly provides false evidence can be sued for perjury and contempt of Court. In its judgement, the court can publicly criticise an expert who has been incompetent.

#### ***VII. 3) Mandatory insurance for the expert***

Most if not all experts have professional insurance.

The Court does not verify if experts are indeed insured.

### **VIII. The expert's status**

#### ***VIII. 1) Existence of selection criteria (accreditation)***

NO

#### ***VIII. 2) Classification of skills***

Not by the court but the "Directory of Expert-witnesses" published by the Law Society of Scotland

classifies the fields of competence.

### ***VIII. 3) Required qualifications***

NO

### ***VIII. 4) Grant of accreditation***

No accreditation

### ***VIII. 5) Possibility of accrediting a legal person***

Not very common. An expert from a specific institution would tend to write a report and mention that other people assisted him in his work.

However, in intellectual property law, the judge can ask the Patent Office to prepare a report.

### ***VIII. 6) f) Validity period for the accreditation***

No accreditation

### ***VIII. 7) Regular assessment tests***

Not applicable. Professional organisations may have their own rules for specific accreditation.

### ***VIII. 8) Supervision of the expert's mission***

Not applicable

### ***VIII. 9) Expert's activity report***

Not applicable

### ***VIII. 10) Code of ethics***

Yes. Professional organisations to which experts belong often have their own codes of ethics.

### ***VIII. 11) Good practice***

Yes. The Law Society of Scotland has published a guide of good practices that the persons registered in the directory of expert-witnesses must abide by.

Every year, the Academy of Experts of the United Kingdom also publishes a guide in partnership with magistrates.

### ***VIII. 12) Possibility of penalties***

No specific penalties. The Court can punish a witness who provides dishonest evidence and professional bodies can act if one of their members discredits their organisation.

### ***VIII. 13) Laws governing the expert's status***

No, only the rules regarding witnesses may apply to the status of experts.

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Macphail, “Sheriff Court Practice “ (3<sup>rd</sup> ed.)

Walker and Walker, “The Law of Evidence in Scotland” (3<sup>rd</sup> ed. 2009)

### **(b) English manuals frequently used in Scotland:**

Hodgkinson & James, “Expert Evidence. Law and Practice” (3<sup>rd</sup> ed. 2010), which is the major textbook,

Blom Cooper “Experts in the Civil Courts” (2006) and

Bond and Others “The Expert Witness: a Practical Guide” (3<sup>rd</sup> ed. 2007) which is a brief general guide.



## **NORWAY (NOT PART OF THE EU)**

**Kjersti BUUN NYGAARD**, *Assistant General Secretary of the Supreme Court*

### **Authors**

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**Christian EMORINE**, *Consultant*

### **Other administrative order**

NO

## **I. procedural rules in calling for an expert examination**

### ***I. 1) On the initiative of***

During the procedure: at the judge's own discretion, if it is necessary in order to establish the facts. At the request of one of the parties or both (and in this case the judge rarely refuses unless the measure seems disproportionate in relation to the dispute) or court-appointed.

In matters in which the parties do not have the free exercise of their will (personal status, parental authority...) the appointment can be made by the court even if the parties are opposed to it.

The judge can also, at one party's request, appoint an expert to ensure "a balance between the two parties" in the production of evidence, when the case can have repercussions that go beyond the trial itself.

First instance courts as well as appeal courts can appoint experts not to investigate the facts but as assessors or aldermen. In this case, the expert participates in the court's decision on the basis of the evidence presented during the public hearing.

### ***I.2) Mandatory expert examinations***

UNSPECIFIED

### ***I. 3) Decision-maker***

The judge alone.

### ***I.4) Is a pre-trial expert examination possible?***

Generally not, except in family matters (for example in determining parental authority).

## **II. CHOICE AND APPOINTMENT of the expert(s)**

### ***II. 1) Register***

For existing registers (doctors), the Council of Physicians determines the conditions for registering the

experts. The expert must prove to have sufficient general knowledge in forensics, basic knowledge of Norwegian law, and a particular expertise in one field of forensics.

There are no registers for civil procedures.

## ***II. 2) Oath***

At each mission.

## ***II. 3) Choice of the Expert***

The judge is generally free to select the expert he will appoint.

The expert must have the necessary competence and experience. If there is a register, the expert must generally be selected from it unless circumstances call for a third party to be appointed.

## ***II. 4) Participation by the parties in the appointment process***

If the parties have agreed on their choice of expert and if he has accepted the mission, he must be appointed, unless specific reasons oppose his appointment.

The parties must be “heard” in writing and can suggest a particular expert, but there is no hearing to rule on the request for an expert opinion.

## ***II. 5) Nationality***

No restrictions.

## ***II. 6) Recusal by the litigant parties***

On the same grounds as for judges

## ***II. 7) Expert's withdrawal (refusal of a mission)***

YES

## ***II. 8) Possibility of adding another expert***

Yes, by the judge

## ***II. 9) Possibility of being assisted by a colleague***

The expert is supposed to fulfil his mission alone but he can nevertheless be assisted by a third party. However this third party will be paid only if the court considers his assistance is an absolute necessity.

# **III. DEFINITION OF THE EXPERT'S MISSION**

## ***III. 1) Who determines the mission?***

The judge determines the content of the expert's mission and gives him the necessary instructions.

He can ask the parties to define the framework of the mission.

### ***III. 2) Type of mission***

All

## **IV. PROGRESS OF THE EXPERT'S MISSION**

### ***IV. 1) Judge supervision***

The appointed expert is under the obligation to fulfil the mission he was entrusted with. If he encounters obstacles when trying to obtain the necessary information from the litigants or from third parties, he can refer to the judge.

### ***IV. 2) Form of contradictory procedure***

The parties can make observations as regards the framework of the mission, and also once the report has been submitted. They can ask the expert questions at the hearing (after the report has been handed in) if he is heard by the court.

### ***IV. 3) Participation in the hearing***

Yes, at the request of the parties or the judge.

If the parties request that the expert be summoned to the hearing, the Court generally accepts.

## **V. Close of the expert examination**

### ***V. 1) Does conciliation put an end to the expert's mission?***

Yes: the judge informs the expert that he can put an end to his work.

### ***V. 2) Form imposed on the report***

The report must be presented in written form. The court can ask for an additional report.

The expert must mention the parties' opinions and respond to them if they are relevant to the fulfilment of his mission. He does not have to enclose all the documents filed by the parties but since he must give an account of his mission, he must mention if he has collected elements from the litigants or from third parties. He must describe his methodology, his results, and his reasoning.

### ***V. 3) Does the report put an end to the expert's mission?***

The court or one of the parties can ask the expert to present his report orally and/or answer questions or provide clarifications. The expert must then appear before the court according to the same rules that govern a witness.

### ***V. 4) Is there an imposed structure for the report?***

The report must be clear and detailed explanations given so that the court may understand exactly how the expert reached his conclusions.

### ***V. 5) Is a preliminary report mandatory?***

NO

***V. 6) Is the judge bound by the expert's conclusions?***

The judge is not bound by the expert opinion.

***V. 7) Possibility of a second opinion***

Yes, if the judge deems it necessary depending on the factual circumstances of the case.

**VI. Funding for the expert examination**

***VI. 1) Security-Payment***

If the expert opinion was requested by one of the parties, this party must bear the cost of advancing the payment. (one exception is for rulings implementing coercive measures in matters related to health and social services. In these cases, just as in criminal proceedings, the State pays the expert's fees).

***VI. 2) Determining the amount of payment due***

By the judge

***VI. 3) Possibility of additional payment***

UNSPECIFIED

***VI. 4) Determining fees and costs***

There are no specific statistics on the cost of a judicial examination: it can go from a few hundred euros to sums above 50,000€.

The expert is paid by a flat rate according to hourly rates set by law. These rates correspond to those of court-appointed lawyers within the context of legal aid.

***VI. 5) Possibility of contesting the fees***

YES

**VII. Expert liability within proceedings**

***VII. 1) Are there any laws governing expert examinations?***

YES

***VII. 2) Expert liability***

If

He is civilly liable towards the parties.

The expert can be sentenced to a fine if he does not answer the judge's questions or is absent at the hearing. However this is a theoretical possibility and in practice if the report has major faults or if the expert does not respect his main obligations, the judge can decide to replace him. His fees can be diminished if he does not respect the due requirements, He is civilly liable towards the parties.

***VII. 3) Mandatory insurance for the expert***

NON

## VIII. The expert's status

### *VIII. 1) Existence of selection criteria (accreditation)*

NO

### *VIII. 2) Classification of skills*

None

### *VIII. 3) Required qualifications*

Assessment of knowledge and experience.

### *VIII. 4) Grant of accreditation*

No accreditation.

### *VIII. 5) Possibility of accrediting a legal person*

Legal persons cannot be appointed, but the expert may be a member of a legal body such as a university laboratory or the like.

### *VIII. 6) f) Validity period for the accreditation*

No accreditation.

### *VIII. 7) Regular assessment tests*

NO

### *VIII. 8) Supervision of the expert's mission*

NO

### *VIII. 9) Expert's activity report*

Not in civil matters.

### *VIII. 10) Code of ethics*

No, unless the expert is subject to it by his professional body (association, order...).

### *VIII. 11) Good practice*

NO

### *VIII. 12) Possibility of penalties*

Yes, (a fine) but they remain quite theoretical.

### *VIII. 13) Laws governing the expert's status*

UNSPECIFIED

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## PART 3 : Symposium Proceedings



### *the future of civil judicial expertise in the European Union*

.....  
*State of play and proposals*

### **le futur de l'expertise judiciaire civile dans l'Union Européenne**

.....  
**État des lieux et propositions**



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## **1. WELCOME ADDRESS AND PRESENTATION OF THE EUREXPERTISE PROJECT**



**M. Jean-Raymond LEMAIRE,  
President of the European  
Expertise and Expert Institute**

Ladies, Presidents of the Supreme Courts;  
Honourable Advocate General, representing the General Prosecuting Office of the Court of Cassation;  
Ladies and Gentlemen First Presidents and Presidents of the Courts of Appeal and Courts of Justice;  
Ladies and Gentlemen Presidents of the Bar Associations;  
Ladies and Gentlemen Presidents;  
Dear colleagues and dear friends,

I wish you all welcome to Brussels at the occasion of the symposium organised by the European Expertise and Expert Institute on “*The Future of Civil Judicial Expertise in the European Union; State of Play and Proposals*”.

Today is an important date in the history of the Institute.

In 2005 the Institute was created in the mind and with the resolve of a few people with the main objective of contributing to the emergence of high quality and harmonised judicial expertise within the European Union. The goal was ambitious, it remains so, but your presence today proves it is relevant and confirms that with your help it is an achievable objective.

In October 2006, a non-profit organisation was created. Based in VERSAILLES, the Institute was officially born, and moreover in a royal city steeped in history.

The founding idea was to bring together in one organisation high ranking magistrates, representatives from law organisations (bar associations), administrators of representative judicial expert

organisations, and academics...

The second formative idea lay in the will to infuse this Institute with the purpose of research, dialogue, and debate among all the actors who contribute to ensuring justice. However the Institute did not and *does* not aim to play a representative role in the European Union. It's a **think tank**.

Out of curiosity, while I was preparing my speech I looked up the definition of the phrase "think tank" in WIKIPEDIA and I'm giving it to you now as I find it particularly appropriate.

*"A think tank (or policy institute) is an organization that conducts research and engages in advocacy in areas such as social policy, political strategy, economics, military, and technology issues. Most think tanks are non-profit organizations".*

The third idea was to recruit members of the Institute at the regional level in the European Union - that is, at the level of Appeal courts or equivalent jurisdictions.

Today the Institute is made up of institutional members, i.e. members that represent an institution - appeal courts, bar associations, expert organisations, universities, and soon I hope, chambers of commerce and industry and chambers of artisans - as well as individual members.

The following road map was proposed by the founders of the Institute:

1. **Finance research works.** This action now leads us to financially assist researchers in doctoral theses on topics that the Institute's Scientific Committee studies and directs.  
For example: one researcher is working on the role of psychiatric experts in dealing with sexual crimes, in five countries. Her research focuses namely on responsibility, trial, the conditions of deprivation of liberty, medical care during this period, possible medical care after the sentence... She's present in this room and I would like to offer her my regards and encouragement.
2. **Present the Institute's works through a website**, statutorily in English and in French, but which aims to - and is able to - accept other languages.  
This site will sooner or later become one of, or better yet, *the* European databank.  
Incidentally, at the entrance you may have picked up a copy of the 100<sup>th</sup> issue of the quarterly journal, *La Revue Experts*, which focuses on experts and expertise. We have regular discussions with Bernard PECKELS, the editor in chief of this journal - who is present today and to whom I offer my regards - in order to work together on this European databank and on the development of a European journal.  
I would like to take this opportunity to mention that there is a very interesting interview in this 100<sup>th</sup> issue, with Alain NUEE, the First President of the Court of Appeal of VERSAILLES, on adversarial contractual appraisal.
3. **Organise meetings and symposiums** on a regular basis, so that the members of the Institute may meet and exchange their ideas, their experience, their wishes... This symposium illustrates this well.
4. **Answer European calls for projects** and propose to the European Commission, and most particularly to the DG Justice, projects that directly concern expertise, whether on civil or criminal matters.
5. Lastly, and it is not the easiest of tasks, although it certainly is the most pleasant, **extend the Institute's representativeness by "recruiting" new members**. Some of you in today's assembly have had to bear our unabashed praise of the merits of the Institute; I ask them to forgive me and thank them for their patience. I don't think they have held it against us, as they are here with us today.

## The EUREXPERTISE project

At the end of 2009, the Institute proposed the EUREXPERTISE project to the European Commission's Directorate-General for Justice. The project can be summarized in the following manner:

- draw up an inventory civil judicial expertise in all European Union countries;
- draw up an inventory of the rules governing experts (statuses, registries, obligations, oaths...);
- make an analysis of the inventoried material and reflect on guidelines for possible and/or indispensable harmonisation during a European symposium – this is the symposium that is beginning today;
- test the effectiveness of the consensus conference method outside the medical world;
- draft a White Paper of proposals.

I am not going to detail the progress of this project; other, much more qualified speakers will do so during the symposium.

Nevertheless, I would like to highlight a few important points.

My first point is of a financial nature and it can shed some light on the progress of the EUREXPERTISE project.

The European Commission allocated an important grant to the Institute for this project, but with two clauses that make it hard to use and hinder its effectiveness:

1. the need to provide a substantial financial guarantee (150 000 €) from a banking establishment; I would like to thank the COVEA Group for providing this guarantee;
2. the obligation for the Institute to finance 40% of the project's budget, while the grant covers the remaining 60%.

The inventory of rules and statuses was based on a questionnaire that was addressed to all the Supreme Courts of the European Union. I would like to thank Ms GRISS for her help. She was the President of the Supreme Court of Austria and the President of the Network of Supreme Court Presidents at the time. Ms GRISS will present a speech in a few minutes.

I would also like to thank Vincent LAMANDA, President of the French Court of Cassation, who not only was at the origin of the Institute, but also took the fruitful initiative of asking for help from the Network of Supreme Court Presidents and participated in drawing up the questionnaire.

A first consensus conference took place in France in 2007. It was jointly organised by the Court of Cassation and the Conference of First Presidents of the Courts of Appeal on the topic of *Civil Judicial Expertise in France*. A second consensus conference was organised in Belgium by the CNEJ (National College of Experts of Belgium) a founding member of the Institute, on the topic: *A Status for Judicial Experts in Belgium*; this conference took place in the second half of 2010 and its conclusions, which were made public in May 2011, were proof that this technique is relevant to help create pragmatic consensus.

I will make the most of this opportunity to thank Alain NUEE, First President of the Court of Appeal of Versailles who co-piloted the conference organised in France and shared his experience with our friends from the CNEJ.

I would also like to thank the President and the administrators of the CNEJ who organised their conference in a remarkable manner and whose works should prove useful in the implementation of a true status for judicial experts in Belgium in the coming months.

The Institute's next stakes.

The EUREXPERTISE project is not yet completed and already we have to draft the action plan for the next few years. In order to do this, we are going to propose a few lines of thought to be discussed in the coming months.

First of all, continue the Institute's expansion.

To this day, the Institute has 29 institutional members:

- 13 courts of Justice including two trade tribunals;
- 5 bar associations;
- 9 experts organisations;
- 2 universities;

and 150 individual members.

Discussions are underway as regards the adhesion of:

- 22 courts of justice;
- 9 bar associations;
- 4 experts associations;
- 1 university;

Which could bring up to 65 the number of institutional members representing 15 European Union countries.

Please note that lawyers and experts are less represented than magistrates. I have two explanations, based on my experience.

1. This is a long-term project. Lawyers' organisations have given us the impression that they focus more on the short-term and on the profound changes that their profession is currently undergoing.
2. There is little coordination among and few organised associations of experts in Europe.

Expanding the institute will impose the following prerequisites:

- adopting a mode of governance that is adapted to the European nature of the Institute, to language and cultural differences, and that takes into account non-existing or non-representative experts' organisations in many European Union countries...
- long-lasting and sufficient resources to finance the Institute; currently the importance of volunteer work conceals this problem;
- a team at the head of a greatly renewed Institute:
  - internationalisation;
  - input of "new blood";
  - rejuvenation.

The Institute's future depends on us reaching these objectives.

I would like to make the most of this opportunity to inform you that the Labour tribunal of Liège will soon join our Institute, as its President, Ms LEBBE-DESSART, has just informed me. She is here now and I welcome her and thank her.

The EUREXPERTISE project needs a follow-up action plan in order for a consensus to be reached following this symposium's proceedings and the White Paper that will be drawn from them in the coming weeks – by the end of June 2012.

We are going to try to answer the current call for proposals made by the European Commission's Directorate-General for Justice. When I say try, it's simply because the deadline is 3 April 2012.

We are going to propose a project whose main objective is the organisation of a European consensus conference on the topics of expertise and the expert's "status".

As a by-product of this consensus conference, we will also try to address the issue of a European registry of judicial experts. It is a topical matter that the Dutch and French delegations asked us to take into account in the Institute's works at the occasion of an e-justice group meeting in Brussels where I made a presentation last month.

In a few days we will ask our members for their support of this project as regards the European Commission.

What we have done for civil judicial expertise, we must also do for judicial expertise in criminal matters. Although a certain number of concerns may be identical when reaching for European harmonisation, others are different. Namely, for example, the funding and costs of criminal expertise, the intervention of private and public laboratories, and the independence of the actors of criminal expertise as regards the States...

The training of experts is going to become a priority subject in the years to come, as much as relates to expert procedures and techniques as to the various business aspects of expert opinions.

This subject will naturally be connected to the initial and continuous assessment of experts' competence. The Institute has a key role in these issues.

Lastly, experts will have to organise themselves and form associations in countries where this has not yet been done, which is in most European Union countries. They will also have to think about an indispensable European representation. The attempt made in this direction for several years now has so far been a complete failure.

I would like to end my speech by reaffirming that Article 6 of the European Convention on the Safeguard of Human Rights and Fundamental Freedoms regarding fair trials will be the foundation of future European judicial expertise.

This is why we welcome ECHR Judge Mr Bostjan ZUPANCIC with great interest and pleasure.

The actual work of the symposium may begin.

Before handing over the microphone, I would like to thank all the people who believed in this project and helped to make it come true: the Institute's assistants, all the volunteers who worked hard and long hours, all of you institutional members who joined us, as well as all of you who are now participating in this symposium. Again, thank you.

## **2. CAN WE SPEAK OF CAUSAL NEXUS? EXPERTISE AND CAUSAL NEXUS**



**M. Boštjan M. ZUPANČIČ,**

**Slovenian Judge at the  
European Court of Human  
Rights**

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Je vais faire en anglais parce que mon français n'est pas assez '*fluent*' on dit en anglais.

Well, and I will speak more slowly so that the translators can follow me.

First of all, I have to make an apology. I thought I would be addressing the experts; now I'm suddenly fearful because I'm *not* addressing the experts; I'm addressing the *legal* experts, the jurists, who don't need certain lessons on the whole story, but in any event the causal link, the *causal nexus*, is such an important part of the expertise in every court and in many, many cases, including some of them as we shall see in our Court—, that this is worth pondering about.

As part of the introduction I might also say the following. You can make a little experiment if you want. I don't know if it works in French, it certainly does work in English. If you go into Google and you type in "causal link," you will get a full overview of the general philosophical and serious problem of causation. Moreover, if you type in causal link law, or causation law you will get another very good overview of the subject matter: a very good overview of the legal causation, the way it is perceived in the adversary system, in the Anglo-Saxon mode of seeing things.

Here, however, we shall concentrate on the civil law, on private law cases. And therefore we shall be concerned mostly with torts, damages. In criminal law - I am a specialist in criminal law more than anything else - we talk of different kind of causation: I should say different kinds of problems, but the same causation.

And then let me also mention what we have here—at one interesting extreme. This is certainly not current practice in Europe, but it would represent a legal innovation of great importance. I speak of class actions in torts and of probabilistic evidence that does not come into play in any single case; it does come, however, into play concerning e.g. the massive tort cases such as introduced by Ralph Nader, employment discrimination cases, ecological problems, and, generally, when it comes to



problems involving Quetelet's Law of Great Numbers. Here we may speak of probabilistic expertise, of e.g. Bayes' theorem that translates the abstract probability into something more specific and is well known in actuarial science, and we speak of Bernoulli's equation which multiplies probabilities etc.

In Continental private as well as in criminal law as we know, this is axiomatic, the expert is simply a different kind of witness appointed by the court with the specific empowerment to the effect, that he or she testifies not only to the facts that he observes (perception), but also to the causal link between these facts and the legally problematic tortious consequences which might occur in a particular case (apperception).

Generally, this is the main point in his or her expertise.

The scientists, on the other hand, do not speak of causation. Causation in empirical science simply doesn't exist. If you go to the classic book on epistemology by Karl Popper, I speak of his work *The Logic of Scientific Discovery*, you will see that they may be talk of necessary conditions, they may be talk of different kinds of forces that result in different consequences, but the work certainly doesn't talk about simple linear causation such as we lawyers are used to. And the question therefore is:

*"Why are we so pent up, I should say, why are we so focused on a determinative single cause—rather than observe the causation as a process, as the interplay of many necessary conditions, as a process which produces certain consequences?"*

There is always a great communication gap, because of this legal obsession, between us lawyers on the one hand—and the experts on the other hand. Typically, since I know more about criminal procedure, you will ask the psychiatrist: *"Has the mental illness—paranoia or whatever—been the cause of his insanity?"* and he or she will refuse to answer the question. This question is simply not part of his game. It is not in his department, as the French would say.

Therefore, there is a communication conflict between the expert and the judge (or lawyers) and the question is, perhaps, why?

In other words, are we entitled to speak of two kinds of causation, two kinds of causal nexus, two kinds of causal link—one belonging to us lawyers and the other one belonging to empirical sciences out there?

The answer is that in science the context is never adversary; it was George Herbert Mead who discovered the problem in 1914 in an article published in the *American Journal of Sociology* in that same year.

G.H. Mead speaks of two attitudes: the friendly vs. the adversarial. In the friendly context the problems do not even arise. For example, between the doctor and his or her patient the word "cause" in the attributory sense will very rarely come to the surface: the issue, for example, is my cancer that has developed in my lungs, and not my smoking as the "real cause" of my illness. To ask the doctor 'Is smoking the real cause of my cancer?' is an irrelevant question. My doctor and I are on the same side of the problem: how to cure, if at all, my lung cancer. This is G. H. Mead's "friendly attitude"—it is simply non-adversarial.

However, if I go to court, we are suddenly into the Mead's "adversarial" mode of ratiocination, as has happened in Philipp Morris class-action cases against the tobacco companies; the lawyers wanted to know whether cigarette-smoking is *"the cause"* of cancer?

From the empirical point of view it is a silly question, it is not logical in terms of scientific thinking. In the context of causation in the Anglo-Saxon adversary trial, our friend here was talking about *expertise contractuelle, expertise contradictoire*, we have a confrontation of two privately hired

experts belonging, as it were, to the two adversary parties the plaintiff and the defendant. One should understand that the philosophy of the Anglo-Saxon adversary trial is very different from our, Continental one and is preponderantly *modest*: its purpose is only to resolve the conflict between the parties. The truth finding is secondary to the conflict-resolution purpose, a mere instrument.

This is why in Europe the adversarial aspect, *le contradictoire* of experts as they say in French, has not yet come into the full play. True, *le contradictoire* is also part of Article 6 of the European Convention of Human Rights.

In other words, what George Herbert Mead discovered, is that in an adversary context, in *contradictoire*, things change, they become polarised and we suddenly seem to look for single cause, which scientifically speaking does not exist. Moreover, the truth itself is, in this confrontation, relativized and there are suddenly two “truths”—instead of one. But perhaps this is, as it ought to be? We do not have the time here to deal with this larger problem. Suffice it to say that legal “truth” does not even exist unless there is a norm that makes certain facts legally relevant.

This is perhaps *the* perennial problem in the relationship between judges and experts. The judges will try to force the expert into *attributing* consequences – the word *attribute* here is very important –, to one cause in the sphere of influence of the defendant. The expert would be asked, “*Has this particular defendant in this tort case been the cause of the consequence, for which we now look as far as damages are concerned?*”

It is, therefore, important to understand that this is decidedly not the expert’s job. It is the judge, who has to take it upon himself to maintain, to discover and finally to *attribute* the cause to that particular defendant. Blaming is simply the judge’s job, not the expert’s. The expert will normally, if he is enlightened, only say “Well, the factor in question *is not incompatible* with the critical consequences at stake in the trial.”

As for the specific kinds of legal causation, let me say at the outset that *sine qua non causation* is the causation without which the incriminated consequence would not have occurred. Clearly, we speak of the (in)action on the part of the defendant, which is a *necessary condition* of the consequence.

Let me revert here very shortly to the framers of the famous Model Penal Code in the United States. That Code has now been adopted by practically all American states. I used to teach it in the United States. They have the *sine qua non causation* built into the Code. And the framers, Wechsler *et consortes*, who had constructed the Code, say it explicitly: “*We have put in the sine qua non causation as sufficient for legal sanctioning because we do not consider the cause, the causation, to be relevant.*”

In other words if you have a spectrum of many different and necessary conditions for the incriminated consequence, the law will go along that spectrum and choose that *one* condition which will be the blameable aspect because it is foreseeable or ought to have been foreseen by the actor—and can be *attributed* to his free will, his *dolus eventualis*, his negligence etc.

We see that a very important model of legislation has completely circumambulated the question of causation; they have discovered that it is not something that is, as a legal doctrine, misleading. What does in fact happen when the judges and the juries look for “*the cause*”? Intuitively when they look for the one cause in question, they simply pick up that *one* cause, the triggering of the revolver for example, typically the American example, of that particular decisive factor on which *the blame can be collé, can be attached*. Of course, this has to do with the postulated free will of the actor.

Again, it is a question of *attributing* the blame to merely one of the necessary conditions. Thus, the *sine qua non* cause is sufficient for responsibility. This simply means that “causation” really doesn’t figure as an important factor in the question of *attributing* the responsibility. Moreover, it is misleading in as much as the decision-maker (the judge or the jury) tends to subsume what is *subjectively* blameworthy (attribution) to the concept of *objective* causation.



As for Francis Bacon's old formula *in jure non remota causa sed proxima spectatur*, what does it imply? Among the many necessary conditions we shall *seek* the one condition, which is "proximate", which again is relevant from the attribution point of view. This simply means, if we peel the onion a little more, that this is the one necessary condition to which we attach the blame that we call the *proximate* cause. Yet, this it is only one of many theories concerning legal causation.

Here we then have two very interesting Italian cases: *Mastromatteo v. Italy*<sup>11</sup> and *Calvelli and Ciglio v. Italy*<sup>12</sup>.

Let us start with *Calvelli* because this is a medical case. Here we have a doctor who had been following a pregnant woman because of her diabetes. I think it was in Naples. She was about to deliver; she was taken to hospital whereas the doctor who was following her pregnancy in view of her diabetic condition and the possible complications—was simply not there. During the delivery the child died. In other words this was, when it came to the European Court of Human Rights, an Article 2 question. The child died—and the question was "Is the doctor responsible or not?"

Meanwhile, it is not for the European Court to delve into raw facts of such matters because we are not a fourth instance Court. On the other hand, we read the expertise because it is part of the dossier, it is part of the file and it comes to us. The question therefore was: "*Is Italy, which has prosecuted this doctor but has not in time executed the sentence — after 5 years the sentence was prescribed, the delay was too long — is Italy as a State responsible for not punishing that doctor?*" Our answer to that question, and it is not a very clear judgement, was *no*. There was a big debate during the Grand Chamber deliberations, but I am not free to disclose what happened in the deliberations, so I can't tell you. But the case is there for you to read and it might be interesting because, as far as causation was concerned, the underlying question could be: "*Would the baby have survived were it not for the doctor's negligent absence?*"

*Mastromatteo* is even more dramatic.

*Mastromatteo* happened in Milan. In *Mastromatteo* the Italian *giudice delle penne*, simultaneously released on furlough two prisoners, former co-conspirators—without having had verified whether they were previously of the same conspiracy. She gave them a furlough of three days whereas, lo and behold, in these three days they robbed a bank. They came together on the outside, they robbed a bank and the poor *Mastromatteo's* son—because it was his father who prosecuted the case at the European Court—was sitting in a car in front of the bank. One of these robbers came to him putting the gun point-blank to his head and said, "*Either you give me the car or I'll shoot you.*" The kid didn't hand over the car; the robber shot him on the spot. The question was—the question of causation! — was the *giudice delle penne* responsible because she bureaucratically overlooked the fact that the two robbers had been previously both in the same conspiracy; this was, of course, in their prison files. The case came before us and we squeezed somehow out of the question of causation, but if you look from the *sine qua non* point of view, the judge was clearly responsible. If she had not committed the mistake, *Mastromatteo* would have not been killed. It was a question of *proximate* causation. The Court was not willing to attribute this "cause" (the necessary condition of the tragic consequence) to Italian state. Next we go to another similar Italian case. I'm sorry I picked up only Italian cases, I don't know why. *Giuliani v. Italy*<sup>13</sup>

<sup>11</sup> ECHR (Grand Chamber) *Mastromatteo v. Italy*, Application no. 37703/97, 24 October 2002

<sup>12</sup> ECHR (Grand Chamber), *Calvelli and Ciglio v Italy*, Application no. 32967/96, 17 January 2002

<sup>13</sup> ECHR (Grand Chamber), *Giuliani and Gaggio v Italy*, Application no. 23458/02, 25 August 2009

In *Giuliani*, which came out last year, we dealt with the question of G10 riots in Genoa. On the occasion of G10 meeting in Genoa there were riots, *émeutes*, and the whole city was aflame. The *gendarmérie*, the *carabinieri* - were all over the place, yet the thing was dis-organised. Among other things, the *carabinieri* were not equipped with guns with rubber bullets and in a tragic moment one very young and inexperienced *carabiniere*, who was being attacked by a demonstrator with a fire extinguisher, caught panic and he shot the attacker in the head. There were many small questions of causation in that particular case and Italian courts very diligently dealt with those.

The question before the European Court was:

Is the European Court willing—because we are an international court, the defendant in our Court is always the State—to attribute the non-proximate causal link between the mass dis-organisation of the protection in Genoa on the one hand —and the death of the young Giuliani, one of the demonstrators, on the other hand. Admittedly, the link was remote. It is difficult for a national court to deal impartially with the question of the responsibility of the State, but in my opinion the European Court, and I think I wrote a dissenting opinion to that effect, this is precisely what international jurisdictions are there to remedy. Previously, we had a similar case from Greece, and clearly we shall have cases like this in other countries. Maybe we could have had one in London recently and the question would be: “*Is the State responsible?*” despite the fact that the causation is remote. Again, we see that this is not about causation *per se*, we are talking about causation in a very particular context in which the State is the defendant and in which a different logic of causation ought to come into play. The issue of causation, as I said before, is misleading; the real issue is whether the Court is willing *to attribute* the consequence to, i.e., *to blame* the State.

However in *Giuliani v Italy* the Court did not live up to this challenge, I must say. And it might be interesting for you to read this case.

Then, if we move on, we may also speak of *contributory causation*. In contributory causation you may have two or more contributory causes; they result in the forbidden consequence, the subject matter of the trial. In the Anglo-Saxon private law this is pretty clear. The judge will attribute the responsibility *pro rata*. The judge will attribute the payment of damages *pro rata* to those who have “contributed” to this chain of causation. In other words, contributory causation is a more sophisticated view of the matter of causation, since it is not focused on a single cause, whereas in criminal law this would be more difficult because the question is discrete: “*Is he or she guilty—or not?*” In private law this easier because you can *apportion* the damages according to the *pro rata* percentage, as it were, of causal contribution by one or the other party.

Another Italian case: *Scozzari and Giunta v. Italy*<sup>14</sup>. Thus was a revolutionary case in which we introduced the *restitutio in integrum* according to Article 41 as one of the basic remedies that the Court can use and which has, in turn, led to later to cases such as *Assanidze v. Georgia*<sup>15</sup>; *Broniowski v. Poland*<sup>16</sup> etc.

This was thus a very important case for other reasons, yet in *Scozzari and Giunta* you have a mother and her mother, grandmother, who have two children in a *fortetto* foyer next to Florence and they want to get them out. In the course of litigation it was discovered that one of the directors of that foyer, was a convicted paedophile, without a criminal record for the last twenty years etc.

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<sup>14</sup> ECHR (Grand Chamber) *Scozzari and Giunta v. Italy*, Applications nos. 39221/98 and 41963/98, 13 July 2000

<sup>15</sup> ECHR (Grand Chamber) *Assanidze v. Georgia*, Application No. 71503/03, 08 August 2004

<sup>16</sup> ECHR (Grand Chamber) *Broniowski v. Poland*, Application No. 31443/96, 22 June 2004

I remember very specifically this particular case, i.e., how really tragic in their effect were the *expertises* submitted by the social workers, psychologists. So, when the Court considered the situation, when we looked at the *expertise*, which was part of their dossier, psychological mostly, and when we even saw videos of interviews with the children, it became clear that in this particular case *restitutio in integrum*—the return of the children to their mother and their grandmother—was the only possible remedy. *The general principle is that the right and the remedy are two sides of the same coin.* In *Scozzari* we have therefore expanded the interpretation of art. 41 of the Convention; there was no other choice if the justice was to be done. But generally the national expertise is not in *our* Court determinative of the outcome, also because we do not deal with facts, supposedly insofar, of course, as facts can be and are separable from the law. I am of the opinion that they are not separable and I deal with this matter extensively in my recent book entitled “**The Owl of Minerva.**” The follow-up on this book is entitled “**The Owlets of Minerva**”, 2012; it contains all my separate opinions.

An exception to this absence of expertise we have in numerous Romanian cases because of the original case called *Brumarescu v. Romania*<sup>17</sup>; these are essentially de-nationalisation cases. In them we rely on the expertise as far as the estimate of the market price of the real estate in question is concerned.

What I would try to point out as a tentative conclusion is perhaps, at the end of this short introduction, that causation is really a very complex problem and we lawyers tend to reduce it simply because the adversary context itself tends to reduce the focus to the single question of attribution, as to who is *responsible* for the consequence, i.e., for whom the consequence as such was foreseeable and what attitude he or she had *vis-à-vis* that consequence.

Thank you very much.

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<sup>17</sup>ECHR (Grand Chamber) *Brumarescu v. Romania*, Application No. 28342/95, 28 October 1999

### **3. JUDICIAL EXPERT OPINIONS IN THE EU – RESULTS OF A QUESTIONNAIRE SURVEY**



**Ms Irmgard GRISS,  
Former President of the  
Supreme Court of Austria**

Monsieur le Président, Ladies and gentlemen,

First, I would like to thank the organisers for inviting me to this conference. It is an honour and a pleasure to give a talk here.

The topic of my talk is a questionnaire - the results of a questionnaire - that was organised by the Network of the Presidents of the Supreme Judicial Courts of the European Union. The questionnaire focused on the state of play of judicial expert opinions in the European Union. I would like to summarise its results answering the following questions:

Who can be appointed as expert? Who chooses the expert? Who defines the expert's mission? What are the expert's duties and tasks? Does the court control the progress of the expert's work? Are there formal requirements for the report? Is it safeguarded that the parties' right to be heard is respected? What is the effect of an expert opinion? And last question: How and by whom is the expert remunerated? You may know the saying, "Who pays the piper calls the tune" - *Wer zahlt, schafft an* – remuneration therefore is an important point.

Before presenting the results, I would like to clarify a few fundamental issues. The first distinction we have to draw is the distinction between expert and witness.

In most or even in *all* continental codes of procedure, experts are mentioned among the means of evidence. This is quite strange, because the expert plays another role; he is not just a 'means of evidence'. Witnesses, for example, are means of evidence. What is the main difference between witnesses and experts? Experts ascertain facts and draw conclusions on the basis of the facts. On the contrary, witnesses are not allowed to draw conclusions. They have to testify what they saw or heard.

A second important distinction between expert and witness is that in most continental jurisdictions experts may be and in fact are often appointed by the court *ex officio*. Some codes of procedure empower the court to summon witnesses - even witnesses not suggested by the parties – but such

provisions are rarely used. Judges are hesitant to hear witnesses not suggested by the parties. I think the reason behind is that witnesses are polarised. People speak of “my witness, your witness...” but, at least in the continental systems, not of “my expert, your expert...”.

There are two main types of judicial experts: Court-appointed experts and party-appointed experts. The relationship between court-appointed expert and court is usually not governed by private law but by public law. Experts are considered an auxiliary of the court. Contrary to the court-appointed expert, the party-appointed expert is not mentioned in the codes of procedure, except in Sweden and in the Netherlands. In all other countries, the opinion of a party-appointed expert is considered only documentary evidence. It proves that the person who signs the document holds a certain view.

The questionnaire focused on court-appointed experts and did not deal specifically with party-appointed experts.

What is the philosophy behind the court-appointed expert? The philosophy behind is that the judge has to establish facts truthfully. This duty was laid down first in the Austrian Code of Civil Procedure, which dates back to 1895. The author of the Code, *Franz Klein*, was disgusted by the adversarial system. He criticized it as being too costly and thus denying people access to court. *Franz Klein* called the adversarial system a “war without a Red Cross”. He thought it in the best interest of society to have substantive law enforced. The best way to have substantive law enforced was in his opinion that decisions are based on true facts. This concept presupposes an active judiciary whereas the Anglo-American system, particularly the system of the US American federal courts, is based on the notion that the parties should play a central role in the gathering and presentation of evidence since it lies in their interest to find out what really happened.

I would like to give a short overview of the results of the questionnaire following the questions mentioned before. I will not present the results in detail.

## **I. Who can be appointed as expert?**

In most countries, courts keep and update lists of qualified experts. In some countries it is a legal duty, in other countries it is just considered good practice.

In some countries there is an approval procedure, in others there is a simple enrolment procedure. Experts are registered if they want to be registered but their competence is not verified. In states with an approval procedure the verification of the expert’s qualities is often assigned to mixed juries consisting of academics and judges. Experts need practical experience; to hold a university degree does not suffice. The listing of experts is subject to renewal. In most countries the renewal procedure takes place every five years.

Judges should inform the institution keeping the list if they have bad experiences with experts. It lies in the best interest of judges that experts are really qualified. Really qualified means, from the point of view of a judge, that they do not only possess the necessary scientific and technical knowledge, but that they are also able to work timely and to express themselves in an understandable language. Judicial experts need qualifications that go beyond just mere technical or scientific knowledge.

Since experts are mostly chosen from among listed experts, what about experts who are not listed in the country where they want to testify, but in another country? In the *Penarroja* case the Court of Justice held that the expert must be given a chance to prove his qualification.



An important issue is the responsibility of experts. In many court cases experts play a predominant role. Parties sometimes fear that the case is decided by the expert and not by the judge. And it is true; it happens that judges delegate the decision-making to the expert. It is therefore very important that the expert feels bound by ethic rules. Most countries have codes of conduct for experts; in all countries experts are subject to civil and sometimes also to criminal liability.

## **II. Who chooses the expert?**

In most continental systems it is the judge who chooses the expert. The judge usually enjoys a broad discretion. The lists only provide information; the judge is not prevented from appointing an expert who is not listed.

The question of whether the judge shall appoint an expert and whom he shall appoint has ethical implications for the judge. To appoint an expert involves higher costs and delays. The judge therefore has to scrutinize carefully whether it is really necessary to appoint an expert. He should not just seek to be relieved from answering difficult questions.

In some countries, the judge is bound if the parties agree on an expert, for example in Germany, whereas in Austria the judge is always free whom to appoint.

## **III. Who defines the mission?**

In all countries the judge defines the mission; usually, and that is good practice, after having heard the parties. In some countries there is a formalised procedure. In other countries, for reasons of flexibility, the judge is entirely free how to define the mission. Nevertheless, judges should carefully identify and define the crucial issues.

## **IV. What are the experts' duties and tasks?**

An expert has to be unbiased and impartial. Furthermore, the expert must enable both parties to participate on an equal footing in the production of the report - as the European Court of Human Rights held in *Mantovanelli v France*. It was a case involving medical malpractice; the claimants were of opinion that their daughter had died because of negligence on part of the hospital. The expert came to the conclusion that there had been no negligence. The French courts held there was no obligation to have a second opinion but the European Court of Human Rights ruled that there should have been a second opinion because the parties had been prevented from participating on an equal footing in the production of the report.

## **V. Are there formal requirements for the report?**

Usually the expert has to render a written report. In most countries no specific form is required. But it is obvious that there has to be a clear distinction between facts and conclusions. In most countries the parties may request that the expert also testifies in court. Apart from this, the court may order *ex officio* that the expert participates in a hearing and explains what he has written.

## **VI. Does the court control the progress of the expert's work?**

The questionnaire contained the question: "What happens between appointing the expert, defining his or her mission and rendering his or her opinion? What does a court do in this period in between?" And the answer was - wait. The court only has to make sure that the expert complies with the time limit.

Expert opinions are a main cause of undue delays. Often the most qualified experts are the busiest ones. The court has to monitor the timeliness and, if necessary, urge the expert to render his opinion.

The court has to safeguard that the expert can fulfil his task. The expert often needs the cooperation of the parties. He needs documents; he must be able to inspect the site. If the parties fail to cooperate the judge has to order the parties to comply with the expert's requests.

The parties have the possibility to invoke privileges. For example, lawyers and physicians are bound to professional secrecy. If such privileges are invoked the court has to balance the conflicting interests.

## **VII. Is it safeguarded that the parties' right to be heard is respected?**

The parties' right to be heard is highly respected in countries like France. And it is less respected in countries like Austria where the parties are only heard *ex post*. According to the *Mantovanelli* judgement the parties must be able to participate in the production of the report. It may not be sufficient that the parties are heard when the report is already finished.

An important question is whether the parties have a right to a second opinion. The Court of Justice held that there may be cases where the only way to really ensure that parties can defend their position is a second opinion. The case in question was a case about foodstuffs.

## **VIII. What is the effect of an expert opinion?**

There is a very harmonious picture in all countries: The court freely evaluates the findings of the expert. The findings are not binding, but the court has a duty to weigh the conclusions of the expert against other evidence. A very important question is whether the court is obligated to weigh the findings of the court-appointed expert against the findings of a party-appointed expert. Whereas in some countries it is the duty of the court, in other countries it is not. The latter situation is not ideal since a private expertise often is the only means to oppose the findings of the court-appointed expert. The court should at least be obligated to deal with it in its reasoning.

## **IX. How and by whom is the expert remunerated?**

In most countries the judge fixes the remuneration. Usually it has to be clarified in advance how much the expert's fee will be. The expert has to warn the court if the cost will be higher. If the expert fails to do so he will not obtain the exceeding amount.

In most countries the costs of the expert form part of litigation cost; they have to be borne by the losing party. This could be criticized as not being justified because the expert was appointed since the judge lacked the necessary knowledge. Lithuania is the only country where experts' fees are borne by the Justice Department.

## **X. Conclusions**

There are some differences among the national systems of judicial expert opinions. What could be the cornerstones of a harmonised system? The most important cornerstone is the right to a fair trial. It must be safeguarded that the expert is unbiased and impartial. Both parties must be able to participate on an equal footing in the production of the expert's report. Furthermore, it must be safeguarded that parties are able to oppose the findings of the court-appointed expert; that implies attaching some importance to the opinion of a party-appointed expert.

What is to be avoided? A harmonised system must safeguard that the decision-making is not delegated

to the expert. Experts tend, in court-centred systems, to be powerful and judges sometimes tend to minimise their work.

Such a harmonised system should be based upon the principle that both the court and the parties are actively involved in matters of expertise. What we need is some form of cooperation between the court and the parties, not a pure court-centred approach and not the expert-witness approach, but something in between, which respects parties' right to a fair trial and safeguards that courts are able to deal with cases in a fair and just way at acceptable cost and in as short a time as possible.

Thank you.



## **4. COST AND FUNDING OF LEGAL EXPERT OPINIONS**



**Daniel CHABANOL,  
Honorary State Councillor  
(France)**

When it comes to expertise, considering financial issues calls on two lines of thinking. The first approach is centred on the expert and examines the methods for determining his pay, which – although the link cannot be considered to be rigid – are tied to the quality and intensity of the work that is supplied. The second line of reasoning considers the price of the expert opinion as an element of the cost of justice, and thus as one of the components of access to this justice system. It is easy to imagine that the two approaches, although linked, may lead to such entirely different views as to make them appear opposed.

### **I. The cost of expertise, payment for a service**

#### ***I. 1) What cost?***

Without over-generalising, we can and must consider that the expert's work should be paid according to the rates of the market in which he intervenes, and of course, according to the number of hours that he has had to spend in fulfilling his mission.

We willingly did not mention here the difficulties inherent to the operations. Indeed, one may wonder whether, after choosing an expert (whose acknowledged competence determines the level of his invoice as an 'independent worker'), it is appropriate to lower his pay based on the grounds that the questions he was asked were easily solvable. Indeed, if we have made the mistake of hiring an expert who is 'overqualified' as regards the difficulty of the issues he needs to solve, there is no reason why he should be the one to bear its consequences.

In fact, this problem is only really a problem in countries in which the expert is appointed by the court and where his fees are determined by a magistrate. There is nothing like this in Great

Britain, where the expert, chosen by the party, is directly paid by said party without any intervention from the public authority.

When it is provided for by law, the role of the taxing magistrate is still not precisely circumscribed, except in those rare countries that have determined a fee grid by legislation or regulation. And this absence of a framework is made manifest by, among other things, a question that has not been raised: regarding the issue of the expert's pay and how to calculate it - whether or not one must take into account the fixed costs that cut into the expert's activity. In other words, must we reason in terms of marginal or average costs? Must we add to the 'spent' expenses the 'calculated' expenses, for example the office overheads or the secretarial work? This question may appear to be purely relevant to accounting or economic technique. We believe the answer depends, implicitly but necessarily, on our conception of judicial experts.

Either he is indeed a service provider like any other and his client's particularity (the public justice system) must then not interfere with the rules for calculating his pay. Plumbers invoice a rate per hour of work, incorporating fixed costs, and it is the same rate whether the clogged sink is in the courthouse or in your private home. Why should the chartered accountant, the doctor, the architect, or the engineer be placed on a different footing?

Or the legal expert is considered a professional "outside the public service", who has commercial relationships with clients, who are invoiced as usual, and who draws from these relationships - that are an integral part of his trade - a competence and a fame that lead the public service to occasionally call on him to benefit from this competence and fame. This leads to the idea that for this occasional extra workload, with no bearing on the usual practice of his profession, the expert should be paid according only to marginal costs, while the fixed cost of his activity should be covered by his usual practice.

As we can see, behind the accounting quarrel there are two interpretations of the legal expert. The first trivialises the expert by considering him as an ordinary service provider (the plumber, in order to stick to our comparison), the second refuses the establishment of a sort of *profession* of judicial experts, a professionalization that would quickly raise the issue of maintaining the level of competence of this provider who, restricted to expert examinations, could quickly lose touch with the evolution of his discipline and the problems it faces.

## ***I. 2) Provisional cost or verified cost?***

It is quite paradoxical to note that, whereas relationships between suppliers and consumers are subject to ever more precise transparency rules, the judicial expert's service is an almost total financial no-man's land.

Consumers no longer think of starting work, construction work for example, without a prior estimate from one or several tradesmen. In some countries these estimates have become mandatory and are sometimes accompanied with the requirement of mentioning detailed service rates. Let's not mention the rules applicable to public orders, competitive bids, and advertising and transparency rules that all stem from Community obligations and apply, as the saying goes, from the very first euro. These are rules that private persons spontaneously apply nowadays.

And yet here we have, in the justice system, a service that sometimes represents a considerable amount of euros, (sometimes disproportionate when compared to the stakes of the dispute), the ordering of which is not subject to any rules (choice of the service provider), and not even to the production of a prior estimate. It is a strange situation, especially when the stakes in question - as part of the public justice system - is incomparably more important than the cost of repairing my washing

machine (which won't be started without a prior estimate of costs)! What of the sometimes biased game of calling for - on the expert's request - a *sapiteur*, which the jurisdiction authorises most of the time without knowing what the appointment of an additional expert will lead to in terms of the cost of the expert mission.

We shall not encroach here on the debates on the choice of the expert, and on the possible outcomes of the *Penarroja* case law. At least when it comes to the cost of expertise one cannot but wonder why - at least when at the very moment the expert opinion is decided it is obvious that its cost will probably exceed a certain threshold - the expert is not required to give any information on this cost. Since this road map is blank, one can draw whatever mechanisms one wishes onto it, though it is not our role within the framework of this speech to anticipate them. However it does seem necessary to introduce a minimum of predictability in the case.

This predictability can in fact be considered as the parties' right to know what financial perspective they are committing themselves to. We have witnessed a certain number of unfortunate cases where, when faced with a party's clear determination, the jurisdiction had to organise an expert appraisal, the results of which were a real financial disaster for said party. Naturally if they had had prior information as to the cost of the expert opinion the party would have abandoned this ruinous request.

## **II. The price of the expert opinion, one component of the access to justice**

Unless we forget that legal proceedings meet the requirements of the European Convention of Human Rights and Fundamental Freedoms and are part of the founding principles of Community law, we cannot consider the cost of judicial expert opinions as that of a 'trivialised' service. Indeed, this cost raises the question of the access to justice, and it is important not to forget this fact, obvious as it seems.

However, the dream of a totally free justice system - including as regards expert opinions - is faced with rough reality. Acknowledging the relativity of this issue can seem scandalous as it pertains to a fundamental right. We agree to do it though, and here is why.

Must we emphasise that free services are just a myth? There is a cost, somebody has to pay it, and thus the question is not to proclaim this gratuitousness but to say that someone other than the claimant will pay, and thus focus on this replacing debtor.

It could be the adversary... but then would he pay even though he has won his case? This would weaken the right to justice, if he must spend only so that his legitimate situation is acknowledged and to prove that the person who questioned this legitimacy was wrong. And if we decide that the losing party is the one who pays the expert opinion - claimant or defendant depending on the case - we weaken the exercise of the right to trial, as the outcome of proceedings can rarely be predicted. In order to put an end to the dispute by way of court procedures, one must take the risk of losing and thus of paying a sometimes heavy price. Moreover the differences in the parties' payment capabilities lead to a shocking inequality in the legal debate. As has already been said, when it comes to probability calculations and games of chance, a person who is penniless is not, when it comes to the probability of a win and the risk of a loss, equal to that who has savings. I believe Bernoulli expressed this thought.

The replacing debtor can be the community. This is not unimaginable, but it is no good dreaming, public budgets are not extendable, and as was made clear in France during the reform of

police custody, new expenses call for additional resources... and so for additional contributions, whose legitimacy can be debated if their aim is to cover the cost of the expert management of unreasonable requests...

This of course means that the answer to the question raised here will only be relative. After all, our societies recognise the right to life and to health, without having organised for food, heating or remedies to be wholly free.

The English answer to this appears rigid. The party-appointed expert is paid by the party who ordered the expert opinion. We believe such an ultra-liberal position diminishes the right of access to a judge and especially the right to justice, as clearly anybody who has the means can directly hire the best, the most qualified and most renowned of experts and thus make a serious bid on the success of his legal action.

Leaving this extreme aside, we believe that the answer to this question lies in two successive paths.

## ***II. 1) reasonable cost***

Everyone or almost everyone has had the occasion to regret cases in which, with a few hundred euros at stake, a heavy, disproportionately costly expert opinion was carried out. Certainly in order to answer a jurisdiction's question an expert may be faced with the necessity of advanced or time-consuming research (think of the systematic examination of accounting documents...), just as sometimes, urged on by the interest of the research subject, he can be tempted to set up in-depth investigations and finally arrive at a report that is closer in nature to a doctoral thesis rather than to an expert's report... Thus we were once faced - in a simple case of frost-bitten fingers following a night on the slopes of a ski resort - with a remarkable and exhaustive work on the effect of frost on the fingers... the problem was that the university-quality level of this work was useless when it came to assessing the harm suffered by the victims...

It is of course difficult for the jurisdiction to mark the limits of the expert's research, to, as it were, render into a requirement the legitimate concern of scaling the scope of the expert examination to the effective stakes of the dispute... This is not a reason to dismiss the problem, which can begin to be solved either by organising a preliminary dialogue between the magistrate and the expert, or- like in Spain- by setting a price cap on the cost of an expert opinion. Indeed, in the Spanish system, expertise costs are determined by the judge and cannot exceed one third of the amount of the sentences handed down in substance.

Incidentally, we can even perfect the pattern and maintain the parties' autonomy. Indeed, we must not forget that they are the "owners" of their dispute: in a cap system, whatever form it takes and as we know that it will limit the expert's investigations, there should be a possibility for one of the parties to refuse this limit, but then at its own risk. On this point we can think of the French health care system where the patient has the choice between a regulated hospital system with a grid of costs and the private system of "free rates".

## ***II. 2) cost that is allocated according to the requirements of the access to justice***

Traditionally, the party that loses its trial bears the cost of the expert opinion. This solution can seriously affect the right to a trial, especially when the call for an expert opinion has been decided *proprio motu* by the jurisdiction or at the sole request of the adversary, whose request for this

investigative measure is sometimes not exempt of interest in its dissuasive nature.

We should, we believe, go further than or complete the traditional vision, and anticipate that the community also sometimes has an interest for the truth that will be judged to be based on exact factual or scientific grounds. Lithuania is an example of this - if the expert opinion has been ordered by the jurisdiction, its expenses are borne by the Ministry of Justice. We shall go further: the court should have the competence to shift this cost away from the party who must bear it according to common law, and thus transfer all or part of it onto the community budget or even onto the adversary. The criteria for this shift could be the interest drawn from the expert opinion for the community or the party thus appointed, but also the concern of ensuring a fair trial, which would command that the party requesting the expert opinion be dispensed of its cost in the name of the principle of access to law. We would thus be closer to a kind of legal aid in matters of expertise (such as is done in France), nevertheless without necessarily developing an automatic regulatory system.

Naturally such a system would not come into play if the request for an expert opinion, just as in fact the launch of legal proceedings, proves to be abusive or frivolous, or, as we say in France, *"téméraire"*.

The idea would be to implement a non-automatic safeguarding system under the court's authority.

We must also concern ourselves with reducing the uncertainty that remains *"ex ante"*: the risk for the claimant to have to bear the costs of an expert opinion (which exists as long as the court has not set up the system we are proposing) may reveal itself as particularly dissuasive and thus adversely affect his right to appeal. It is possible to remedy this situation. Indeed, we could set up a type of *"written ruling"* by which we would ask the judge, before any expert proceedings have been launched, to rule on the derogation to the rule of common law that the system we are imagining would lead to. The court's answer could of course not subsequently be questioned.

The preceding remarks were a product of free personal thinking whose only imposed limit was what seemed unreasonable. Some of you may even have thought that we sometimes went beyond this limit. We gladly accept this risk if it means that our suggestions have encouraged critical interest in expert opinion finances, and fostered reflection or even sparked passion on the subject.

## 5. MODERATORS FOR THE WORKSHOPS

<p>Workshop 1 (in French) Moderators :</p> <p>Alain A.HENDERICKX, Belgian Lawyer Partner of Lawell Lawyer at Brussels Bar Association, former member of the board of the Council of Belgian Lawyers (Treasurer)</p> <p>Sara PONS, Spanish Lawyer Lawyer at Barcelona Bar Association Academic responsibilities in the ESADE Law Faculty</p>	<p>Workshop 2 (in French) Moderators :</p> <p>Béatrice DESHAYES, French/ German Lawyer Lawyer at Cologne and Paris Bar Associations Partner of hw&amp;h</p> <p>Claude DUCAROUGE, French Expert IT Expert in Versailles Appeal Court and Administrative Appeal Court of Paris.</p>
<p>Workshop 1 Moderators :</p> <p>Vladimir STIBORIK, Czech judge President of Prague Superior Court</p> <p>Johannes RIEDEL, German judge President of Cologne Appeal Court</p>	<p>Workshop 2 Moderators</p> <p>Anna GAVRILOVA-ANCHEVA, Bulgarian Lawyer Chair of the Board of the Foundation Bulgarian Lawyers for Human Rights</p> <p>Anthony FORDE, British Academic Senior Lecturer in Commercial &amp; Property Law, Leeds Metropolitan University</p>
<p>Workshop 3 (in French) Moderators :</p> <p>Etienne CLAES, Belgian Expert Public accountant, tax consultancy adviser Partner at Claes Verburgh &amp; Co.</p> <p>Henning HABERLAND, German Judge Counsellor at Naumburg Appeal Court</p>	<p>Workshop 4 (in French) Moderators :</p> <p>Pierre GARBIT, Magistrat Français Honorary Judge Former President of the Court of Lyon (2004-2011)</p> <p>Rafa ORELLANA, Spanish expert President of the Catalan Association of Forensic and Judicial Experts and Vice-president for Catalonia and for European affairs in General Council of Experts</p>
<p>Workshop 3 Moderators :</p> <p>Nienke MULDER, Dutch Expert Policy Officer at the Netherlands Register of Court Experts (NRGD). Advises the NRGD Board on a variety of policy issues with an emphasis on legal matters</p> <p>Michel BEAUDOUT, French Judge Elected judge in Nanterre (La Défense near Paris) since 2001, in charge of bankruptcy procedures and follow up of judicial surveys</p>	<p>Workshop 4 Moderators :</p> <p>John COSTER VAN VOORHOUT, Dutch Judge Former vice-president and still senior judge of the Appeal Court in Arnhem. Chairman of the Board of the Dutch Register of Court Experts.</p> <p>Barry TURNER, British Academic Senior Lecturer in Law at the University of Lincoln, teaching criminal investigation in the Forensic science department and media law in the Lincoln School of Journalism</p>



## **6. PRESENTATION OF THE WORKSHOPS**

### **I. ROUNDTABLE N° 1: "APPOINTING AN EXPERT: MISSION AND EXPECTATIONS"**

#### **I. 1) Review of the state of play**

Deciding to call for an expert opinion – Choice of the expert- Content of the mission

Judge's imperium: in most European Union countries, the judge has sole power of:

- deciding when to call for an expert opinion, at the request of the parties or on his own motion (Common Law - he has the power to authorise or refuse the right of a party to call for an expert opinion),
- appointing an expert,
- defining the content of the expert's mission.

The parties' participation is sometimes possible in some or part of the proceedings.

#### **I. 2) Topics for discussion**

*a) Principles governing the use of judicial expertise*

*b) Conditions and tools available to the judge and/or the parties to select an expert*

*c) Type, content and form of the mission– the expert's autonomy*

### **II. ROUNDTABLE N° 2: "EXPERTISE PROCEEDINGS AND THE EXPERT'S REPORT"**

#### **II. 1) Review of the state of play**

Expertise proceedings – closing of the expert examination – funding of the expert opinion

Expertise and judicial proceedings: although the means of implementing an expert appraisal vary from one country to another, the investigative measure is an integral part of judicial proceedings. It is subject to the same principles of European law.

Fair trial

Reasonable deadlines

Right to equality of arms (fair opportunity for investigation)

.....

Judicial expertise is here defined as court-ordered or initiated by the parties with the judge's approval.

What principles should govern an expert examination to ensure that all the parties and all the judges in the EU will acknowledge it as fully valid although it was ordered and carried out in a country other than that in which the case is judged ? It is important to try to avoid challenges based on the conditions in which the expert examination is carried out, whether as regards the time limits or the content of the report.

## **II. 2) Topics for discussion**

*a) The judge's control over the expert proceedings*

*b) requirements for a fair trial*

*c) the report*

## **III. ROUNDTABLE N° 3: "QUALIFICATIONS, COMPETENCE AND ASSESSMENT OF EXPERTS"**

### **III. 1) Review of the state of play**

Status – accreditation – monitoring of the activity

Across the European Union there are many differences in the manner of verifying the competence and qualifications of experts.

### **III. 2) The three topics for discussion**

*a) A well-known competence, identified and recognisable*

*b) Qualification of experts*

*c) The assessment of experts*

## **IV. ROUNDTABLE N° 4 : "THE STATUS AND ETHICS OF EXPERTS: FREE EXERCISE AND LIABILITY"**

### **IV. 1) Review of the state of play**

Status - code of ethics - good practice - penalties

Most European countries have texts governing the status of judicial experts.

### **IV. 2) Topics for discussion**

*a) one status*

*b) one code of ethics, possible penalties*

*c) free exercise and liability*



## **7. SPEECHES OF MODERATORS OF THE WORKSHOPS**



### **RECOMMANDATIONS WORKSHOP 1 :**

#### **APPOINTING AN EXPERT: MISSION AND EXPECTATIONS**

Rapporteur : Alain A.Henderickx

Here are the conclusions of the 1<sup>st</sup> group. Its work focused on a triple task:

- review the principles governing the call for expertise;
- examine how to make it easier for the judge to choose an expert;
- discuss the more targeted question of the expert's mission.

#### ***1st topic: appointing an expert***

I would like to review the principles that govern the judge's possibilities when appointing an expert - we somewhat lost track of these principles during the course of our debates.

A trial is governed by the principle of party disposition according to which it is the parties and they alone who entrust the magistrate with ruling on the dispute that opposes them.

When the magistrate receives a request from the parties and within this limit, it is up to him to rule. As everybody here knows, ruling does not necessarily mean "rendering justice" but, more humbly, saying what the law is.

Within his judicial mission, the judge can appoint an expert. He has this right.

The workshop participants expressed the wish for this power to be complemented by two safeguards:

- respect of the necessity test, to avoid expert opinions that are not essential, or ordered solely for reasons of "convenience"
- the subsidiarity criterion that imposes that a judicial expert be appointed only if there is no simpler, faster, or less expensive means of evidence.

These discussions can be summarised briefly. As everyone knows, conciseness suits well expressed views:

*“Judicial expertise is a court-ordered appraisal or implemented by the parties with the judge’s approval or under his control. It should be ordered only if it is necessary to solve the dispute, if there are no easier, quicker or cheaper means of evidence.”*

### **2nd topic: How to make it easier for the judge to choose an expert**

The work also examined how the magistrate’s choice could be facilitated. A consensus was quickly reached on the fact that promoting registries of experts would ensure that magistrates be faced with a more reassuring choice by providing a guarantee of the listed experts’ reliability.

The question of registries is a major concern for the judicial world and for experts.

The working group agreed on a rather long sentence, but one which we hope contains more ideas than it does words:

*“A European-wide frame of reference should be established, periodically reviewed and publicly available. It should allow the judge to accurately pick a relevant expert who will have been subject to review, including on the level of ethics, either by a national judicial or administrative authority, or by a recognised professional order, or by a yet-to-be-determined European entity, and who will provide guarantees of technical competence, impartiality and independence.”*

The debates that led to the merging in this text of the work of the francophone and anglophone workshops sometimes reflected different approaches, namely on the following points:

The participants of the anglophone workshop highlighted the need for the common frame of reference to be publicly available rather than remain a restricted tool. They also justly insisted on the importance for the experts listed in this repository to undergo continuous ethics training.

Lastly, the members of the anglophone workshop came up against the “redundancy” of the terms “technical competence”, since for them the expert’s competence is inherently technical and not judicial.

Various participants called for implementing possibilities of appeal if an expert is refused registration or is excluded from the lists. This is not only legitimate but also essential in order to be in accordance with ECHR case law.

For example in Belgium, when judicial representatives are excluded from official court registries, they can only be so based on a reasoned decision and with the possibility of lodging an appeal.

### **3rd topic: considerations relating to the expert’s mission**

The expert’s mission can only cover technical questions. The judge cannot delegate his judicial competence and when he decides to call for an expert opinion based on his possibilities of securing evidence, he cannot delegate his task of ruling. He cannot delegate his imperium: the expert must be strictly restricted - and this is not derogatory - to a technical mission.

The judge can modify the mission on his own initiative or at the request of the parties or of the expert himself, depending on the progress of the mission. It was agreed that the adversarial nature of the expert mission should also be highlighted.

Thus a consensus was reached on the following statement:

*“The expert’s mission must be restricted to technical questions. This mission must be defined as precisely as possible since it binds the expert’s activity. The judge can, on his own initiative or at the parties’ request, change the expert’s terms of reference, depending on the progress of his mission, which has to mandatorily comply with the principle of adversarial debates.”*

It is a limit that is imposed on the expert, and to which he must restrict himself.

The clarification “as precisely as possible” reflects a contribution of the anglophone workshop.

The anglophone workshop also wanted the mission to be drawn up by the judge “depending on the information in his possession at the time of his decision”. It was agreed to add the words “as precisely as possible”.

These deliberately brief words summarise yesterday afternoon’s proceedings.

Our efforts were made with the constant concern of breaking away from the constraints of our national laws to try to reach a consensus. Not on what was positive or less positive in one or the other of the said national legislations, but rather to agree on how to try to go beyond them, starting anew from their very principles.

There is a Belgian saying that I invented this morning, that says that when you’re lost in the rubbish you need to climb back onto the top of the bin..., or more nobly said, when you are lost in the woods you need to climb into the oak tree.

This was the philosophy that guided our work. It inspired us. I hope it will have convinced you.



## **RECOMMANDATIONS WORKSHOP 2 :**

### **EXPERTISE PROCEEDINGS AND THE EXPERT'S REPORT**

Rapporteur : Anthony Forde

I would like to present the results of those workshops both in the French workshop number 2 and in the English workshop number 2.

Firstly may I thank the President and the board in relation to inviting me here today, also thank you to all of my colleagues who helped in moderating those boards and also to all the people who provided their ideas and information in relation to those workshops, thank you very much.

What I would like to do is present to you a synopsis of the information that came from that and some of the ideas that we took from it. Just to assure you, although I won't cover absolutely everything that was said in each workshop, all of your views were represented, from both workshops, to the board.

The first element in relation to what we were looking at was the acceptance of the judge's authority in relation to the actual process, and to look at those issues in relation to fair trial, equality of arms between the parties, and the expert's independence in relation to that.

The first element in relation to that particular point, you see here on Recommendation 1, "The expert's independence". What we tried to do here was to get some form of consensus on what was expected. Throughout both groups everybody felt that the judge should actually have control over the process, and that was an agreement between all of us. However it was also felt that there was a need to balance out the actual control of the judge in the process with the expert's independence in relation to that. And that was also felt necessary to alter some of the information in the recommendation to ensure that there is a sort of relative autonomy to the expert and the parties concerned, to ensure that there is an equality of arms between the parties and a fair trial on that basis.

So, here, you will see, in relation to that, some of that first recommendation. The first element of the first paragraph remains unchanged in relation to that particular element. What we had after discussion inserted is some details to try and ensure that the process was fair, that the judge had control over the process, but equally that the experts have independence and are able to work on behalf of the court in relation to the requirements of the actual mission given to them.

The second element on that point there, you see "the expert has the right to seek directions in writing from the judge in any matter to do with the case". We felt that this was necessary to put in place so there was an open dialogue between the experts and the court, to ensure that if any issues arise for the expert at any point, already having agreed the terms and conditions of the contract and the work

expected of them, there was some form for the expert to exercise independence and judgement to contact the court and seek further directions from them on any matter that might be.

To ensure expediency in relation to the process and to remove any unnecessary hearings that would delay the process, we felt that could be done in which then the judge would respond in writing back to them, keeping a record of the events and the information that had passed between them.

The third element there, “the judge should, on his own motion, having heard the parties...” there was an issue here around the autonomy of the judge, not so much the fact that they have control over what is going on, but potentially the fact that they might start to interfere with what is going on when it would be unnecessary. So we reworded that information to read as it does there, that “the judge should, on his own motion, having heard the parties, or at the parties’ request, be able to restrict or extend the expert’s mission, within the observance of *res judicata*, or to extend (and it should also say there restrict) the timeframe of the mission.” That provides a recognition of the control of the judge in the process, but also tries to preserve the independence of both the parties and the expert in relation to their role.

So if it was felt necessary at any point that the judge might wish to restrict the mission or alter the mission details or restrict or alter the timeframe in relation to that, they wouldn't do that without the parties being present or having heard what the experts have got to say in relation to the judge's concerns. Equally, if there was concerns on either side from other experts on either side in the litigation, or from the parties themselves about the way the process is being run by the other side or the experts involved, they also could apply to the judge to be heard on that basis, and then for a judgement to be given and then further directions be given to them on that basis. So in a way it provides some authority back to the experts and allows them a recognition of their independence, but also keeps that dialogue open between them and the court in a way that allows the judge to control the events but not in the way that might result in unnecessary interference with the actual event.

The next stage in relation to that is “the judge should be able, on his own motion, and having heard the parties, replace an expert” and at the end there you see “who has not respected the deadlines”. That too was recommended that the last element there, “not respected the deadlines”, should be removed, and that was replaced with the final part there, “at the beginning of the expertise, the expert should agree with the court to a preliminary timeframe and/or stages of completion of the report.”

The fourth point there, let me take you back to it, just saying that “the judge should be able, on his own motion, having read the parties, replace the expert.” That again is an important element in relation to control of the overall process, to ensure a fair trial, to ensure expediency of the trial, and to ensure that the parties have equality of arms. For instance, it is a recognition that as healthy as you all look, that at some point we could be run over by a bus and killed, or unfortunate things happen to us. A judge would need to be in a position that if an expert that, for whatever reason, had to be removed and or be replaced to ensure the expediency of justice, they have to have that authority to that and that last line allows them to do it.

Equally, for instance, if an expert was found to be incompetent, or had falsified their details, or was found to be struck off by their profession or anything like that at all. That particular last element, again, allows the judge, if necessary, to intervene and protect not only the court's interest but also the parties who they represent and their interest and remove them or replace them with a suitable expert at any sort of point from there on. So this element here is a way of balancing out the authority of the court with the necessary requirements of independence of the experts and the parties involved, and that's the way we sort of approached that particular question. The final element, I said at the beginning of the expertise, the “expert would agree with the court to a preliminary timeframe and/or stages of completion of the report” that too then allows you to seek directions from the court and have

a clear idea of what is going to be required of you and the timeframe required.

But it puts you as an expert slightly in control of that element because you would be suggesting to the court what would be the expected timeframe and with their agreement be moving forward on that basis. If for any particular reason during your expertise and your analysis of any situation you feel that the timeframe needs to be extended then having agreed this process with them and having the option to seek directions from a judge at any point, either in writing or even by asking for a public hearing with them, you can go back and have that timeframe extended, restricted, whatever you felt might be necessary. So again it gives you some dialogue between you and the judge, in that you're working together for the benefit of the court and for the litigants overall; and that's how that process came around.

In relation to this element, under number two, “the possibility for the parties to discuss the expert's technical findings before a report is submitted”, between both groups there was no overall consensus on how this should be approached. There was differing views, but I think what could be agreed is there was a feeling that in principle this could be a good idea, and that it should remain in some format. A number of individual suggested that maybe a mandatory preliminary report would be submitted, others didn't feel that would be necessary and there may be other ways of looking at this particular issue to ensure again that if we're looking at the overarching principles of ensuring a fair trial (expediency of the trial, process, and those sort of things, equality of arms between the parties and ensuring that the process works fairly). So the point of this was kept in place but with recommendations to the board that potentially it may need to be looked at in further detail.

Suggestions that were put forward as an example that might be up for consideration – and I stress might because we only put these forward as suggestions – is that there may be a sort of pre-hearing discussion; particularly in relation to any situation where a party wants to introduce new information or information in relation to the expert report that wasn't found in the initial analysis and recommendations.

Beyond that then, the experts in this pre-hearing discussion might be ordered by the court to get together, to represent their individual parties and to set out for the court all the points that they currently agree on at this preliminary stage and all the points that they are still not agreed upon at that preliminary stage. They would then formulate the report and pass that forward to the court and the court would be in clear understanding of where they were at that particular point in time, as would the parties, and as would be the experts. On that basis, they would all be sure of where they'd reached at that particular point. And that would prevent delays in relation to mandatory reports being put forward that would then tie up court time. What it does is pushes back the responsibility and reflects the independence of the expert in managing that process for the court. In that way everybody is clear on what is going on and it makes it clear to everybody where they've reached to that point. And so that is one suggestion on how this might be dealt with, other than, say, through a mandatory report which could be quite time-consuming for the court and extend issues. And also perhaps create a lot of headaches for experts who might have difficulty getting parties together to agree on how this would work. And so that recognises the autonomy and put you in control of that process as well. So that was a particular element in relation to that point.

Point 3 in relation to the content and structure of the reporting and how that might potentially work, again there was consensus on the idea that clearly this is a good idea but again not so much consensus on the types of structure and approach that might be required for the style of report. When you think about the diverse ranges of expertise that are potentially out there – let alone in this room – to prescribe a particular format of report that every one of you should adhere to is quite difficult to do. So again it has to be recognising that you as independent experts will have your own style and format of reporting that is relevant and pertinent to your own expertise. And to say that an expert in architecture reporting on a structure of a building has to do exactly the same style and format of report



of somebody who is reporting on a forensic injury or something like that would not actually have a sort of one-size-fits-all. The purpose then was to look at something that might substitute what would satisfy the requirements of the court in that they would be satisfied that your style of reporting fitted into the overarching process of fair trial, equality of arms for the individuals concerned who can understand the report and those sort of areas. One of the suggestions – again beyond keeping this sort of basic format that you see here which would be relevant to most reports, the one that might give you sort of guidelines and directions –the sort of things that were suggested again were that the courts would outline for you what is expected to ensure compliance with judicial rules and acceptance from an evidential point of view.

So issues such as details of qualification, relevant experience and accreditation in relation to your background; details of any literature or other information relied upon; it would contain a statement setting out the substance of all the facts given to the expert which are the material, time, that they are basing their opinion upon at a later stage; make clear which of the facts stated in the report are within the expert's own knowledge and which are not; state who carried out any examinations or tests used in the report, if the expert is using a team of individuals to do an examination as opposed to just themselves; give any qualifications, any relevant experience and accreditation those individuals may have and what areas they actually looked upon; if there is a range of opinions on the matters reported upon, to summarise that range of opinion and to give reasons for the particular opinion you may have chosen. On top of that you would also have a declaration in there that there would be expected where you would identify that you understood what the European rules would be in relation to whatever guidelines you were eventually given, that you've complied to those, and that you appreciate that your work is there for the benefit of the court as opposed to any particular litigant party, and so your job is to report for the court to ensure there is a fair trial not to be partisan and take a particular view.

So that was the sort of general outline of potential possibilities in relation to the last two questions. As I said, they are not actually set in stone in any way, these are suggestions that we placed forward before them to let them have a look and discuss in detail from there. Beyond, that then sort of concludes our synopsis of the events in relation to both workshops and I am happy to take any questions if you'd like to talk to me. Thank you.



## **RECOMMANDATIONS WORKSHOP 3 :**

### **QUALIFICATIONS, COMPETENCE AND ASSESSMENT OF EXPERTS**

Rapporteur : Nienke Mulder

I'm representing the workshop number three: qualifications, competences and the assessment of experts. I am from Holland and I am working at the Dutch register of court experts. I thank the organization for the invitation to be part of this symposium and part of this very necessary and important mission. So thank you all and also for the brilliant organization of this Colloque.

As I said I am the representative of workshop three. The French workshop had mainly French participants, and as I understood some Spanish people. The English workshop was very interesting for me as I was part of the English workshop, of course. There were 12 nationalities represented there. It was very nice to know as I hear this also today: there is a good mix of judges, experts. Of course, one of the goals of this symposium is to start a dialogue and an exchange of views between the different professional views on court expertise. So that alone is a very good way to start and it is good to be part of this mission.

Of course, with two different workshops different aspects are discussed in the workshops. And if you try to reach a consensus between those two workshops that is, as is explained before, a little bit hard. But we tried to put it in the document I have put here on the screen and I will go through the recommendations with you.

But before that I wish to give you a small summary, a synopsis of the state of play of the regulation on the status of the expert. It is very well developed in the European Union. There is a great heterogeneity among the methods of the legal experts' competence assessment in the member states, especially how they assess, if they assess the expert at all and who is responsible for the assessment. So there you have a great heterogeneity and you can see that coming back in the recommendation of our workshops.

The first question was how can we certify the expert's prominence, independence, and competence in regards to the European courts? In the first recommendation, there aren't a lot of changes. We didn't have a consensus on the way we should gather the experts' existing registers. The first step was not to have a register on a European level, but to gather the existing registers in the various European Union countries. An very interesting point from the French workshop is that they made the recommendation that national competent authority would provide information on the experts' availability for European



assignment. That was talked about a little earlier in regards to workshop one. We will get to that later when discussing the fourth and fifth recommendation. But what it does say as I understood from the French workshop that the competence authority will see to it that if an expert wants to be available abroad, then he would say so, because not every expert wants to work abroad. So that's why there will be information about the experts' availability on a European assignment.

The next recommendation was only adjusted a little bit because of the procedure rules and the final version of the final part of this sentence, "and the ability to write a report in an understandable manner for parties involved". This recommendation regards the technical competences of the qualities what you can expect of an expert. The recommendation we decided on was "the registration on a national level implies a level of technical competence". As of course, that is very important. You cannot be an expert without technical competence, everybody agrees on that, of course – and then "sufficient training in guiding principles of the fair trial and in procedure rules" for it is very important of the expert to know the contexts of law, in what context of law he is working, it applies to civil as well as it applies to criminal law. There is no difference there. It is of great importance that the expert has those qualities. And then as well in the expert's code of conduct and in experts' procedures.

And of course one of the competences of the expert is to write a report that everyone understands. Not every expert is capable of writing an expert report in layman's terms: the judges have to understand, of course, what the expert is writing, and the other way around, the judges should understand a little bit of the technical competences, but that is of course why he asked for an expert report. The ability to report in an understandable manner is the final part of this recommendation.

Then I will continue to the registration procedure: as I mentioned before there is a great heterogeneity in the way people are assessed, if they are assessed at all. So to start with a registration procedure that is a consensus reached very easily. That you would want to have a registration procedure. But not all countries are there yet. What was mentioned in the English workshop: there was a wish that on a European level general guidelines were developed on criteria of habilitation. You might find the word habilitation a little bit strange. The people of the English workshop might not recognize this term. As one of the things we find here, there is a lot of linguistic problems, English, German, French... so it was suggested in the English workshop to use the term "certification", whereas the French workshop talked about "accreditation". We decided to use the word "habilitation" because that was the common consensus to use that word. I wasn't familiar with the term before, but now I am. This is of course what you have in an international setting; to reach a consensus on terms is the first step.

Some countries find it necessary to have guidelines, but we recommend that each member state must implement a registration procedure allowing it to assess candidates' degrees, his professional experience and his morality and his knowledge on expertise proceedings.

Also, in the French workshop, and I come to the final recommendation to the first question. A consensus has been reached on the recommendation that at the European level, there should be developed a set of transnational procedure rules regarding expertise and the expert. For the reason of this recommendation, it is necessary to have a common basis when an expert renders evidence as an expert abroad. It would be very easy and very helpful if the expert in another country would have not so much difficulty to learn new procedure rules. If we have a common ground there, it would help the expert and it will help, of course, the quality of the expert's report.

So that is a quick synopsis of the first of the recommendations on the first question. I would like to continue now to the second question that is about "should one point an entity which can attest that the legal expert has undertaken adapted and up-to-date training in proceedings"? The central word here is "training" and again here the wording "habilitation". This is what they understood: that in a lot of

countries people are reassessed after a couple of years, such as in France; that you are reassessed after five years. And for a renewal of the habilitation and the expert has the duty and obligation to undertake continual professional development covering his area of competence, as well as the preceding rules which regulate expert examination and expert practices in his specialty, and it should be verified by a national habilitation body.

This recommendation comes very naturally to me, because, to be an expert you need to have current knowledge and current knowledge means that you are constantly improving yourself, constantly finding, constantly learning to be qualified. The procedural rules change, the expertise fields change, so you have to, as an expert, train yourself continuously. And this should be verified by a national habilitation body. You have to have an objective view if you did the training and the continuous professional development. You should be able to have it verified.

Then I will continue to discuss the final question: “should the expert be attached to a standardized evaluation entity?” We came to the recommendation that registering means that the authorities drawing up the register must regularly reassess the expert on the register by ensuring, among others, that they have undertaken continuing professional development and by obtaining the opinions of the judges who referred them, and the opinion of the authorities must take into account a quantity and quality of reports submitted. It has a lot to do with the second recommendation, but it focuses on the standardized evaluation entity.

And then the final recommendation: regarding this question, that the judge should take part in the assessment of the expert. The people of the English workshop may not see the recommendation they made, about direct feedback on the expert’s report used in courts. It was left out here because it was too detailed to have it put on the White Paper. But we had a very interesting discussion about it, because, of course, an expert does have the wish to get feedback on his report: did I do well? Was it useful? Can I improve myself? So for the direct improvement of quality that would be very use usable thing to do in the future; but to put it in here and to put it in a recommendation, we voted against it. However, please think about it as something for the future, for future development. So those are the recommendations from workshop three.

If you have any questions, I will be happy to answer them.



## **RECOMMANDATIONS WORKSHOP 4 :**

### **THE STATUS AND ETHICS OF EXPERTS: FREE EXERCISE AND LIABILITY**

Rapporteur : Rafa Orellana

Our workshop was called “The status and ethics of experts: free exercise and liability.”

Even before it started I was certain it would be easier than in the other workshops, and it was just so. The content of the other workshops was really much more complicated, with a lot of different debatable issues, and ours was rather easier. I think we managed to infuse the debate with the appropriate spirit.

Sometimes it was difficult and Mr Garbit was an excellent chair. We are happy to say that we reached a consensus not only in the English and French versions but also when the moderators from the two groups met. We were very surprised to see that we arrived at almost the same recommendations.

On a personal note, I am very happy to participate in the Institute’s work.

I think the good ideas about expertise all stem from France. I know that France has of course a very clear idea of its expertise, but I believe that sometimes one must also share one’s experience with other countries.

As President of Catalan experts, I sometimes feel rather lonely because we do not have a compact body of experts, one that would be represented to the authorities with as much prestige as the body of lawyers or magistrates. And we experts are here, somewhat revolving around all of this. So I believe that having a European Institute that discusses the notion of experts, which is sometimes such a complicated question and sometimes a rather straightforward one, is an excellent initiative.

On ethics, for the 1<sup>st</sup> recommendation we more or less kept the suggested draft version and we finally worded it as follows:

*“Whatever the method of appointment of the expert, (based on a registry established by a public authority, appointment by peers or by the jurisdiction after review), the designation of the expert is by reference to a body of rights and duties.”*

We considered whether or not to include the end of the suggested sentence: “in respect of the parties and the judge that appointed him. However since in the francophone workshop we thought that ‘rights and duties’ could also refer to those in respect of colleagues for example, we decided to word it more generally and crossed out the last part of this recommendation.

As to the word 'recruitment', I think it is a question of semantics, but I think the change is fine and is close to what we were thinking during the workshop.

For the 2<sup>nd</sup> recommendation, we also more or less kept the suggested terms.

*"To ensure compliance with these duties it will be necessary to establish a European wide body of regulations and ethical principles with a means of ensuring compliance. (Compliance with this body of regulations and ethics will be a determining factor in the authority of the expert to practice and to produce reports and testimony in legal proceedings.)"*

We thus added 'principles' as well as rules because a principle relates to a moral issue whereas 'rules' can be more specific, and we wanted to include both aspects.

In the French workshop we had a long debate on the question of penalties. Several participants did not believe we needed to include the concept of penalties within rules of ethics. Whereas others, myself included, believe that ethics must be respected through appropriate sanctions.

As we did not manage to reach a consensus on this point we chose softer terms, which are *"with a means of ensuring compliance"*. It is a sanction but said in a softer way. So we can accept it as a consensus. In the anglophone workshop they agree and also debated this point.

I must say that over the course of these 2 days I found that people had different views of what the concept of ethics can cover. There are general norms, principles, or rules, such as loyalty or honesty, but also for example where I come from, in Catalonia, we included in the code of ethics more specific rules such as those relative to establishing the fees. *How are we going to write out the invoice, on what criteria are we going to establish the fees...?* And we consider that these types of questions are also ethical questions. For example not turning down a mission can also be considered a question of ethics.

So this notion is very lax, it can be specific but can also include many other things that may go beyond the idea of deontology or ethics.

3rd recommendation:

The initial idea was really very vast, with a lot of content and ideas, and we decided to express it concretely, focusing on civil liability and the expert's obligation to *"maintain sufficient professional insurance for the protection of the clients and other parties affected by errors made in the production of expert testimony and reports."*

Going back to my previous example, in Catalonia we have included in the ethics code the obligation to take out specific civil liability insurance in order to become a member of our experts company.

As a closing remark, I would like to say that I am very pleased with these rewarding and rich debates which nevertheless ended in consensual recommendations.

## **8. GENERAL SUMMARY OF THE SYMPOSIUM ON THE FUTURE OF CIVIL JUDICIAL EXPERTISE IN THE EUROPEAN UNION**

Brussels, 16th and 17th March 2012



Vincent VIGNEAU,  
First Vice-president at the Superior  
Court (Tribunal de Grande Instance)  
of Nanterre, Associate professor at  
the University of Versailles-Saint  
Quentin en Yvelines

I have been granted the honour to say a few words of summary for this symposium.

Does this honour mean I have been given preferential treatment? I would think not, given how difficult it seems to summarise the high quality proceedings of the last two days. The task is even more arduous as I am not an expert, and yet have been asked to conciliate - in a few sentences - the opinions of an assembly mainly made up of experts. These opinions were indeed sometimes divided, but always very convincing and staunchly argued.

Perhaps it was the influence of the European Court of Human Rights that led the organisers of this symposium to believe that the most ignorant of participants would be the best suited to prepare a summary report!

I should first point out that I will not be doing a summary of the summaries that have already been presented to you.

Last night, as I was looking for inspiration in preparing this speech, I remembered the Chinese proverb that says that “when the wise man points to the stars, the fool looks at his finger”.

You realise of course that the wise man are the experts, and the stars are the European dimension. Mr First President will tell us more about this in a few minutes to close the proceedings, and I will talk of the wise man’s finger.

Yesterday Ms Griss very artfully presented the state of play that was sent to the members of the Network of the Presidents of the Supreme Courts of the European Union.

Beyond the awareness of two alternative models - a continental model based on the idea that the expert is the judge's agent and draws his legitimacy and powers from him, and a model based on common law, that considers the expert a sort of "grand witness" whose opinion is used by the party who has chosen and will pay him - the number of principles that we all subscribe to is actually greater than our differences.

Indeed, we all agree:

- to draw a clear distinction between the judge and the expert's respective roles: indeed, the judge makes the law and settles the dispute, whereas the expert provides insight on a factual question which the judge cannot answer alone,
- on the parties' right to retain control over the costs and the length of the expertise proceedings in spite of the judge's legitimate power to conduct the trial,
- the requirement of complying with the obligations arising from the right to a fair hearing.

This morning the rapporteurs from the various roundtables in which we participated yesterday presented the results of their work, of *your* work, in a much better way than I could ever have done. The fact that we were able to get such a diverse assembly to agree on such specific recommendations in less than two days bears witness to the realistic approach of the founders of the European Expertise and Expert Institute. Indeed, although they have sometimes been wrongly accused of lacking this realism, they have managed to give substance to the idea of high quality and harmonised judicial expertise across the European Union.

In the few minutes that I have been granted to speak, I will limit myself to sharing with you the considerations inspired by our work. These considerations are inevitably superficial as I have only had a few hours to formalise them.

You know that French legal experts usually present their ideas in two parts, however, as today I am lucky enough not to be in my natural environment, and moreover because I am in Belgium, I will divert from this dialectic and present this summary in three parts.

Firstly, a question:

We can wonder if the main issue of this debate was not to lead us to reflect on what we expect from an expert. What is his mission and what are the qualities required of him? Are these expectations identical in all the countries and according to the different stakeholders in the proceedings?

Typically, but it remains useful to repeat this, typically the expert gives the judge a technical opinion without making any assessment of the law. Armed with this expertise, the judge then rules on the application of the law. This is why all across Europe the law or case law prohibits the deciding judge from delegating his powers by entrusting the expert with a mission on a question of law. I remember that when I was at the Court of Cassation we systematically imposed sanctions on the courts that had violated this rule.

However, sometimes this distinction between fact and law is difficult to make. Indeed, in civil liability matters for example, there is a thin line or at least a thin line of appreciation, between not complying with the "accepted rules" of conduct and *misconduct* in the legal sense of the term. The technical and legal points of view are not, however, identical, as Mr Zupancic so brilliantly presented to us yesterday, although humility leads us to being reassured when these two points of view converge. An author even wrote wryly and somewhat provokingly on this subject that "*a technician who proves you*



right is an expert; an expert who proves you wrong is just a technocrat”<sup>18</sup>. Thus the nobility of the role of the expert and of the judge lies in remaining respectively independent from each other.

More than twenty-two years of experience in judicial work has led me to believe that in close to two thirds of civil trials, the issue of fact is at the heart of the proceedings. Everyone agrees that the judge is not bound by the expert's conclusions. However, a study by the University of Paris I in 1998 showed that, in the expert examinations carried out in 1995 by the Paris Court of Commerce, the judges were guided by the expert reports in over 90% of the cases. Rather than taking this phenomenon for granted, one author expressed concern and deplored “*a frequently observed, insidious tendency to purely and simply adopt expert reports, which results in a real de facto delegation of judicial function*”<sup>19</sup>.

Clearly, under these conditions, when the parties receive the expert's report they are more inclined to reach an agreement based on his findings rather than proceed with a costly procedure that has all the chances of ending in line with the expert's recommendations.

Thus in the 19<sup>th</sup> century, an author prophetically wrote that “*trials by ordeals, then torture, and then the jury, and soon expertise: these have been or will become the successive talismans created to discover truth in the justice system*”<sup>20</sup>.

As often there is the law – the judge is free not to follow the expert's findings – but there are also the facts, and in reality the judge only rarely deviates from these findings.

Yesterday it was noted that in France - and I am truly sorry to have to cite this country as an example but I think the situation is similar in Belgium - 80% of expert opinions are ordered by a judge who does not rule on the case and intervenes before any legal proceedings (interim relief judge) and 80% of these expert opinions are followed by an out of court settlement. This proves that the dichotomy contrasting an expert who brings insight and a judge who judges is quite relative, as in the end it is the expert's opinion that puts an end to the disputes, and things are, as always, a lot more complex than an oversimplifying mind like mine would like to be able to present.

For the legislator, the expert's mission is limited only to the technical investigation and to the determination of evidence. Does the judge have the same expectations? Yes, in most cases, but we must wonder if the judge sometimes orders an expert opinion to reassure himself on his own judgement and not really to launch a factual investigation that he is unable to carry out himself.

The expert is thus more of a friend than a collaborator, *amicus curiae* in the full sense of the term.

It is important to highlight that the authority of the expert's words, the value granted to his expertise, depends on the conception we have of his field of expertise. It is strong in fields of “hard” natural sciences and naturally weaker in human sciences. And then again, we may add that science, whatever the kind, provides only temporary certainties.

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<sup>18</sup> Cl. CHAMPAUD, « Société contemporaine et métamorphose de l'expertise judiciaire », p. 63. (*Contemporary Society and the Metamorphosis of Judicial Expertise*)

<sup>19</sup> B. Oppetit, 1976, 61 Les rôles respectifs du juge et du technicien dans l'administration de la preuve en droit privé, Xème colloque des IEJ, Poitiers, 26-28 mai 1975, Paris, PUF / (*The respective roles of the judge and the technician in the administration of evidence in private law. 10th Symposium of the Judicial Studies Institute / IEJ of Poitiers.*)

<sup>20</sup> G. Tarde, La philosophie pénale, 1890, réédité en 1972, Cujas, p 436 / (*Criminal Philosophy, 1890*)

As Karl Popper wrote “*A theory which is not refutable by any conceivable event is non-scientific.*”

But as the honourable judge Zupancic brilliantly showed us, the scientific aspect of expertise enriches the relationship we legal practitioners may have to the world.

In this, the preliminary presentation by this high representative of the Court of Strasbourg made it possible to dispel the misunderstanding that sometimes opposes judges and experts.

In fact, and contrary to what we could believe, their procedural approaches do not overlap. The scientific spirit that animates the expert leads him to a quest for truth in which there is no one adversary but plural forces, necessary conditions, and few certainties. Scientific knowledge is far from being intangible and it would be illusory to think it is immutable, no matter who the expert is. In other words, there is no neutrality of knowledge, exterior to the expert's person.

As to the judge - who must rule within a reasonable time limit and whatever the quality of the evidence submitted to him and the certainties that derive from these elements - he must often bring himself to rule either by using legal fictions (we legal practitioners call this presumptive evidence), or by ruling in favour of the party who can gain acceptance of - not the truth - but the most convincing thesis and the evidence that is the least weak.

Article 1349 of the French Civil Code defines presumptive evidence as: “*consequences that the law or a magistrate draws from a known fact to an unknown fact.*” It distinguishes two types of presumptions depending on whether they are imposed on the judge by law or laid down by the judge himself.

*Legal presumptions* are imposed by law and exempt the benefiting party from proving the legal situation they are claiming. They result in a reversal of the burden of proof, which is essentially contrary to any scientific approach.

According to Article 1353 of the French Civil Code, *Man's presumptions are left to the judge's lights and caution:* (I love this text but I am not sure that contemporary parliamentarians would still dare write that they give themselves up to the lights and caution of judges) he is granted the sovereign faculty to deduct, by his reasoning, the proof of a fact of another's reality. Here again, acknowledging the judge's almost supernatural power to enlighten under these conditions is contrary to the logic of science.

Paraphrasing a famous line by Audiard, “*Judges dare everything, that's how we recognise them*”.

Mr Zupancic's participation also marked, in a very symbolic way, the participants' unanimous agreement to place expertise within the context of a fair hearing. This unanimous agreement is all the more remarkable that, as previously stressed, Article 6-1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms makes no mention of it whatsoever, and that it was only in 1998 with the Mantovanelli ruling that the European Court of Human Rights explicitly stated it. Although all the judges who replied to the questionnaire provided nuances to these words, all take it for granted that the expert must comply with the essential components of a fair trial: independence, impartiality, and respecting the adversarial principle.

In fact, it is clear that in order to effectively consider expertise it is necessary to consider the judge, and that the two models of expert examinations reflect the two different conceptions of the judge. Thus, whatever aspect of the law of expertise we address goes beyond the issue of evidential value. Expert opinions are justified by the need to enable the judge to understand the factual elements, which is necessary to resolve a dispute in a loyal, complete, reliable, and clear manner, within reasonable time



frames and costs. Thus in view of the quantitative and qualitative importance given to investigative measures in the modern justice system, these provisions are essential.

In this respect, Mr President Chabanol's demonstration was insightful: behind the seemingly prosaic question of the expert's pay appears the more general issue of the cost of the justice system, and thus of the access to it.

A second series of remarks: are we at the dawn of the appearance of a new European judicial expert? Once again, everyone, and when there are general agreements I like pointing them out, everyone or almost agrees that being an expert is not a profession, but that there are professionals who devote a more or less significant part of the knowledge they have acquired over time in their profession to serve the justice system and persons subject to legal proceedings. There was also unanimous agreement as to the need to let the judge have the right to choose the expert and define his mission, to achieve common professional standards (namely in terms of training and assessment) and to set up a common standard for the procedure of expert missions. Incidentally the issue at stake in the roundtable discussions was to make recommendations to the European Commission in view of developing a White Paper on proposals for the harmonisation of practices in the various countries of the European Union.

In this respect, the progress of these roundtables seemed to me to adequately reflect the way the European Union works: a two-headed direction, difficulties in agreeing on shared concepts and in respecting deadlines, a strong capacity to discuss details for hours, some language barriers, but also a lot of pragmatism, the will to overcome useless, endless debates, the wish to achieve harmonisation for the better and the vision that the future will necessarily be embedded in a common approach.

However, one uncertainty remains on the ambition that we wish to give these proposals. Do we wish to promote the idea of a European expert who will be called for in all disputes under the competence of European courts or to encourage the development of common rules across the European Union? Must we create European registers of experts or enable the use of the registers from one country to another and thus foster the appointment of foreign experts?

In other words, are we developing a law on European expertise or a European law of expertise?

Or yet again, can we propose a "mix" as Ms Griss suggests, by creating specific rules for transnational disputes that can also serve as a common ground of reference for all the systems in the various countries of the European Union and that would enhance the application of the Council Regulation of 28 May 2001 on the cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters? First President Nue will surely say more on this matter in a few minutes.

We know that our national jurisdictions must not only apply a legal corpus based on community or conventional law, a corpus that is increasing daily, but also, in virtue of this regulation, that they must set up or support the implementation of these rules of foreign law on national territories as regards expert proceedings and the status of experts.

**Following the free movement of persons, goods and services, now is the time for the free movement of evidence.**

Lastly, a third and last thought (and this came to me more during the discussions I had with people during the breaks from the sessions and at mealtimes - well do we know that these informal exchanges are just as important as public speeches): expertise can also fulfil a role that goes beyond the judicial framework. The expert can become not only a partner for the judge but also for example for the

family whose tensions he will have to ease, for the company whose weaknesses he will detect and with his feedback assist in improving its processes, to use a managerial term, and whose development he will thus enhance. In these cases the expert becomes a consultant, not in the legal but in the managerial sense of the term.

What do the experts think of all this? What struck me during the debates was the realisation that really experts talk less of their role than of the qualities that are expected of them, as if the scope of their intervention were strictly defined by the mission they are entrusted with and on which they do not consider they have any control. They are however continually questioning themselves on their manner of being.

In other words and to their credit, the immutability of their mission has not prevented them from independently developing a reflection on their own code of ethics.

To conclude, the merit of this symposium is also to have led us to address the issue of the expert's ethics and deontology.

The expert's legitimacy is based on an indispensable triptych: competence, objectivity, and pedagogy.

During our proceedings I often heard that an expert is not necessarily a specialist who knows something better than others do. It is the expert's knowledge as much as it is his method, listening skills, ability to stimulate dialogue and capacity to clearly explain complex matters that enable the emergence of the solution. In fine, these qualities, this ethic, this respect, as much of the parties as of the justice system, and of the expert's own conscience, is this not what is also expected of the other two actors in trials who also participated in this symposium - the judges and the lawyers? Exactitude, integrity, honour and conscience are as much an obligation as they are a characterisation of these three roles. They could be the European Expertise and Expert Institute's motto.

## **9. THE FUTURE OF CIVIL JUDICIARY EXPERTISE IN THE EUROPEAN UNION**

### **RECOMMENDATIONS TO SUBMIT TO THE UPCOMING CONSENSUS CONFERENCE**



**Alain NUEE, First President of  
the Appeal Court in Versailles,  
FRANCE**

### **I. CREATE A STATUS OF THE EXPERT**

The multiplication of cross-border litigation, the need to provide bases for decisions whose mutual recognition is widely acknowledged, on elements of technical evidence which must also be recognized by the members of the countries in questions, the requirements of Community jurisdictions which tend to apply to judiciary expertise all the rules of fair trial (reasonable time-limits, equality of arms) promote the creation of a status of the expert recognized at a European level.

Therefore, no matter the expert's recruitment mode (on a register held by a public authority, appointed by his peers or by the court after debate), we must establish a status of the expert which sets the rights and obligations of the experts versus the parties and/or the judge who appointed him.

Competency, independence, impartiality and loyalty, virtues which the judge and the expert have in common, are at the heart of his obligations.

The expert must undertake further training which covers his career and specialty, the procedure rules which regulate expertise and the expert practice in his field of specialty.

He must provide proof of insurance if the State in which he is appointed does not cover the expert's liability for damages he might cause to parties or to third-parties due to his expert activity.

The expert must also enforce the principle of contradiction and of equality of arms during the expertise mission.

He must notify the judge and the parties as soon as possible of any event which might affect his independence or make him doubt his independence.

No matter the country, he must respect the deadlines which have been set by the judge to carry out his mission, and make sure the cost of his operations is proportional to the interest of the litigation.

He must make sure to notify the parties of the duration and foreseeable cost of his operations on a regular basis.

He must regularly account for the progression of his mission to the judge to which, when he has carried out his mission, he must submit a report structured along a specific manner, understandable for laymen, which answers clearly and precisely to the questions asked, or states the lack of answer.

The expert is entitled to a legitimate fee and to being reimbursed for the fees incurred during the mission of expertise, which will be set by the judge and either paid by one or more parties, or covered by the State.

This payment can be reduced if the expert does not respect the deadlines or if he exceeds the predicted limits on his fees and costs without obtaining the consent of the parties or the judge.

The expert has the right to appeal against the decision of the judge who set the amount of the fees and expenses to be reimbursed.

## **II. CREATE EXPERT REGISTERS**

The establishment of an expert register is the answer to a practical need for EU judges.

Such a register should be created at a European level by gathering existing lists in the different member states..

Enrolment on a national or European register implies a level of technical competence, sufficient training in the guiding principles of court proceedings as well as in the expert's code of ethics and the expert procedure.

Each member state must thus implement a registration procedure which allows it to control the candidate's degree, his professional experience, his morals and the acknowledgement of his qualities.

Registering implies that the authority establishing the register must regularly re-assess the experts on the list by making sure they have undergone further training and by gathering a favorable opinion from the judges who required their services.

### **III. REINFORCE THE JUDGE'S ROLE**

The quality of the expertise depends on the speed with which the report is handed in, it must reinforce the role and control powers of the judges to diminish downtimes due to an eventual lack of diligence on the expert's part or due to the parties' inertia.

The judges who requested the expert, or another judge appointed by the court for this purpose, must control the mission's progression by ensuring that the deadlines are respected and that the costs are proportional to the interest of the litigation.

Taking care to obtain the parties' opinion, the same judge:

- must set the deadline before which the expert's report must be submitted and may, on the expert's request, push this deadline back,
- on his own motion decide to replace the expert who has not respected the deadlines,
- can restrict or expand the expert's mission, allow the expert to appoint one or more additional experts or technicians, or even order another expert to carry out a second opinion.

The judge also decides on any difficulties which might happen while the expert is carrying out his mission. He can notably order the parties or third-parties, on pain of monetary penalties if they cannot invoke just cause to oppose it, to provide their help in the mission's progression, notably by providing the expert with all the necessary evidence to allow him to answer the questions asked by the judge.

The judge sets the expert's fees. To this end, he takes into account, barring any legal scale, the duties carried out, the respect of deadlines, the interest of the litigation and the quality of the work presented.

The judge must take part in the assessment of the experts he appoints.

### **III. A STRUCTURED EXPERT'S REPORT**

Each judge in the European Union must be able to count on the submission of a report which has, according to each type of mission, the same elements no matter who was the expert who carried out a mission for said judge, or for another judge.

The pre-report, if it exists, and the report ending the expert's mission, which must be submitted to each party for examination, before the parties present their lines of argument and requests to the judge, must thus have:

- a reminder of the mission he has been entrusted with and the chronology of operations,
- the list of evidence examined by the expert,
- a description of the observations made by the expert or for the expert,
- a presentation of the investigations carried out by the expert,
- the analysis carried out by the expert on the elements he has thus gathered,
- the observations made by the parties on the pre-report and the answer given by the expert,
- an answer weighted with a detailed technical opinion covering each question the judge asked the expert; if the expert was unable to answer one of them, he has to specify the reasons why.

The expert may be called upon to complete or explain his report, either orally or in a written form, by a judge's decision, acting on his own motion or on the request of the parties.

## **10. EUROPEAN EXPERTISE IN CROSS-BORDER DISPUTES**

*Alongside these recommendations, whose integration into national legislation and implementation by all the countries of the European Union will take time, we recommend the establishment of a European expertise system which, modelled after the European order for payment procedure, would aim to replace expert appraisals governed by national regulations in cross-border disputes or expert appraisals with possible cross-border extensions.*

*The rules governing this expertise would cover all the recommendations made above except as concerns the choice of the expert, which temporarily and in the absence of a registry for all the EU, should take into account the above-mentioned criteria of competence and reputation.*

*Thus the following text could be submitted to the consensus conference, and once validated it would prefigure positive law.*

The following rules and regulations concerning judiciary expertise measures apply to cross-border litigations or to any other litigation for which the parties request it or for which the judge orders it, in cases where the litigation might have cross-border consequences.

### **I. THE CHOICE OF THE EXPERT**

The expert will be chosen among a list of experts drawn up for these purposes. This list will be EU-wide and will have been created from national lists. The expert can also be picked from experts who correspond to the criteria of competence and renown set out in the following recommendations.

When the appointed expert is a legal person, it will appoint a natural person who will control the mission's progression and will report to the judge.

If the litigation's technical complexity justifies it, the judge will appoint a college of experts. They will then designate one of themselves to be spokesperson.

The expert has a duty of loyalty and impartiality.

### **II. THE OBLIGATIONS OF THE EXPERT**

The expert cannot accept a European expertise mission if he has not taken out insurance covering his liability for damages incurred during his mission, the exception being if the State in which the appointing jurisdiction is located covers this liability. He must offer proof of this insurance to the parties as soon as he starts his mission.

Even if he does not take an oath, by accepting the mission, the expert the expert is committed to following the obligations set out in this text.

Under any and all circumstances, the expert must ensure that the principle of contradiction and of equality of arm sis respected. He must ensure that the parties have a genuine possibility to efficiently



comment on his investigations, the method he used, his reasoning as well as the results and conclusions that he drew.

The expert can be recused for the same reasons as a judge under any of the legislations regulating the parties in litigation, as well as for violating the principles laid out by article 6-1 of the European Convention on Human Rights.

The expert must resign if he believes to be an impediment.

At the beginning of his contract, the expert must sign a declaration of independence in which he pledges that he has no ties of interest with any of the parties in litigation or specifies the facts which could cause him to be an impediment. The parties, once they have received this declaration, have a month to request the appointment of another expert. Once this deadline has passed, the parties may no longer submit such requests on those grounds.

If a cause for impediment appears during the intervention of another party in the litigation, the judge ordering the expert is apprised by the expert himself or by the first party to act, to determine whether the expert should be replaced or whether the mission should be divided and a second expert appointed to carry out new operations between the intervening party and those present for the first expert.

During his mission, the expert must take care that the cost of his investigation is proportional to the interest of the litigation. He will inform the parties of the real cost of his investigations as well as of the expected cost of the completed mission.

### **III. THE JUDGE'S ACTIVE ROLE IN THE MISSION'S PROGRESSION**

The judge sets the deadline for which the expert's report must be submitted and can, on the expert's request, push back this deadline after informing the parties.

The judge who appointed the expert or a judge operating in the same jurisdiction as the one who appointed him has control over the compliance with the deadlines set for the mission's completion.

The judge can act on his motion, after receiving the parties' opinion, and replace the expert who had not complied with the deadline set.

The appointing judge, or the judge in charge of controlling the implementation, can, on his own motion or upon the request of the parties – observing *res judicata* – restrain or broaden the expert's mission, allow the expert to adjoin one or more experts or technicians, or order another expert to carry out a second opinion.

These judges also make decisions on any difficulty that may happen during the expert's mission. They can also oblige the parties or third parties which cannot claim a legitimate reason to oppose it to provide help in carrying out the mission, especially by providing all the necessary documents to help the expert answer the questions asked by the judge.

The judge decides on the expert's fees, which will be paid by the party requesting the implementation of the mission, unless there is a counter order or the State which has mandate over the judge who ordered the mission covers the fees.

To set the expert's fees, the judge takes into account, barring any legal scale, the duties carried out, the respect of deadlines, the interest of the litigation and the quality of the work presented.

The judge's decision setting the expert's fees can be contested in front of a court.

Before the expert's mission can start, the judge sets a retainer fee for the appointed expert that is proportional to the interest of the litigation and the foreseeable investigations; he also designates the party who will pay this fee.

This retainer fee is either deposited until the end of the mission or handed over to the expert by the party as the mission progresses, if the expert submits expense statements showing proof of the duties carried out.

If the party who should pay the retainer fee does not do so within the deadline and according to the assigned methods, the expert's appointment lapses, unless another party in the litigation offers to displace the party in default.

#### **IV. PROGRESSION OF THE EXPERT'S MISSION**

The expert's mission is carried out under the control of the judge who ordered it, or the control of a judge of the court who has been specially appointed.

Upon receiving the decision appointing him, the expert invites the parties to bring him any evidence linked to the litigation, proves he is insured and submits his declaration of independence.

There is a two-month period after he has been appointed during which the expert must tell the parties of the methods considered to carry out his mission and set the date and times during which he will carry out his findings.

Following this, the expert will notify the parties, if necessary, of the necessary investigative techniques and methods to implement them; he will specify the evidence necessary to carry out his mission; he will notify the parties and the judge in charge of the foreseeable cost of his operation and, if necessary, of the deadline extensions necessary to carry out his mission.

The parties have two months upon receiving this information to send the experts observations on the suggested methods and the expert must answer. Beyond this deadline, the expert may ignore these observations.

When he believes he has shed enough light on the matter to have an opinion, the expert writes out a pre-report which he submits to the parties' counsels and to the non-assisted non-represented parties; he sets them a reasonable deadline, depending on the nature of the litigation, to provide him with feedback and observations.

Once this deadline is passed, the expert writes a final report which matches the requirements set out below and must have:

- a reminder of the mission he has been entrusted with and the chronology of operations,
- the list of evidence examined by the expert,
- a description of the observations made by the expert or for the expert,
- a presentation of the investigations carried out by the expert,
- the analysis carried out by the expert on the elements he has thus gathered,
- the observations made by the parties on the pre-report and the answer given by the expert,
- an answer weighted with a detailed technical opinion covering each question the judge



asked the expert; if the expert was unable to answer one of them, he has to specify the reasons why.

This report is simultaneously submitted to the parties' counsels, to the non-assisted, non-represented parties and the judge in charge; with it is enclosed a summary note of the costs and fees, after deducting any potential retainer received; this shall be considered as a request by the expert to the party legally required to pay the expert's fees, request on which the judge has to rule as soon as possible.

At the judge's request, the expert orally presents his conclusions during a hearing; he answers the parties' questions under the control of the judge.

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