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Shaping Expertise across European Justice Systems

JUST/2013/JCIV/AG/4664

EGLE
European Guide to Legal Expertise

CONSENSUS CONFERENCE
on

Civil judicial expertise
in the European Union



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WORKING GROUP 1 (WG1):

**FR: "DESIGNATION ET MISSION DE
L'EXPERT"**

**EN: "APPOINTING AN EXPERT: MISSION
AND EXPECTATIONS"**



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Working Group 1 (WG1): Appointment of the expert and definition of their mission

Working Group 2: Progress of the expertise and drafting of the report

Working Group 3: Training, competences et evaluation of experts.

Working Group 4: Status and code of ethics of experts / free practice and liability



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EGLE Working Group 1 Members



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Simona Cristea, Judge at the High Court of Justice and Cassation, Romania

Beatrice Deshayes, German and French lawyer (Bars of Cologne and Paris), Partner of the law firm HW&H, Paris, France

Lubos Dorfl, Judge of the High Court in Prague, Czech Republic

Sylvain Eloit, Expert at the Court of Appeal of Paris and the Administrative Courts of Appeal of Paris and Versailles, France.

Gianfranco Gallo, Prosecutor in the Prosecutor's Office for Juveniles in Brescia, Italy.

Alain Henderickx, Lawyer at the French Brussels Bar of Brussels, Belgium.

Jacques Honkoop, Expert, arbitrator and mediator in ICT-conflicts, Netherlands

Norbert Koster, Judge at the Court of Appeal in Hamm, Germany.

Hans Mulder, University of Antwerp, managing director Viagroep nv and expert LRGD, Netherlands.

Rafael Orellana, Court expert on documents, lawyer and partner at "Gabinete Jurídico Pericial Orellana" in Barcelona, Spain.

Assya Subeva, Judge at the Sofia Court of Appeal, Bulgaria.

Alfonso Valero, Principal Lecturer at Nottingham Law School (Nottingham Trent University), Solicitor & lawyer (non-practising), United Kingdom.



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WG1 EGLE MEETINGS:



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1) 09.07.2014 in Brussels (BE).

Attending: Dorfl, Gallo, Henderickx, Honkoop, Koster, Orellana.

2) 03.09.2014 in Barcelona (SP).

Attending: Deshayes, Gallo, Honkoop, Koster (Skype), Orellana.

3) 21.11.2014 in Paris (FR).

Attending: Deshayes, Eloit, Gallo, Henderickx, Honkoop, Koster, Orellana.

4) 13.02.2015 in Delft (NL).

Attending: Deshayes, Eloit, Henderickx, Honkoop, Koster (Skype), Mulder, Orellana.

5) 17.03.2015 (Skype conference).



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Topics broached:



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- 1.- Definition of judicial expertise.
- 2.- Tenets regulating the use of judicial expertise.
- 3.- Conditions and tools the judge and the parties have to choose an expert.
- 4.- Type, content and format of the mission, costs.



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1- Definition:

The general definition of "JUDICIAL EXPERTS" in a civil trial must include:

- experts appointed by the judge.
- and those appointed by the parties, inasmuch as they fulfill the conditions of independence, impartiality, competence, oath, etc.



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2- Tenets regulating the use of judicial expertise:

- The judicial expertise can be ordered in a civil case:
 - When it is necessary, essential or “relevant” to allow the judge to solve the case.
 - When the judge is unable to take a substantiated decision without this technical opinion.
 - It can only focus on technical topics in a broad sense, outside of any judicial issue (except in terms of foreign law – controversial).
 - It can only be ordered when there are no simpler or faster means to obtain evidence (controversial: “or cheaper”: according to the majority of the group members, the potential costs of the expertise should not be an impediment to its implementation).



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3- Tools the judge and the parties have to choose an expert (1):

The main idea is to create a European register of experts for cross-border litigation, which would also be available for domestic trials in each EU Member State, with technicians qualified in several competences, selected according to harmonised admission criteria.

This proposal was unanimous among the work group. Some suggested that first, during a transition period, expert registers established in the different Member States (when they exist) be made available to all the courts of the Member States on a single platform.



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3- Tools the judge and the parties have to choose an expert (2):

However, the following issues were the focus of discussions:

- For cross-border litigations, the expert should be picked from this European list, unless the cases are exceptional (in which case the judge will have to explain their decision) or the parties have come to an agreement.
- If the appointed expert is not on the register, they will have to swear an oath and sign a "Charter of the principles of European expertise" which needs to be drafted (also discussed: this Charter will also have to be signed by the experts on the European register).



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3- Tools the judge and the parties have to choose an expert (3):

- Enrolment criteria for the register are being studied by group 3. We recommend that they be established along a harmonised nomenclature of fields of competence, and especially that it mentions the expert's past experience and their working languages, and that it be available on-line.
- The national judicial or administrative authorities already existing for the national expert registers (if such authorities exist) should be the ones to check that the admission criteria are being respected. Otherwise, one could resort to a central body, which should be created by one of the EU organisations.



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3- Tools the judge and the parties have to choose an expert (4):

Among the admission criteria of the experts for this register, we should find:

- technical competence and professional experience,
- knowledge of the principles of fair trial (especially the respect of the adversarial procedure),(contentious),
- the signing of a “European expertise charter” and/or a Code of Conduct, (contentious),
- the subscription to and maintenance of a civil liability insurance which covers judicial expertise.



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3- Tools the judge and the parties have to choose an expert (5):

- In some countries, the expert is not picked by the judge in charge of the case but by a third party (for example, the chief justice of the court). In other countries, the parties are the only ones to pick the expert. The workgroup majoritarially prefers the appointment directly made by the judge in charge of the case; some members would be in favour of an appointment by a supranational body. Moreover, the judge has to respect the parties' choice if they are in agreement.
- It seems important that prior to appointing an expert, the judge contacts them to check whether they are available and competent for the mission in question, and whether or not there is any conflict of interest. The expert has to fill out a declaration about this.
- The parties must always be able to refuse the expert in case of a lack of independence, impartiality or for any other reason laid out by the law of the country in which the case is being tried.



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4.- Type, content and format of the mission, costs (1):

- The mission must be written as precisely as possible and as close as possible to what is needed to solve the question of law; inasmuch as possible, it should be presented as questions. The parties must be able to give their opinion about the phrasing of the mission (contentious).
- The expert must be able to talk to the judge about their mission; the parties must be informed about these discussions.
- If the expert, during the mission, decides that additional measures would be useful/necessary to solve the case, or that they should be asked additional questions, they can provide the judge with suggestions for this (contentious). However, the parties must always be able to ask additional questions during the expertise, depending on its progress (unanimous). It is up to the judge to decide whether or not these questions should be added to the mission (contentious).



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4.- Type, content and format of the mission, costs (2):

- The judge must set a first deadline to carry out the mission which should not be over 6 months (or 12 in complex cases). This deadline can be pushed back after an expressed and detailed request from the expert; the parties must be able to give their opinion before the extension is agreed.
- Contentious: for small cases (see Regulation EC 861/2007) or simple technical questions, a simplified expertise procedure can be implemented, respecting the adversarial principle: mission limited to one or two questions, with only written communication, shortened deadline, reduced costs...)
- The expert's mission can provide for an attempt at conciliation; the judge must expressly mention it and provide a framework for it (contentious).



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4.- Type, content and format of the mission, costs (3):

- A first provision can be paid by the party requesting the expert to fund the fees for studying the file and estimating the costs.
- It is up to the judge to decide, at the beginning of the expertise, which party will pay for the cost of the expertise (some members of the group believe that this deposit should be paid equally by both parties, or only by the party requesting the expertise).
- The expert is entitled to a fair compensation once their report is handed in. Provisions can be allocated during the expertise if the expert has to pay third parties (laboratories...) (contentious).
- A provision must be paid by one or both parties for the costs of the expertise before it starts, which means the expert must draw up a first estimate when receiving the file, specifying how he has calculated this estimation; the judge must decide which party (or parties) should pay this provision.
- The provision paid at the beginning can be adapted depending on the progress of the expertise.



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To summarise, here are the recommendations on which the members of WG1 reached a consensus (1):

- The definition of the justice expert.
- Most of the criteria which should be respected for a judicial expertise to be called for.
- The opportunity of creating a European expert register according to a harmonised nomenclature.
- The need to respect certain criteria to be registered.



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Consensual recommendations(2):

- The right of the parties to refuse an expert for lack of independence and conflict of interest or in any other case laid out by the law of the Member State in which the expert is appointed;
- The right of the expert to fair compensation once their report is handed in;
- The need to obtain provision for the costs of the expertise before it starts, which requires the expert to carry out a first estimate when receiving the file, specifying how it has been calculated;
- The opportunity to complete the provision paid at the beginning depending on the progress of the expertise.



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Consensual recommendations(3):

- The need for the mission to be phrased as precisely as possible, depending on what is required for the case to be decided; if possible, the mission should be formulated as questions.
- The mission can contain technical conclusions and observations, but never legal ones.
- Before starting work, the expert must be able to talk with the judge about their mission; the parties must be told of this, and if necessary an audience to redefine the mission and lay out the expertise can be organised.



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Consensual recommendations (4):

- During the expertise's progress, the parties must be able to ask the judge to add questions to the expert's mission; it is up to the judge to decide whether or not these questions should be added.
- The need, upon the request of the parties, or unilaterally decided, to organise, after the report is handed in, an audience allowing the judge and the parties to ask the expert any questions to help understanding and using the report; this audience can be done by videoconference.



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However, several points remained contentious at the end of our assignment (1):

- An the content of foreign law be the focus of a judicial expertise?
- The influence of the probable cost of the expertise on the decision whether or not to use judicial expertise.
- The judge's obligation, in case of cross-border litigation, to choose an expert registered on the European list.**
- The body which will establish and manage the European expert register: a central European authority, or the national bodies in charge of national registers?**



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Contentious recommendations (2):

- **The weight of the parties and of the judge during the expertise process (using an expert, defining their mission, choosing the expert, etc.).**
- Before accepting a file, the expert can establish a declaration of independence and availability.
- It is up to the judge to decide, at the beginning of the expertise, which party will pay the cost of the expertise (some members of the group believe that this payment should be shared equally by both parties).
- The judge should set a first deadline within which time the expert should hand in their report, this deadline can be extended if needed. This deadline should not go beyond 6 months, or even 12 months for complex cases.



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Contentious recommendations (3):

- **If the expert, during the mission, decides that additional measures would be useful/necessary to solve the case, or that they should be asked additional questions, they can provide the judge with suggestions for this.**
- **For small cases (see Regulation EC 861/2007) or simple technical questions, a simplified expertise procedure can be implemented, respecting the adversarial principle: mission limited to one or two questions, with only written communication, shortened deadline, reduced costs...).**
- The expert's mission can provide for an attempt at conciliation; the judge must expressly mention it and provide a framework for it.



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Ouverture du débat sur les points controversés essentiels au sein du WG1:



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- 1- L'obligation, pour le juge, en cas de litige transfrontalier, de choisir un expert inscrit sur la liste européenne.**
- 2- L'entité qui devra établir et gérer la liste d'experts européenne: une autorité centrale européenne, ou les entités nationales en charge des listes nationales?**
- 3- Le poids des parties et celui du juge au cours de la procédure d'expertise (recours à l'expertise, définition de la mission, domaine de l'expertise, choix de l'expert, etc).**



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