Civil-law expert reports in the EU: national rules and practices

In-depth analysis for the JURI Committee
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IN-DEPTH ANALYSIS

Abstract

Upon request by the JURI Committee, this in-depth analysis compares national rules and practices governing expert reports in the civil law area. All EU Member States expect experts to be competent, independent and impartial. The method of recruitment and rights and obligations of experts still vary. The lack of public registers is an obstacle to their appointment. Only judges can authorise an expert report and generally define the mission, but it is not the case everywhere that they are given the powers to oversee how the process is carried out. It is not universally the case that EU Member States require experts to respect the adversarial principle, and they do not require expert reports to be structured in any particular way.
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LIST OF ABBREVIATIONS

CEPEJ  European Commission for the Efficiency of Justice

EEEI  European Expertise and Expert Institute
EXECUTIVE SUMMARY

General information

This in-depth analysis is based in part on documents provided by the Council of Europe's European Expertise and Expert Institute (EEEI), particularly the final report of the Eurexpertise project dated 30 June 2012 and entitled The future of civil judicial expertise in the European Union: state of play and proposals\(^1\). It is also based on documents issued by the European Commission for the Efficiency of Justice (CEPEJ), namely the 2014 report entitled Report on European judicial systems: efficiency and quality of justice\(^2\), and on the good practice recommendations adopted on 12 December 2014 for the 47 Member States of the Council of Europe, which are set out in a document entitled Guidelines on the role of court-appointed experts in judicial proceedings of the Council of Europe's Member States\(^3\).

The information in this document, and in the documents mentioned above, is drawn from the answers provided at a given time by Member States or professionals in these countries; these may now be different due to legislative developments in the countries concerned.

This document was drafted at the same time as a consensus conference organised by the EEEI with financial support from the European Commission (public session scheduled for 29 and 30 May 2015 in Rome) which sought to adopt good practice recommendations limited solely to court-ordered expert reports in the civil-law area (hereinafter 'expert reports') in the 28 EU Member States; these recommendations could of course not be taken into account.

Indeed, two series of recommendations are set to be published only a few months apart. These recommendations are likely to have much in common but also to have a different scope, both geographically and in terms of the types of expert report concerned. While the CEPEJ recommendations cover all forms of expert report (criminal, civil, commercial, administrative, etc.) and have been entrusted to court-appointed experts (technical experts), and also cover 47 countries, the consensus conference, by contrast, aims to result in good practice recommendations that are relevant to civil expert report in the 28 EU Member States, whether drafted by court-appointed experts (technical experts) or expert witnesses appointed by the parties.

For convenience, this document will retain the term of expert witness used by the CEPEJ to refer to experts contracted by the parties to give their opinion in court, despite the particular role played by experts compared to regular witnesses. This term will be used both for common law countries and continental law countries such as Spain, despite the fact that these countries have another definition of expert witness and use the concept of expert appointed by the parties to refer to the same type of expert.

\(^1\) http://gb.experts-institute.eu/IMG/pdf/actes_du_colloque_eng.pdf
\(^3\) https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2014)14&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864
**Aim**

This in-depth analysis, based on documents provided by the EEEI and the CEPEJ, focuses on expert reports in the civil-law area and legal experts who are involved in these arrangements intended to help reach legal decisions, whether they be technical experts appointed by the judges or expert witnesses appointed by the parties to support their case and who, when they appear in court, are subject to obligations which distinguish them from party experts.

This study stresses the need for harmonisation in order to facilitate the resolution of cross-border litigation and, in other litigation, to enhance the faith that judges and those subject to the jurisdiction of the courts have in experts from other EU countries and the expert reports that they provide, in order to achieve some form of mutual recognition of expert opinions.

In all European judicial systems, experts’ opinions are not binding on judges, who have sole authority to interpret facts and the rule of law; in reality, expert opinions often have a decisive influence on the outcome of litigation and the quality of decisions.

Continental legal systems, in which experts are proxies for the judge and subject to the same obligations and prerogatives, and common law systems, in which experts are a type of special witness summoned by parties who select them, make identical demands regarding experts’ competence, independence, subjective and objective impartiality and a strict standard of ethical conduct.

However, the way in which experts are recruited and appointed varies greatly, as do their rights and obligations, which undermines the trust they should inspire in judges and parties. Their activities are not universally governed by procedural rules or specific texts, their title of expert is not consistently protected and, above all, their involvement with the courts is only rarely preceded by a check on their ability and reputation, carried out when they are added to or retained on public registers, which must become more widespread in order to enable experts to be appointed by judges from outside the country where a given expert usually works.

Most countries have established codes of conduct with penalties for non-compliance; it is not currently possible to determine whether these penalties are actually enforced. Expert liability applies in almost all countries, but not all countries require experts to provide proof of insurance.

While all countries grant the judge the sole power to commission an expert report, the choice of expert is a matter either for judges or parties, and the appointment of experts is not necessarily dependent upon their inclusion on a register, even when such a register exists. Furthermore, the power of recusal exists in the vast majority of countries.

It is most often judges who are responsible for defining the mission of the expert report, but they do not necessarily have the power or the desire to monitor the expert report procedure, despite the fact that more widespread effective monitoring is a prerequisite for effective judicial cooperation.
Surprisingly, most countries do not require experts to enforce the adversarial principle referred to in the case-law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), which is a serious obstacle to the EU-wide recognition of the validity of court-ordered expert reports.

The expert report process ends, de facto, with the submission of a written report, although in some countries the mission is, de jure, only considered to have been completed when the hearing is held before the judge. These reports, which are not necessarily preceded by preliminary reports, are not subject to any requirements with regard to their structure, whereas the statement of the facts and the list of supporting evidence, the analysis of the points at issue and the account of the approach taken by the expert leading to the reasoned position, promote the upholding of the adversarial principle and are essential for parties and judges to be able to assess the value of the expert's opinion.

Finally, the financing of expert reports is generally subject to judges' supervision and authority. A deposit is generally set at the start of the process by the judge or by agreement between the expert and the parties. While the expert's fees are usually charged to the losing party, with the amount being set by the judge according to the market price or a statutory scale, there is at least one judicial system in which the cost of an expert report is charged to the court if commissioned by the court of its own accord.
1. SCOPE AND MOTIVATION OF STUDY

1.1 Experts and expert reports: two inseparable aspects

According to the French version of Wikipedia, "an expert report is a mechanism which helps reach decisions by means of technical or scientific research in cases where decision-makers are confronted with issues that are beyond their immediate grasp. An expert report requires three elements: commissioning, execution and a report. An expert's opinion may also be requested in the form of a consultation.

Expert reports are inextricably linked to experts: specialists who are judged fit to carry out this work and who will provide an opinion that can be used to reach a decision. The expert report may be assigned jointly to several experts (a group of experts).

The 'specialist' expert must be recognised as such by his peers in the field."

Given the inseparable nature of expert reports and experts, confirmed by this definition (if confirmation were needed), this survey of court-ordered expert reports in the civil-law area in Europe will begin with a discussion of the position and role of experts.

In the legal field, as elsewhere, experts provide decision-makers - in this case, judges - with clear and substantiated responses to the specific and complex problems about which they are consulted. Their services are being requested with increasing frequency due to the increased complexity of our societies and the improvements in investigative methods linked to scientific developments; they thereby help to make justice more effective.

Although experts and expert reports are traditionally used as evidence in all codes of Continental law, experts play a different role - as Ms Griss, former president of the Supreme Court of Austria, pointed out very judiciously during the Eurexpertise project - that goes beyond the role of witnesses: experts establish the facts and draw conclusions based on those facts, while witnesses do not have the right to draw conclusions and must limit themselves to testifying to what they have seen and heard.

Thus even if - according to the law, and in all European countries - experts' conclusions are not binding on judges, their opinions tend to have a decisive influence on the outcome of litigation and the quality of decisions.

In contrast to jurisdictional decisions, there is no principle of mutual recognition of expert conclusions produced as part of a court case at the request of or with the authorisation of a judge.

Therefore, particularly in cross-border litigation, a problem arises relating to national courts' acceptance of an expert report drawn up for a court in another country, produced following different procedures by experts who have been recruited according to different procedures and criteria, which may give rise to doubts regarding their competence.
Furthermore, by virtue of the principle of freedom of establishment, experts who normally assist their home country’s courts are increasingly required to work in other countries, either on their own initiative when responding to the request of parties, or at the request of the courts of these other states.

Judges in these countries may consider that no national experts possess the necessary abilities, that there is a need to seek experts beyond their borders who have no links with the parties involved, which is particularly necessary in certain areas with a high concentration of businesses (aeronautics, pharmaceutical laboratories, etc.), or that there is a need to put "expert" service providers in competition with each other at European level in order to cut costs (e.g. genetic analysis laboratories).

However, a problem then arises regarding the information available to judges when appointing European experts to help them resolve litigation, and regarding the guarantees that are provided to judges, and those subject to the jurisdiction of the courts, regarding the quality of these experts.

Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters does provide for an expert report to be carried out at the request of the court of a requesting country but stipulates that, unless specifically requested by that court, the procedures followed for this expert report will be those of the court of the requested country. This at the very least raises the issue of the acceptance of expert reports prepared without following the procedures of the requesting country, particularly in cases when it is impossible to apply these procedures, and does not settle the issue of guarantees given by the requested state regarding the quality of the experts appointed by courts within that state.

As this regulation has proved insufficient, harmonisation is needed regarding expert report procedures and the methods used to recruit experts and publicise this recruitment within the European judicial area.

This harmonisation is all the more necessary given that several countries treat expert reports, even when commissioned by the judge, as a procedure unconnected to the trial, which might only take place later if no prior agreement has been reached based on the expert’s opinion. The result is that these expert reports circulate between countries divorced from judgments. Furthermore, the success of the alternative conflict resolution methods that European states are encouraged to develop often requires that the parties commission a preliminary expert report that offers all the guarantees of an expert report commissioned by the judge, in particular the guarantee whereby experts enforce the adversarial principle.

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1.2 The difficulties of harmonisation

1.2.1 Different legal traditions

The variety of the rules governing expert reports and experts' activities reflects the variety of different countries' legal traditions and, more fundamentally, their divergent concepts of the role of judges.

A succinct comparative analysis of the different systems reveals the gulf between common law and Continental law countries. Fundamentally, judges in common law countries have a passive role in the conduct of proceedings, limiting themselves to an appraisal of the evidence presented to them and considering that it is the parties who are principally responsible for gathering and presenting evidence, it being in their interest to unravel what actually happened. In Continental law, the judge actively participates in seeking the truth.

If this division were taken to be definitive, this would lead to a distinction between countries in which experts are appointed by the judge and those where experts are appointed and paid by the parties, and would lead to a proposal to harmonise only court-appointed experts, as was the case with the CEPEJ best practices.

In our opinion, this approach is too narrow: on the one hand, Continental law countries such as Spain have recently adopted provisions to limit the power of judges to commission expert reports by, in most cases, allowing only expert reports produced by the parties to be used in court; on the other hand, the quintessential common law country, England, has increased the power of judges to nominate experts in the wake of Lord Woolf's reforms.

Lastly, as will be shown below, the overwhelming majority of European countries have both court-appointed experts and experts appointed by the parties, both of whom help judges to arrive at decisions by contributing their technical or scientific knowledge.

1.2.2 The lack of common concepts

The second difficulty encountered by any attempt at harmonisation is the lack of commonly accepted definitions within the EU for the following terms, which are the product of different cultures and must be clarified in order to pinpoint the subject of our study: court-ordered expert report, legal expert report, technical experts, expert witnesses, party experts, legal experts, judicial experts.

In its 2014 report on European judicial systems, the CEPEJ noted that no consensus or European standard had been established regarding what constituted a judicial expert. It is true that, in 1959, the European Convention on mutual assistance in criminal matters dealt with such matters as letters rogatory for the examination of experts and summoning experts, but this part of the document is short and limited to criminal matters. A chapter of the CEPEJ report is devoted to judicial experts, defined as experts certified or accredited by a court or another authority to provide their expertise to the judicial administration.

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As part of the CEPEJ working group on the quality of justice (CEPEJ-GT-QUAL), which developed the good practice recommendations mentioned above\(^6\), the 2014 report on European judicial systems\(^7\) defined a court-ordered expert report as an "investigative measure assigned to a technician by, or with the approval of, a court or a prosecuting or adjudicatory authority, in order to contribute to the judicial settlement of present or future litigation by adducing technical or factual evidence. A judicial expert is a technician (doctor, plumber, architect, medical laboratory, etc.) appointed by the judge to carry out this investigative measure."

Listing the experts present in the judicial systems of the 47 states party to the European Convention of Human Rights and subject to the jurisdiction of the Strasbourg court, the CEPEJ distinguished and defined three categories of experts who are of course to be found in the 28 EU Member States:

- **law experts** present in six countries out of 28 who can be consulted by judges on specific questions of law or can support judges in their judicial work without participating in the judgment (Germany, Estonia, Greece, Malta, the Netherlands and Poland);

- **technical experts** present in 26 countries out of 28 who make their scientific and technical knowledge available to the court to resolve factual matters;

- **expert witnesses** present in 20 countries out of 28 who are appointed by the parties to use their expertise in support of the arguments put forward by the parties.

It should be noted that within the United Kingdom, expert witnesses and technical experts are present in England and Wales, while Northern Ireland only has expert witnesses and Scotland does not use the term judicial expert.

Therefore, as has already been stated, the vast majority of countries have both technical experts and expert witnesses, while Northern Ireland only has witnesses and six other countries only have technical experts (France, Luxembourg, Portugal, Slovenia, Bulgaria and Croatia).

Given this list and these definitions, this study will mainly focus on expert reports prepared by technical experts and expert witnesses. We propose that these be assembled under the term court-ordered expert report, which can be defined in two ways:

- expert report ordered by judges, rather than triggered by the unilateral decision of one of the parties (technical experts);

- expert report authorised in principle by judges and performed by experts aware that their work will be used in legal proceedings (expert witnesses).

This study will therefore not examine party experts or expert advisers, although the legal situation described below does not preclude the possibility of parties arriving in court with their expert, authorised on their own initiative and on their initiative alone. This is clearly true of all systems. However expert reports drawn up in these cases do not have the characteristics of "legal" expert reports. They are admissible in the same way as any piece of evidence or argument intended to convince the court, but such expert reports,

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ungoverned by any procedural rules (and notably not bound to the adversarial principle or the criterion of impartiality), fall outside the scope of procedural study just like using the internet to answer a technical question.

It is crucial not to confuse the expert witnesses of the common law system - or systems that designate these experts as experts appointed by the parties - with party experts (or expert advisers); although all these types of expert are appointed and paid by the parties, expert witnesses, who provide their opinion in the knowledge that it will be used in court, are for that very reason subject to particular obligations towards the court and to stringent codes of conduct.

In short, the form of expert report examined in this document contributes to the legal resolution of a dispute, whether the litigation is already underway or envisaged.

This is not to say that "private" expert reports that are completely separate from any use in court does not merit examination⁸; this is simply a different matter.

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⁸ It should be noted that, in order to be of service to their clients, lawyers are subject to a stringent code of conduct, which includes both factors that are intended to guarantee their "integrity" with regard to their clients (prohibition of conflicts of interest), and elements that could be linked to the adversarial principle. In this regard it is perhaps worth pondering the appropriateness of linking inclusion on the official register of experts - when one exists - to compliance with a code of conduct.
2. EXPERTS

The first observation that must be made is that the number of experts working in European courts is not known and the way they are recruited and appointed and their rights and obligations are all very diverse.

According to the 2014 CEPEJ report on European judicial systems, the average number of technical experts per 100,000 inhabitants is around 50 in greater Europe which, scaled to the population of the Union, would represent a group of at least 250,000 people who are concerned by the matters discussed below, with a rather significant margin of error due to countries' incomplete responses, including from countries where experts' activities are the most organised. Incomplete responses were also a problem for the EEEI and its Eurexpertise project, and this may to some extent explain the discrepancies between the CEPEJ figures and the Eurexpertise figures given below.

2.1 General observations

Two main categories of statute exist in the various legal systems. In a number of systems (11 countries out of 22 usable replies), experts are proxies for the court - its technical eyes and brain, so to speak - and are therefore subject to the same obligations and prerogatives as the judge. Therefore, in these countries (making up half of the usable replies), judges alone are competent for appointing experts.

In other systems (11 countries), which could be described as "Anglo-Saxon" (and this indeed holds true for the United Kingdom), once the decision has been made by the court, or with its consent, to have recourse to an expert report, each party is invited to appoint its expert (who is compensated on the basis of an agreement between expert and party) and the judge only becomes involved if the parties do not make such an appointment (9 countries).

Each expert draws up a report which is presented during the debate and submitted for the parties to discuss in court. In principle, adversarial debate only takes place at this stage, but this does not necessarily preclude prior meetings between experts in order to identify the points on which the parties agree and those that are still disputed and must be decided on by the judge.

Experts therefore become a sort of special witness called by the parties who have chosen them. Their position is thus ambiguous, since the special relationship they have with their party cannot obscure the fact that they are contributing to the administration of justice, which means that they cannot lie or distort scientific truth to help that party.

In general, this system is criticised on the following grounds:

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• Expert witnesses allegedly do not furnish the guarantees of independence and impartiality that judge's experts do;

• Two expert reports may cost more than one ordered by the judge;

• Court proceedings are made longer by hearing two experts;

• Judges who are called upon to adjudicate between two expert reports that put forward opposing arguments are transformed into "super experts" without being technically competent to fulfil this role.

In fact, the judge also requires expert witnesses to be independent, impartial and ethical, and this is guaranteed by the oath that they take and the risk of incurring civil liability for negligence and criminal penalties for giving false evidence or perverting the course of justice.

Moreover, an opposing expert's objections made during their own hearing in court could destroy all the credibility of an expert witness, not just as a witness, but also as a professional. This leads expert witnesses to advise their clients to come to a pre-trial settlement if their technical opinion is unfavourable, and also leads clients not to invoke this unfavourable opinion if they intend to continue with the trial regardless.

Lastly, experts in the United Kingdom who can expect to be particularly successful with potential clients as they are regarded as being able to influence courts by virtue of their competence and their independence are generally chosen from registers drawn up by two private bodies, the Expert Witness Institute and the Academy of Experts. These institutions have identified good practices and enacted a code of conduct to which their members must conform, failing which they will be subject to sanctions by these bodies.

With regard to costs, it should be noted that the two expert reports are faster because they do not have to be prepared in accordance with the adversarial principle and they remove the need for parties to obtain the assistance of expert advisers when dealing with experts appointed by the judge.

The system of technical experts is also not free from criticism:

• These experts do not have an unambiguous position either given that they are financially tied to the judge appointing them, who also controls their payment, even if the payment is advanced and borne by the parties. This ambiguity has given rise to the suspicion, especially in criminal matters, that there is collaboration between judges and experts, and that experts are not independent, since they would naturally tend to support the view that judges may already have of the case.

• The involvement of technical experts appointed by the judge does not preclude the possibility, during adversarial debate in court, of the experts' opinions being disputed by the parties with the support of opinions drawn up by experts who are often appointed by the court.

• Above all, expert reports drawn up by experts appointed by judges are often long and costly since these experts have to uphold the adversarial principle and respond to the opinions of private experts (expert advisers) appointed and paid by the parties to support their respective interests. Furthermore, despite having the support of the
judge, they do not have the same authority to tackle delaying tactics employed by parties who have an interest in playing for time.

In this respect, it is worth noting that, in the case of expert reports commissioned by parties who do not receive legal aid, Spain (a Continental law country) has opted for a system of expert witnesses, with the same goal as countries which have introduced single technical experts appointed by the judge. The goal is to have shorter trials, which Spain found to be better served by having expert reports prepared prior to the hearing.

On analysing both systems, it can be seen that what is required of experts and their rights and obligations are identical and that effective guarantees regarding the quality of experts and their work are indeed given to those subject to the jurisdiction of the courts in both systems, although these guarantees are different. The exclusion of expert witnesses from the CEPEJ good practice guidelines, which are restricted to technical experts, is therefore most unfortunate as this maintains an artificial divide based on the method of experts' appointment, a divide that must be overcome so that judicial systems can mesh with one another and so that experts and their opinions can move freely between European courts.

That is the reason why the Eurexpertise project considered it appropriate - with a view to a common core of principles that could govern "European" expert reports (expert reports that could be used in cross-border litigation, for example) - to state that when using the "Anglo-Saxon" system, parties' freedom to choose experts should be circumscribed in two ways:

- the only expert opinions admissible in the litigation would be those prepared by experts who had expressly committed to a code of conduct imposing, in particular, an obligation to be competent, impartial and sincere, and who had declared that they were aware that their work would become part of a court case;
- these experts' reports should include not only statements of pure fact and stamped copies of the documents submitted to the experts by the parties, but also the elements, evidence and documents on which their opinion is based in such a way that their reports respect the principle of refutability dear to Karl Popper10.

2.2 Rules on recruitment and approval procedures

According to the CEPEJ report on European judicial systems: efficiency and quality of justice11, the activities of judicial experts are regulated by legal standards in only 20 out of 28 countries, and their title is protected in only 17 countries out of 28. These standards are the result of procedural rules and/or autonomous texts framing experts' activities.

23 countries have established binding provisions regarding experts, and 13 of these have specified time limits for submitting their opinion. These time limits vary but are generally short with a few possibilities for extension.

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10 It is well known that Karl Popper thought that a theory could only be taken to be scientific if it was refutable.
22 countries have registers of experts; only ten such registers are drawn up by the courts, whereas five are prepared by institutions and four by professional bodies.

In some countries, these registers, drawn up for the use of judges by each court according to undisclosed criteria, are not made public and must not leave the court building.

Despite the fact that its judicial tradition is very similar to the one in use in France which has regional and national registers of judicial experts drawn up and published following relatively sophisticated procedures, until recently Belgium had only ad hoc registers drawn up by each court. A law which is still being put into effect has just amended this situation by introducing a national register drawn up by the justice ministry.

Furthermore, a majority of the countries which provided useful replies on this point for the Eurexpertise project (14 of the 23 usable replies) have an approval procedure which is generally implemented by the public authorities (in 12 cases, the judicial services deliver the approval). Inclusion on the register requires both diplomas and experience, and approval is either permanent (four countries) or subject to renewal (on a five-yearly basis in six countries).

However, these data must be viewed with some caution: 11 of the 20 countries which provided usable replies hold regular aptitude tests, which suggests that approval is subject to renewal more frequently that the replies would seem to state.

Countries whose courts do not themselves carry out prior recruitment by means of drawing up registers of experts do not necessarily differentiate between nomination for a set period, generally with an approval procedure, and appointment for a specific case, resulting in some confusion. In the CEPEJ report, two countries quite naturally (in light of their legal traditions) replied that they do not nominate experts for a set period since the experts are appointed by the parties (the United Kingdom and Ireland) and three others replied simply that the experts are selected by the justice ministry. However, many of those who state that they appoint experts on an ad hoc basis for each case in fact do so using registers drawn up either by the justice ministry or by professional bodies, or even using registers of people acknowledged to be competent without it being known whether inclusion on these registers is for a set period or what criteria are used to draw up the register.

Currently, the approval procedure and the less binding registration procedure serve only to inform the experts included or approved that they have a good reputation, irrespective of whether this acknowledgement is by the profession (in four countries), by the court (eight countries) or by institutions (nine countries).

The crux of the existence or absence of these aptitude testing procedures is checking the expert's competence and the scope of that check.

No body may give a ruling on the quality of the university or scientific diplomas held by an expert: this is solely the responsibility of university panels or the scientific community.

However, the authority which draws up the register, particularly when that authority is a court, must check that in addition to being of good reputation in their profession,
candidates have sufficient knowledge of the guiding principles of the process and rules governing expert reports.

Making a common practice of registers accessible to the public and to the judges of all European countries would seem to be a prerequisite for opening up the activity of experts and boosting confidence in other countries’ expert reports.

Provided that these registers are viewed not just as a directory to which professionals holding the relevant diplomas may add their name but rather as a brand of the candidates' ethics, competence and reputation, the registers will enable approval procedures to become both stronger and standard practice.

The registers will make it possible to develop specific penalties (distinct from civil and criminal penalties) to which experts are liable, which would be more geared towards penalising any failure by experts to meet their obligations and particularly to comply with the ethical requirements (temporary suspension and being struck off the register).

When the registers are renewed, there is an opportunity to ensure that the experts have continued to train in their area of specialisation, the investigative methods which they use and procedural matters. This facilitates the roll-out of quality control mechanisms.

Clearly, any registration or approval procedure therefore poses the problem of recognition of the reputation of an expert who is a foreigner in the country in question, as stressed by the CJEU’s Peñarroja ruling\(^\text{12}\).

However, if registers are to be drawn up, particularly for use by the court, the following prerequisites must be met:

- a common nomenclature must be created, so that experts may be classified by specialisation,
- the registration criteria must be clearly stated\(^\text{13}\);
- these criteria must include a good grasp of procedural rules, the only point on which the courts asked to give their views on the names included on the register may make a fully informed decision;
- a decision must be taken as to whether courts having no need of experts is sufficient reason to reject an application;
- a procedure must be established for appealing against decisions to reject an application.

### 2.3 Professional ethics and penalties

In 16 countries, codes of conduct have been laid down; in five countries, no such codes exist. Provision has been made for potential penalties in 20 countries, (including Estonia,

\(^{12}\) Joint cases C-372/09 and C-373/09.
\(^{13}\) As per the CJEU’s Peñarroja ruling.
Greece, France, Hungary\textsuperscript{14}, Italy\textsuperscript{15}, Lithuania, Poland, the United Kingdom and Sweden); in three countries, no such provision has been made.

Competence, independence and impartiality are the essential qualities required of experts by all judges and claimed by the experts themselves, whether they are technical experts or expert witnesses. These qualities entail obligations which all experts should agree to meet once the experts know that their opinion will be used in court, specifically informing the judge and the parties of any existing conflict of interest or any danger of conflict of interest which arises during the proceedings.

With regard to penalties, the question clearly arises of whether these potential penalties are pure window dressing, or whether they are put into practice and if so, how. The study will need to develop this point with a view to establishing a hierarchy of penalties, which will only be meaningful if it considers how they are actually applied, irrespective of what is provided for in the texts.

\textbf{2.4 Liability}

In almost every country, the expert is subject to civil and/or criminal liability; in only two countries (Cyprus and Ireland) is there a complete lack of liability. In six countries, the expert is subject to civil liability (Germany, Luxembourg, Slovenia, Slovakia, the Netherlands, the Czech Republic), in one country the expert is subject to criminal liability only (Romania), and in 15 countries, both types apply (Austria, Belgium, Bulgaria, Spain, Estonia, France, Greece, Hungary, Italy, Latvia, Poland, Lithuania, Denmark, Sweden and Portugal).

Not all countries require that experts provide proof of insurance against specific risks related to their work as expert, meaning that the guarantee stemming from the option of engaging their civil liability may be deceptive.

If the position adopted with regard to interpreters and translators were to be extended to all experts – which is far from certain at present – the Peñarroja ruling will certainly oblige all EU Member States to review their liability arrangements for judicial experts.

\textsuperscript{14} In the event of failure by experts to meet their obligations, such as an unjustified delay, the court may impose a financial penalty. Should experts be absent, a warrant for their arrest may be issued and they may be detained.

\textsuperscript{15} Negligence in submitting the report or fraud is a criminal offence (one year's imprisonment and a fine of EUR 10 329).
3. EXPERT REPORT PROCEDURES

Beyond the unanimity regarding the authority empowered to order an expert report and the obligation of impartiality incumbent upon the expert, there are many differences on points as crucial as the judge's control over the expert report procedure, the expert's compliance with the adversarial principle and the content of the expert report.

3.1 Who is empowered to order an expert report?

At first glance, there is considerable consistency between the EU Member States regarding the fundamental matter of who is empowered to order an expert report. Regardless of the type of system (accusatory or inquisitorial), the decision to have recourse to an expert report is in the hands of the court, or at least (as in the United Kingdom) if proposed by one party it must be accepted or validated by the judge even though in this case the expert will be the party's and not the court's expert. There is therefore a strong consensus leaving control of proceedings in the judge's hands. In only one country out of the 26 usable replies is the decision to have recourse to an expert report completely out of the judge's control.

This is made clear by consideration of the conditions in which this decision is taken. On the positive side, in every country (except for Sweden) judges are authorised to order an expert report of their own accord if they deem it necessary for the truth to be revealed, even where the parties have not so requested or are opposed to such a measure.

On the negative side however, the court is not required to accede to a request for an expert report made by one or more parties\(^\text{16}\), except in the relatively rare cases in which the law demands a prior expert report. Naturally, this affirmation of the legal sovereignty of the court must be tempered by the fact that in reality the court, called upon to settle a case in which facts are significant, generally has no alternative but to uphold the suggestion made by one or more parties to call for an expert report when the facts submitted to it are unclear.

3.2 Launch of the expert report process by the court

3.2.1 Choice of expert

This unanimity fractures once the decision to request an expert report has been made and one or more experts must be appointed. While the majority of countries (23 out of 25 usable replies) involve the parties in the process of appointing the expert, two major systems prevail with regard to appointment:

- in half of the countries (11 out of 22 usable replies), the judge alone selects the expert, with the existing registers (either official or solely professional) being simply for information;

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\(^{16}\) With the exception of cases of summary proceedings, for which the conditions are considerably more flexible: in France, the expert report requested need only be "useful" for the judge to be required to grant it.
• in the other countries, notably the United Kingdom, the parties appoint the expert (2 countries) or have the option to do so, with the judge empowered to act only when the parties are unable to reach an agreement (9 countries).

Whether or not an expert is included on a register (institutional or purely professional) has very little legal relevance in the appointment process, although inclusion on a register (particularly an official register) does provide a "brand" of quality and competence. This situation is in contrast to the meticulous rules of procedure governing the process of drawing up the register. There are however some countries in which inclusion on a register equates to approval, which would influence the court's appointment.

The fact that the judge has the flexibility to appoint an expert who is not included on the register can easily be explained: in many regions, there is no expert specialising in the field required to deal with the case, and there are scientific authorities who do not wish to be included on a register as expert but who, when the case calls for highly specialised knowledge, may agree to give their opinion on a case-by-case basis. The key point with a view to harmonisation is therefore to recommend that judges explain the decision to appoint an expert who is not included on the register.

It has not been asked whether a legal entity may be appointed as expert. It would appear that this is not a matter for discussion as everything depends on the type of litigation: it is now clear that laboratories have their place in expert report procedures, but it would be difficult to see how medical opinions could be given by a civil law partnership.

3.2.2 Subjective and objective impartiality

In almost all the countries considered, experts may be recused for the traditional reasons. They also have the right (and even the obligation) to step aside if they consider that they lack (in actual fact or in appearance: we must not forget the position taken by the ECtHR!) the required impartiality; this applies in 23 countries out of 25 as regards recusal, and in 22 countries out of 24 as regards stepping aside.

The right to a fair trial, enshrined in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, means that the principles applicable to judges also apply to experts. These principles are stipulated by the Court in the case of Micallef v. Malta ([GC], No. 17056/06 (http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"appno":["17056/06"]}), ECHR 2009):

"93. Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the Court's constant case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its

94. As to the subjective test, the principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long-established in the case-law of the Court (see, for example, *Kyprianou v. Cyprus [GC]*, no. 73797/01, § 119, ECHR 2005-XIII). The Court has held that the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Wettstein*, cited above, § 43). As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will for personal reasons (see *De Cubber v. Belgium*, 26 October 1984, § 25, Series A no. 86).

95. In the vast majority of cases raising impartiality issues the Court has focused on the objective test. However, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test) (see *Kyprianou*, cited above, § 119). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see *Pullar v. the United Kingdom*, 10 June 1996, § 32, *Reports* 1996-III).

96. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Wettstein*, cited above, § 44, and *Ferrantelli and Santangelo v. Italy*, 7 August 1996, § 58, *Reports* 1996-III).

97. The objective test mostly concerns hierarchical or other links between the judge and other actors in the proceedings (see court martial cases, for example, *Miller and Others v. the United Kingdom*, nos. 45825/99, 45826/99, and 45827/99, (26 October 2004; see also cases regarding the dual role of a judge, for example, *Mežnarić v. Croatia*, no. 71615/01, § 36, 15 July 2005, and *Wettstein*, cited above, § 47, where the lawyer representing the applicant's opponents subsequently judged the applicant in a single set of proceedings and overlapping proceedings respectively) which objectively justify misgivings as to the impartiality of the tribunal, and thus fail to meet the Convention standard under the objective test (see *Kyprianou*, cited above, § 121). It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Pullar*, cited above, § 38).

98. In this respect even appearances may be of a certain importance or, in other words, “justice must not only be done, it must also be seen to be done” (see *De
Applying this case-law to experts exceeds the cases of recusal generally and restrictively established by the various legal systems as family ties to one of the parties or friendship or enmity displayed in relation to the party in considering whether there are any objective reasons to doubt the expert's impartiality. Grounds for doubting the required impartiality could thus include ties between expert and party several years in the past, such as the expert having advised on another case. Another situation frequently criticised involves an expert who is the usual expert for insurance companies being appointed expert in liability proceedings, even when the company for which that expert is the usual adviser is not involved. Generally, the argument in such instances is that the experts are so economically dependent on the insurers that they would hesitate to assess compensation at a higher level than would be set by the companies' reimbursement tables.

3.2.3 Definition of the mission

In 22 out of 25 usable cases, the mission is defined by the judge, although clearly the judge cannot turn a deaf ear to suggestions made by the parties. This confirms what has been said: the expert serves the court which is in control of the litigation, even in Anglo-Saxon countries.

3.3 The expert report procedure

There are differences in a number of areas.

3.3.1 Control of the expert report procedure

The court controls the expert report procedure in two thirds of cases (17 countries out of 25), which would suggest that once the procedure has begun, judges in almost one third of countries simply wait for the results without wishing to become involved.

However, there is a tendency to involve a "judge responsible for expert reports" to monitor expert reports, which would confirm the two-thirds proportion mentioned above. This judge focuses on ensuring that the expert complies with the time limits and on issues which might arise during the expert report process (such as one party refusing to hand over documents).

Making standard practice of having a judge supervise time limits and being competent to deal with issues arising during the expert report process is crucial for ensuring that the mutual assistance mechanisms laid down by Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters\(^{18}\) are effective and for guaranteeing the judge of the requesting state that the

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expert report asked for will be drawn up as rapidly as would have been the case in the judge's own court.

3.3.2 Adversarial procedure

It might be expected that a large majority of countries would require expert report procedures to be run along these lines. In fact this is not the case: out of 19 usable replies, only seven say that the expert is permanently required to uphold the adversarial principle (France, Belgium, Greece, Malta and Romania), while four countries (Germany, Spain, Austria and Bulgaria) do not impose this at all and organise the adversarial procedure ex post, with the parties able to discuss the content and to question the expert during a hearing once the report has been submitted. Moreover, in seven countries, compliance with the adversarial procedure is not mandatory.

In light of the requirements of the European Court of Human Rights, questions could be asked about the practice of the adversarial procedure being required only once the report has been submitted. The ECHR considers that the expert's conclusions are likely to have a preponderant influence on the assessment of the facts by the judge, and so the rules of a fair trial (and in particularly the principle of adversarial proceedings) must usually apply to the stage of judicial expertise (ECHR, Case of Mantovanelli v. France, 18 March 1997)\(^{19}\). This position was essentially and with some nuances echoed by the CJEU in a ruling of 10 April 2003 (case of Joachim Steffensen)\(^{20}\), deeming that admission as evidence of the results of the analyses which have not been carried out in accordance with the adversarial procedure can lead to a breach of the right to a fair trial: "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 its assessment of the facts and, should this be case, whether [the plaintiff] still has a real opportunity to comment effectively on that evidence [before the court]."

Conversely, there are sound practical reasons for the adversarial procedure to be held after the expert report proceedings: increasing numbers of meetings which all the parties are invited to attend is a source of considerable expense and often a waste of time. Systematising the adversarial procedure will thus make the expert report proceedings more onerous.

Minimum good practice, on which a majority of countries (11 out of 18) seem to agree, is in line with the above-mentioned Steffensen decision. This could be applied across the board, pointing out that the most important aspect is that, at a minimum, the adversarial debate takes places before the expert and prior to the submission of the expert's report.

3.3.3 Participation by the expert at the hearing

For all countries whose replies are usable (27), the expert may be asked by the judge to attend the hearing (25 countries) or is required to attend (two countries). Judges may decide on this oral addition to the written report, either of their own accord or at the request of the parties.

\(^{19}\) The European Union has integrated the standards of the European Convention for the Protection of Human Rights and Fundamental Freedoms into the fundamental principles of Community law, and intends to sign up to this convention.

\(^{20}\) Case C-276/01.
3.4 Closing of proceedings and the report

3.4.1 Conciliation

This subject would not appear to be of particular interest to the countries concerned, as only 14 replied to this question: two to oppose it and 12 to point out that conciliation puts an end to the expert report procedure. Clearly, the experts may and even have to note that the litigation on which they have been called to give their opinion is no longer relevant as the parties have reached an agreement, meaning that any continuation of the proceedings is now irrelevant. Experience shows that any problem which might arise is due to the fact that the experts could have regarded bringing about conciliation to be the purpose of their mission, and thus delayed that mission while endeavouring to secure conciliation.21

3.4.2 The report

It is no surprise to note that in the majority of cases this is written (a written report is mandatory in 18 countries and not necessary in six countries), and that in general the form is not set (15 countries out of 18). There is no consensus as to whether the report must be preceded by a preliminary report (it must be in four countries, while there is no such obligation in 14 countries). It would seem (as confirmed by various interviews) that, aside from the codes, practices vary depending on experts and cases, and are not set in stone. The situation prevailing in France demonstrates this.

Questions might be asked about the general absence of any mandatory requirements regarding the structure of the report (15 out of 20 usable replies). As indicated above, the formal content of the report is not insignificant: without expecting a prescribed rigid presentation, a report should be expected to be built around three strands: the statement of facts (incorporating the list of supporting evidence on which the report is based), an analysis of the points at issue and an account of the approach taken by the expert leading to the reasoned position. Presented in this way, the report may be debated and thus allows for compliance with the adversarial principle.

As indicated from the start of this study, in almost every country which submitted a useful reply (25 out of 26), the judge is not bound by the expert’s conclusions; in every country which submitted a useful reply, the judge may even order a counter-expert report if not convinced by the first expert.22 However, in Austria, judges must explain why they have decided not to follow the expert’s conclusions. The difference is not as clear cut as it would appear, however: all courts must justify their decisions, especially when they have elected to disregard the duly justified position of a specialist acknowledged to be competent, and who has been appointed precisely on the basis of that competence.

In the majority of countries (15 out of 25 usable replies), the submission of the report does not mark the end of the expert's mission. This legally accurate statement must however be seen in context: experts will undoubtedly need to supplement the report for one reason or another (for instance because they have neglected to answer a question) or to add a detail

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21 This explains why, in some countries, experts are forbidden to conciliate the parties.
22 Sometimes, the rules in force require that a counter-expert report be ordered, as in the case of checks on the quality of foodstuffs, where the right to order a counter-expert report is established by Council Directive 89/397/EEC of 14 June 1989 on the official control of foodstuffs (see CJEU, Case C-276/01).
Civil-law expert reports in the EU: national rules and practices

orally deemed to be necessary. However, in most cases, submission of the report marks the end of the expert report procedure and triggers the payment mechanism. It could be considered that by submitting the report, experts have themselves put an end to the mission (meaning that, in principle, the experts may no longer amend or add to the report on their own initiative²³). However, at the express request of the court, this closure may be overturned and the mission re-opened.

### 3.5 Financing of the expert report procedure

The financial operations take place under the control and authority of the judge. They begin with the payment of an advance, which is usually consigned, with the amount set in 15 out of 16 countries by the judge (except in the United Kingdom where, it would appear, it is up to the parties to determine the amount).

The fees are also generally set by the judge (in 19 out of 23 cases), sometimes (Germany, Austria, Estonia, Italy, Norway and Poland) on the basis of a statutory scale. An unusual situation applies in Cyprus, where the expert's fees are freely set between the expert and the parties (who have requested and been granted an expert report), unless the costs are charged to the losing party which did not request the expert report, in which case they are subject to a legal ceiling. The Spanish system is equally unusual: the expert report costs, set by the judge, cannot exceed one third of the amount of the final sentence.

As a general rule, the fees are charged to the losing party. However, an interesting innovation applies in Lithuania where, if the expert report has been ordered by the court of its own accord, the resulting costs are charged to the justice ministry.

There is some debate, particularly in Belgium, regarding whether, where the parties do not contest it, the judge is bound by the expert's financial assessment.

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²³ This does not apply in the United Kingdom.
4. CONCLUSION

Here is a rapid overview of the rights and obligations of experts and of the criteria to be met by expert reports in the civil-law area in Europe; there are many differences but also a number of common principles.

Harmonisation, intended to correct the most flagrant discrepancies in order to boost the confidence of judges and the general public in expert reports, would focus on the following issues:

- the establishment of public registers of experts, with checks on the competence, ethics and reputation of the applicants;
- the creation of a statute of expert, whether the experts have been appointed by the judge or instructed by the parties to give their opinion in court. This statute would specify the experts' obligations to the court and to the parties, with particular regard to compliance with the obligations of independence and impartiality and implementation of the adversarial principle;
- strengthening the role of judges across the board, so as to enable judges to supervise expert reports effectively and deal with any issues which might arise;
- the establishment of a standard presentation for expert reports to facilitate checks on their scientific value;
- the establishment of a single expert report procedure which, in cross-border litigation or in litigation with cross-border implications, would replace national procedures and thus facilitate the tasks of experts from other countries.
# APPENDIX - TABLE SUMMARISING THE REPLIES

Table summarising the replies from the EU Member States and Norway

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24 Taken from the final report of the EEEI’s Eurexpertise project of 30 June 2012.
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