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Study on the role of experts in judicial systems of the Council of Europe Member States

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I. Introduction & Methodology

This project was desinged to gain an impression of the practices and law surrounding the role of court experts in Council of Europe member states.[1] It is not possible to analyse the role of the expert without also analysing the role of judges and the legal professions in relation to scientific evidence and expert testimony more generally.[2]

After the initial literature review, a questionnaire was developed to deliver data to fill in gaps where there was little or no information to answer the original terms of reference.[3] The original terms of reference asked for an examination of three specific areas. Firstly, general organisation: roles of court experts in different judicial traditions; identifying the evidentiary value of their work; the adversarial principle (as protected under article 6(1) European Convention of Human Rights- ECHR); and the status of experts; secondly, the principle of expeditiousness was examined; and finally, good practices on how to balance the expectations of courts and work of experts. Further research was also conducted on cases on some of the issues discussed in this report, and have been cited where appropriate.[4]

The questionnaire is a mixture of multiple choice questions, with some opportunity to explain or add information that would help to understand any responses they give. In order not to be overly descriptive, the paper will give general trends or patterns. The questionnaire was sent to all forty seven member states of the Council of Europe. There were thirty five responses over twenty two countries. Some countries delivered responses from various courts, from first instance to appeal, or across different jurisdictions such as criminal/civil and administrative.[5] Therefore any conclusions that this report will come to, can be considered only as preliminary.

There is another limitation of this paper is that the original conceptual paper delivered research including common law systems outside of the Council of Europe member states. Whilst these will not be removed, there is no further data for USA or Australia.

The remainder of this report is dedicated to analysing the responses to the questionnaire, in light of the original conceptual paper.

II. General organisation

A. Roles of court experts in different judicial traditions

From a brief overview of the literature, in procedural laws across various inquisitorial and common law countries, the role of the court expert is to **assist** the decision maker[6] in understanding certain types of evidence requiring specialised analysis and treatment, in order to come to a decision in the case, that is

[1] Another research project of the Europe Union (EU), "Eurexpertise Project" was presented at Symposium Proceedings "The Future of Civil Judicial Expertise in the European Union: State of Play and Proposals", on 16-17 March 2012, and published in June 2012, and also presented to the meeting of 19-20 September 2013 at CEPEJ. That project "carried out an inventory of national practices concerning judicial expertise in the various countries of the European Union" for civil justice systems, for all 27 countries of the EU plus Norway. These discussions were also guided by article 6(1) of the European Convention on Human Rights, the right to fair trial. The idea behind it was to develop a "uniform European legal framework" This was conducted by the European Expertise and Expert Institute. The final report presents the data from each country in raw format, and ends with presentations from the symposium proceedings. The EEEI project differs from this project, as it focusses on EU countries (plus Norway) and only on civil justice, whereas this project has seen responses to the questionnaire set from across Council of Europe member states, and all jurisdictions.

[2] It is not within the scope of this this paper to describe in any detail the complexities of scientific research, the problems with statistical analysis and the presentation thereof to court, nor does it describe in any detail the on-going developments in DNA profiling although these issues are prevalent in the continuing discussion on quality of expert testimony.

[3] Thanks to Marco Velicogna for his input

[4] My thanks CEPEJ, Council of Europe for its assistance

[5] Ireland, England & Wales, Denmark, Finland, Norway, Sweden, Bosnia-Herzogovina, Croatia, and Slovenia, Czech Republic, Estonia, Hungary, Turkey and Azerbaijan, Austria, Germany, Netherlands, France, Switzerland, Italy and Monaco

[6] This refers to judges and/or juries in common law, and judges in civil law systems: Ward, Tony, 'Expert Evidence, Ethics and the Law', in *The Wiley-Blackwell Handbook of Legal and Ethical Aspects of Sex Offender Treatment and Management*, (eds), John Wiley & Sons, Ltd, 2013 p.82 on common law; Rosenfeld, Adina, 'Admissibility of DNA Evidence: Italy under Attack', *Southern University Law Review* 2012, 40, 197-241. P.221

'beyond reasonable doubt' in common law criminal cases, or 'within intimate conviction' standards in civil system criminal cases.[7]This requires independence, objectivity and reliability on the part of the expert.

In common law systems, in America, judges act as "gatekeepers" for expert testimony, deciding what is admissible based on standards developed both by case law and statutory law.[8] In Sonenhein's comparative work, other common law countries, essentially the expert assists in explaining difficult scientific or technical concepts to the court, but that it is ultimately the judges' and/or juries' job to decide the case.[9] In England, "it was vital for the judge to make clear to the jury that they were not bound by the expert's opinion".[10] In civil law countries, for most part, judges must decide the value of any expert report within the context of the case, and explain why they have given it the weight they did. For example, in Italy, judges must do this in "motivaziones", which are detailed reports on how they came to a decision- different from reasoning in that they have to describe which evidence was considered and which discarded and why.

In two case studies in Europe, the judge had abdicated this role assigned to them by law, and have appeared to give undue deference to the expert. The first is in Switzerland, where Vuille is highly critical of the attitude of judges and legal professions in this deference.[11] The second was a case in the Netherlands, "where a judge had asked the expert to decide not only on the scientific admissibility of evidence, but also on the legal admissibility…" The expert declined on the latter request.[12] In an opposite situation, in Spain, the legislator had taken away the judge's role as assessor of expert evidence in cases of identifying drug substances.[13] In all three cases the authors are extremely critical of this situation, as it allows judges to ignore the fallacies of taking expert testimony at face value, without checking for reliability and bias.

The ECtHR further requires that judges take into account "the nature of the task entrusted to the experts, the experts' hierarchical position, and their role in the proceedings, in particular the weight attached by the court to their opinion."[14] It also asks that they take into account the manner in which experts performed their functions and the way the judges assessed the expert opinion.[15] If the judges do not have free evaluation of the expert reports (whether court or party appointed), it means that the court appointed expert statements carry greater weight- and it is also doubtful whether a court appointed expert can be independent and impartial.[16]

a. Role of experts

The questionnaire asked, in light of the definition of the 'proper' role of the expert from the literature as an assistant to the court in understanding evidence, how the respondents would define the role of experts in courts.

Generally speaking, the majority defined the role of the expert to fit within the literature definition in terms of assisting the court in understanding the facts and evidence presented to them. In Sweden and Ireland, they also treat expert witness reports as a type of evidence, and these are therefore treated as any other type of evidence presented to them- for the court to decide their value. The respondents from England and Wales,

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[7] Stavrianos, C. , Papadopoulos, C. , Vasiliadis, L., Pantazis, A. and Kokkas, A., 'The Role of Expert Witness in the Adversarial English and Welsh Legal System', *Research Journal of Medical Sciences* 2011, 5, 1, 4-8. P.4 The standard in civil cases appears to be somewhat lower in civil cases, requiring in some cases only "a balance of probabilities"- see Ward, Tony, 'Expert Evidence, Ethics and the Law', in *The Wiley-Blackwell Handbook of Legal and Ethical Aspects of Sex Offender Treatment and Management*, (eds), John Wiley & Sons, Ltd, 2013 P.82

[8] Champod, Christophe and Vuille, Joëlle, 'Scientific Evidence in Europe — Admissibility, Evaluation and Equality of Arms', *International Commentary on Evidence* 2011, 9, 1, p.37-38

[9] Sonenshein, David and Fitzpatrick, Charles, 'The Problem of Partisan Experts and the Potential for Reform through Concurrent Evidence', *The Review of Litigation* 2013, 32, 1-64.

[10] Ward, Tony, 'Expert Evidence, Ethics and the Law', in *The Wiley-Blackwell Handbook of Legal and Ethical Aspects of Sex Offender Treatment and Management*, (eds), John Wiley & Sons, Ltd, 2013 p. 84

[11] Vuille, Joëlle, 'Admissibility and appraisal of scientific evidence in continental European criminal justice systems: past, present and future', *Australian Journal of Forensic Sciences* 2013, 1-9.

[12] M'charek, Amade, Hagendijk, Rob and Vries, Wiebe de, 'Equal before the Law: On the Machinery of Sameness in Forensic DNA Practice', *Science, Technology & Human Values* 2013, 38, 4, 542-565. Pp.557-558

[13] Lucena-Molina, Jose-Juan, Pardo-Iranzo, Virginia and Gonzalez-Rodriguez, Joaquin, 'Weakening Forensic Science in Spain: From Expert Evidence to Documentary Evidence', *Journal of Forensic Sciences* 2012, 57, 4, 952-963.

[14] See, inter alia, Sara Lind Eggertsdóttir v. Iceland, no. 31930/04, § 47, 5 July 2007 and more recently, Placi' v. Italy, n. 48754/11, 21/04/2014 § 74

[15] see Zarb v. Malta (dec.), no. 16631/04, 27 September 2005, and Lasmane v. Latvia (dec.), no. 43293/98, 6 June 2002

[16] Independence and impartiality of the expert has come into the public eye recently in England following a documentary by Panorama on BBC, titled "Justice for Sale" first aired on 9 June 2014 at 19:30 GMT. This brief documentary by a journalist exposed several experts selling their expertise to favour the paying client despite first-hand knowledge of guilt. This programme also highlighted several cases of miscarriage that relied on expert witness reports.

and the Netherlands are the only countries to set the standards to which experts should comply when working for the courts: objective and unbiased and independent and impartial.[17]

However, one anomaly was found: The administrative courts of Finland and Sweden have separate definitions from the civil and criminal counterparts: experts in administrative courts have a place in deciding the judgment within judge panels at court. This is strange because it gives a decision making role to the expert.

b. Expert reports binding in practice?

The word '**assist'** is highlighted to emphasise the importance of expert reports to aiding decision makers in understanding evidence and coming to a decision independently of the expert, yet being informed by it. It was therefore asked whether, by law, expertise is binding on the courts. At the same time, it is possible to examine a possible correlation of a tendency of judges to rely overly much on expert witnesses by asking the respondents to review the rate of successful appeals against decisions on the basis of expert reports.[18]

The majority of respondents stated that they are not bound by expert witnesses. Only three respondents stated that they were.[19] However, there was a wide range of over-reliance, not only between countries, but between courts within the same countries, with some places reporting low incidences of over-reliance and others reporting a high incidence.

Whilst the results varied on over-reliance, the three respondents who answered that they were bound by expert testimony also answered that they had a high incidence of over-reliance. This is an unexpected result, given that if they are bound by law to expert testimony, one would not expect high incidences of over-reliance.

However, several of the other respondents also stated a rate of 3-4 out of 5, which can imply that whilst judges may not be bound by law there may be a mental attachment of importance to expert reports when coming to a decision that reflects a high degree of trust of experts. There are of course, several other possible reasons for a high incidence of over-reliance. Firstly, it could reflect a lack of training in how to treat expert reports, especially for the more technical reports, leading judges to defer to the opinion of the expert(s). Secondly, it could reflect a lack of proper reasoning in judgments as to what value has been given to the experts' opinion, especially in relation to the facts and other evidence. This leads to the issue of the value of expert reports.

c. Evidentiary value of expert reports

However, the role varies with the way that expert evidence is presented in each system. On the one hand, in most common law, the experts present their findings to court, but usually through examination and cross examination.[20] The difficulty with this for experts is that they "cannot convey their results freely."[21] This makes objectivity of the expert questionable.[22] However, it allows the parties to dictate how information is presented to the fact finder, and help their clients' case.

On the other hand, in inquisitorial systems, courts generally appoint experts.[23] It has been argued that this allows experts to present their findings freely and impartially, having had the terms of reference from the judge, and with possible input from the parties. In this system, it is ultimately up to the one judge to decide the relevant facts and the legal case.[24]

In order to clarify the issue of the weight given to expert reports by judges, the questionnaire further asked about the evidentiary value of expert reports to the court.[25] A mixture of answers was given in general.

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[17] A few courts did not give actual definitions of the role of the judge, such as Austria, and Bosnia, with a very vague one given from Azerbaijan.

[18] Respondents were asked to rate incidences of this on a scale of 1-5, 1 being low incidence, and 5 being high.For the purposes of this report, I have stated that 1-2 is low incidence, 3 is some incidence, and 4 upwards is high incidence (no court answered 5).

[19] One Swiss court of administrative law, the Turkish respondent, and one of the Azeri court respondents.

[20] Champod, Christophe and Vuille, Joëlle, 'Scientific Evidence in Europe — Admissibility, Evaluation and Equality of Arms', *International Commentary on Evidence* 2011, 9, 1, p.20

[21] Ibid. p.20

[22] Ibid.

[23] Although not always to the exclusion of party appointments, though their reports can be of lesser value to the judge

[24] Champod, Christophe and Vuille, Joëlle, 'Scientific Evidence in Europe — Admissibility, Evaluation and Equality of Arms', *International Commentary on Evidence* 2011, 9, 1, p.22

[25] a) forms the basis for judicial decision; b) informs the court how to interpret evidence presented to it; c) other. The first was phrased in such a way to indicate a deeper reliance on expert reports than the second choice.

However, only two respondents highlighted the importance of explaining the value of expert reports in a judgment. The respondent from Norway stated that:

"… procedural laws do not give any specific regulation regarding the judge's duty to explain why an expert opinion was used or not, but this will follow from the general duty to reason decisions. If the judge follows the reasoning of the expert, a short reference to the expert's opinion is made. If the opinion is not followed, it will be natural to give a concrete reason why."[26]

In Hungary, the respondent described that expert reports have the same value as other evidence, and the court must explain the value (or lack thereof) of the expert report in the decision itself.

The value placed on expert reports by the respondents does not always correlate with courts showing over-reliance to the expert. The Austrian respondent for example, whether it treats expert opinions as the basis for decisions, or as informing the court on how to interpret evidence, has shown a low incidence of over-reliance on review of appealed cases. On the other hand, the Norwegian respondent states that expertise only informs them how to treat evidence, yet still reports some incidence of over-reliance. This may show that, despite the rules, judges are still over-reliant on expert reports in practice.[27] The responses to the questionnaires and literature show a critical amount of deference in practice and (rarely endorsed by legislation) to expert opinion.[28]

The next question to address, therefore, is what steps should be taken to prevent over-reliance.

d. Prevention of over reliance

More scrutiny on this issue can be had by asking whether any steps are taken to ensure that the role of the judge in coming to a decision is protected from over reliance on the expert.[29] Almost all respondents[30] chose at least two of the measures to prevent over-reliance. The emphasis for the majority of respondents is on the importance of reasoning in the decision, and that the judge shows that they have understood the report itself, and the importance and relevance (or lack thereof) of any given expert report to the case they are hearing. The reasoning may also show the degree to which a decision maker has been assisted in coming to a decision.

What can be highlighted here are any extra measures taken to reflect best-practices across the Council of Europe member states. Reversals are possible in Austria, Germany and the Netherlands where there is a lack of proper explanation on the weight of the expert's opinion (or lack thereof).

It would appear that the pilot courts which have the possibility of "sanctions" – such as reversal on appeal also show a lower rate of over-reliance (with the exception of the Netherlands). It is also interesting that so few respondents named sanctions as a step to prevent over-reliance. Even though they are not sanctions in the strictest sense, the fact that some respondents put reversals down, shows that it is an important deterrent to over-reliance, as it can be a basis for that appeal.

e. On understanding the value of expert reports

One question that has arisen in the previous section is why, with all the steps taken to prevent over-reliance, does it still occur at such high reported levels. Aside from high levels of trust (which has not been tested in this research), one reason could be the lack of understanding the true value of expert reports in a case. As discussed in the literature, this can be very technical at times, and judges only have expert knowledge of the law. It was asked therefore, whether judges and professionals receive training to gain perspective of expert

[26] This is the same in Lithaunian court for civil, criminal and small penalty cases in administrative law

[27] It would be interesting for future research to look at appealed cases, to understand how "over-reliance" is defined in practice for these countries which place a heavy emphasis on reasoning and explaining the value of expert reports in judgments.

[28] Lucena-Molina, Jose-Juan, Pardo-Iranzo, Virginia and Gonzalez-Rodriguez, Joaquin, 'Weakening Forensic Science in Spain: From Expert Evidence to Documentary Evidence', *Journal of Forensic Sciences* 2012, 57, 4, 952-963. P.957-959; see also Vuille, Joëlle, 'Admissibility and appraisal of scientific evidence in continental European criminal justice systems: past, present and future', *Australian Journal of Forensic Sciences* 2013, 1-9.; and M'charek, Amade, Hagendijk, Rob and Vries, Wiebe de, 'Equal before the Law: On the Machinery of Sameness in Forensic DNA Practice', *Science, Technology & Human Values* 2013, 38, 4, 542-565.

[29] a) The judge must explain which parts of the decision used the expert testimony presented at court; b)The judge must explain why expert testimony was not used in coming to a decision; c) Sanctions where the judge fails to explain the role of expert reports in their decisions; or d) Other. It was possible to give more than one answer. Reasoning under a) and b) allow appellate courts to identify situations of over-reliance, and allow them to apply sanctions under c.

[30] With the exception of France and one respondent in Finland

testimony.[31] Without consistent training, and confidence in the areas in which experts are asked to report, a consequence could be over-reliance on expert reports.

The majority of respondents have reported some incidence of training ranging from low to very high.[32] The Swedish court of general jurisdiction and Swiss court of administrative law gave a high score and explained that this can be from training to be a judge, and through experience as a judge. The Dutch have a voluntary training scheme, but it would appear that not many take it.

Training is patchy and inconsistent throughout these pilot courts. However, looking at specific responses, one can see for example some consistency for having quite low incidences of over-reliance, yet providing some training on these issues.[33] More respondents show higher rates of over-reliance than training.[34] Remaining countries show equal rates of over-reliance and training. One can speculate whether there is a good understanding of the training needed for judges to prevent over-reliance and understand the true value of expertise. The training offered in this group, compared to the levels of over-reliance, do not always seem proportionate.

B. Status of experts

In assisting the court, the experts conduct their investigation and produce a report that is submitted to the court as part of the evidence.[35] However, there can be more than one type of expert in law. For example, in the USA, there are two different types of expert. An expert is hired by the party, and these are called “expert witnesses”.[36] On the other hand, a judge may appoint an expert to assist her in understanding the expert reports, called an “assessor”, whose advice to the court does not have any probative weight or value. In England,[37] Canada,[38] and Australia[39] experts are called “expert witnesses”. In Germany, under the civil procedure, experts are not considered “witnesses” but rather “judges’ aides”.[40] In France, like Germany, experts are not considered to be “witnesses” but rather “auxiliaires du juge.”[41] They literally assist the judge in understanding evidence that requires specialisation to explain it. In Italy, they treat experts differently for civil cases as they do for criminal cases. In civil proceedings, they are, similarly to France and Germany, judges’ aides: “consultente tecninco d’ufficio”.[42] In criminal proceedings however, the experts are called “perito” and have “a more active role in aiding the judge’s final decision than experts in civil proceedings.”[43] In addition there are also the “consulente tecnico di parte” and “perito di parte.”

In fact, the European Court of Human Rights (ECtHR) has established “that the term “expert” is an autonomous concept. Even though

“it is not for the Court to depart from the definition which the Government have furnished of the notion of "expert" … in order to assess the role played in the particular circumstances … the Court cannot rely solely on the terminology employed in the [national] legislation but must have regard to the procedural position he occupied and to the manner in which he performed his function.”[44]

[31] On a scale of 1-5, with 1 being the lowest incidence and 5 being the highest.
[32] Four respondents had no data available: Denmark, England, France, and one Swiss court
[33] Hungary, Turkey, Monaco, Lithuania and Ireland.
[34] Finland, Norway, Sweden, the Netherlands, Switzerland, Italy, Czech Republic,
[35] Champod, Christophe and Vuille, Joëlle, 'Scientific Evidence in Europe — Admissibility, Evaluation and Equality of Arms', *International Commentary on Evidence* 2011, 9, 1,
[36] Sonenshein, David and Fitzpatrick, Charles, 'The Problem of Partisan Experts and the Potential for Reform through Concurrent Evidence', *The Review of Litigation* 2013, 32, 1-64. P.6
[37] Blom-Cooper, Louis Jacques, *'Experts in the civil courts'*, Oxford University Press, Oxford 2006
[38] Sonenshein, David and Fitzpatrick, Charles, 'The Problem of Partisan Experts and the Potential for Reform through Concurrent Evidence', *The Review of Litigation* 2013, 32, 1-64. P.53
[39] Ibid. p.59
[40] Ibid. p.37
[41] Jeuland, Emmanuel, 'Le changement du rôle des témoines et des conseils dans quelques pays de droit civil et, en particulier, en France', in *Common Law, Civil Law And The Future Of Categories*, J. Walker and O. G. Chase (eds), LexisNexis, Ontario 2010 p. 201 (Code of Civil Procedure art. 232)
[42] Sonenshein, David and Fitzpatrick, Charles, 'The Problem of Partisan Experts and the Potential for Reform through Concurrent Evidence', *The Review of Litigation* 2013, 32, 1-64. P. 44
[43] Ibid. p.45
[44] Bönisch v. Austria, n. 8658/79, 06 May 1985; see also Commission, dec., Aldrian v. Austria, n. 10532/83, 15 December 1987

a. A rose by any other name?

In the courts surveyed, various names have been assigned to the expert.[45] What has been shown is that the name itself does not matter. As illustrated by the ECtHR, what matters is the function and to whom the expert owes a duty: either as auxiliary to the court or to the parties.

In the majority of courts surveyed, the expert is auxiliary to the judge only, however, there are a few places where it is also auxiliary to the party, such as Norway, where the expert witness presented by one party is auxiliary then to the party (also in the Swedish administrative court). In Ireland, they are unofficially auxiliary to the parties. This is significant because, even though the experts are hired by the parties, they are held to account by the courts. Lithuania explains that experts are auxiliary to both judge and parties, because they have a duty to assist the judge in understanding the facts, but may be hired by the parties to also help them clarify the facts in the case. In the other countries, there is also some variation in name, but the experts are auxiliary to both, depending on who engages the work of the expert.

There seems to be no real connection between the name given to the expert and the role that they play. It would be very easy therefore to standardise official names of specific types of expert across Europe as it would not really have an impact on what they do.

It was also asked whether any of these jurisdictions had the American styled "assessor". Sweden has someone with this function: In the Swedish administrative court, exceptionally, the government may nominate one. Ireland has the possibility of appointing assessors under "Competition Proceedings", but they are very rarely used.[46] The Lithuanian court of general jurisdiction has a specialist consultant in criminal cases, but not for civil cases. France has an assessor who is called in for "*consultation*"[47], which is also done by an expert.

There could be a number of reasons for the lack of assessors: the experts that are used explain their findings in clear enough terms; that judges show an understanding of a broad range of technical issues without further need for explanation; that during the procedures themselves, judges can freely ask for further explanation of the expert report; or that it hasn't been considered as a possible tool to prevent over-reliance.

b. Status

It was also asked whether the expert, for the duration of the case or investigation, has the status of an officer of the court, with similar obligations. The majority of responses overwhelmingly answered in the negative. Only one Norwegian respondent said yes, and explained that "An expert judge is appointed as a member of the court panel with equal rights and duties as other judges appointed to the case…"[48]

c. Corporations and Assistance?

It was first asked if a corporation could be appointed as an expert in litigation. There is a variation between jurisdictions of the same country, and between the countries. It is possible to use corporations in some countries,[49] but this can also vary between jurisdictions.

In Ireland, in theory it is possible, "but this is generally extremely unlikely as what is required is a person who can give evidence on an issue". In Switzerland, it's possible to appoint a corporation, as long as a "specific individual is named as named as the person responsible." On the other hand, the requirement of a physical person is the reason given in Monaco for not allowing corporations to be hired as experts. This reason appears to emphasise the need to assign accountability to named individuals.

The questionnaire further put the question: if an expert could be assisted by another expert: only two respondents said not.[50] In England and Wales, "One party may call their own expert to rebut the evidence of an expert called by another party. An expert may have to refer to another expert for a specific point of specialism but is usually expected to be able to answer what is asked."

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[45] The following choices were available within the questionnaire: They were given a list of five to choose from: i) forensic experts; ii) expert-witnesses; iii) expert-referees; iv) judicial experts; v) other.
[46] Please see questionnaire from Ireland for much more detail
[47] under article 256 of Code of Civil Procedure
[48] The only other respondent to answer yes was the Lithuanian court of administrative law, but gave no further explanation.
[49] Denmark, Sweden, Finland, Ireland, Estonia, Lithuania, the Netherlands, France, Czech Republic, Hungary, Slovenia, Croatia, Bosnia & Herzogovina
[50] Finnish court of administrative law; Lithuania court of First Instance for civil, criminal and administrative offenses for complex cases

Austria qualified this possibility by stating that unless the second expert was working as an assistant to the first, he/she had to be called by the court as a separate expert. In Germany, the court simply requires details of the person assisting the expert under procedural law. In France and Monaco,[51] these assistants are called "*sapiteur*" but they must work for the expert. In Switzerland, an assistant must also work under the responsibility of the expert. The respondent from the Czech Republic explained that "for practical reasons, in" such cases the expert institutes are usually appointed."

Where there have been explanations for allowing corporations and/or assistants to do the work of the named expert, it is clear that these are only possible if there is a clear line of responsibility for the work done, and that it is done to the same high standard as would be done by the appointed expert.

d. Status of the expert report

It is interesting at this point to also ask what the status of reports of experts is, as this may also reflect their status in practice.[52] There is a broad variation within countries of different jurisdictions and between countries, also depending on the type of expert called. For example, in the Finnish Administrative Judicial Procedure Act, it is called "Opinion (from an expert witness) or statement (from another authority)". In Sweden, the court of appeals respondent called it merely an "opinion", whereas the administrative court called it "technical" and "expert" opinion. In France, the name depends on the type of expert: it is 'findings' for the expert or 'technical opinion' for the assessor.

On other occasions, the name simply reflects a range of information: In Estonia, they are called "expert opinions, which includes technical opinions, findings, conclusions etc."[53] In Lithuania, "expert conclusions are usually submitted in writing as expertise report which shall contain detailed description of performed studies, conclusions made on the basis of those studies and reasonable answers to the questions put by the court." In Austria, the respondent explains: "Expertise: the expert describes the situation and finds conclusions to answer the questions the judge asked the expert."

What does this mean for the status of the expert report? Like the name of the expert, unless it is an assessor, the name does not have much of an impact. On the other hand, they have a heavy enough burden that individuals must be able to take responsibility for the work delivered to the court, whether corporations or assistance may be used or not.

III. Selection, sanctions, training and remuneration

The method of expert selection and rules surrounding it are linked directly to reducing bias of expert testimony in court, whether in inquisitorial or common law legal systems.[54] This issue is also very much connect to the issues of role and how status is reflected in methods of appointment, training and possible sanctions. This issue also relates to principle of adversariality and equality of arms, but expands more on the balance and choice between experts pro parte and experts pro veritae and quality control of experts discussed in the next section.

In the common law systems, experts are "…chosen by the parties, instructed and financed by them, having the same status as witnesses."[55] At its heart, this supports the adversarial system by presenting different approaches to interpreting the evidence, and by trying to reduce bias by allowing cross-examination in the court procedure. However, Sonenshein is critical of this, as he argues that "payment of experts leads to biased testimony."[56] The general principle in any country is that witnesses may not be paid for testifying. Experts are the exception to this.[57] Due to this situation, the market in "experts" has flourished in all areas in the U.S.[58]

Furthermore,

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[51] Monaco: code of civil procedure, article 354

[52] i. Testimony; ii. Findings; iii Conclusions; iv. Technical opinion; v Other. "Testimony" comes closest to what witnesses are usually called upon to give in court, the others having a more scientific connotation, with technical opinion being the least conclusive of those.

[53] Similarly in Germany, Italy, Bosnia-Herzogovina, Croatia, Czech Republic, Azerbaijan

[54] Sonenshein, David and Fitzpatrick, Charles, 'The Problem of Partisan Experts and the Potential for Reform through Concurrent Evidence', *The Review of Litigation* 2013, 32, 1-64.

[55] Champod, Christophe and Vuille, Joëlle, 'Scientific Evidence in Europe — Admissibility, Evaluation and Equality of Arms', *International Commentary on Evidence* 2011, 9, 1, p.20

[56] Sonenshein, David and Fitzpatrick, Charles, 'The Problem of Partisan Experts and the Potential for Reform through Concurrent Evidence', *The Review of Litigation* 2013, 32, 1-64. P.6

[57] Ibid. p.6

[58] Ibid. p.7

"[in] most cases, any minimally qualified practitioner of the expert discipline at issue is eligible to testify".[59] This has led to "expert shopping" which "gives the party the opportunity to hire the expert based almost exclusively on the content and manner of their testimony…Unfortunately, the correlation between the qualities attorneys seek in expert witnesses and the truth is eliminated when they are sold like commodities."[60]

This means that there are few standards to hold experts to.[61] The more experience an expert has with testifying, the more believable they sound, the more they are retained.[62] Therefore, there is a question as to reliability of expert witnesses.[63] These problems also apply to England,[64] and the problem may begin to get worse since the UK government closed down the Forensic Science Service and left the provision of forensic services to the private market.[65] In Canada, and Australia experts are also appointed by parties.[66]

In the inquisitorial systems, judges are generally responsible for appointing experts. This is regulated in Germany by Code of Civil Procedure.[67] Even though the judge may choose an expert, parties may object and ask for recusal, opening the way to appoint another expert. This will only work where the party can show bias.[68] In France, experts are appointed through the court by the Judge Delegate to assist the collegiate court to come to their judgment.[69] In Italy, during civil procedures, the judge appoints the expert, but parties may request one be appointed. Where this is the case, the judge has the discretion whether to appoint one or not.[70]

In the ECtHR's view, a decision to appoint an expert, be it with or without the parties' consent, is a matter that normally falls within the national court's discretion under Article 6 § 1 in assessing the admissibility and relevance of evidence.[71] It follows that the party does not have an automatic right to an expert opinion.[72] As such, if a court refuses to order an expert opinion, this is not in itself unfair, but the ECtHR (if a case goes that far) must then ascertain whether the proceedings as a whole were fair.[73] This has been recognised especially in cases involving parental access to children, and account will be taken of the whole process.[74]

The ECtHR also has regard for cases where experts should be appointed in cases of incapacity that lead to confinement. It is expressly the right of a party to have a case reviewed over time where incarceration is based on an initial expert report.[75]

A. Appointments

Whilst it was asked in the questionnaire who appoints the expert, this is dealt in more detail below within the adversarial principle. It is clear that there is a mixed practice, and in the majority of inquisitorial systems, it is the judge that appoints, sometimes allowing the parties to suggest, or to agree or challenge a specific choice. This section will go on, therefore, to look at the possibility of having a single joint expert, whether courts have lists available to them,

a. Single joint expert

The majority of respondents stated that it is possible to appoint a single joint expert, with a few respondents qualifying this possibility.[76]

[59] Ibid. p.7
[60] Ibid. p.8
[61] Ibid. p.9
[62] Ibid p.9
[63] Sonenshein, David and Fitzpatrick, Charles, 'The Problem of Partisan Experts and the Potential for Reform through Concurrent Evidence', *The Review of Litigation* 2013, 32, 1-64. P.10
[64] Ibid. p.57
[65] See "Forensics upheaval 'threat to justice,' MPs warn.", by Paul Rincon, Science Editor, BBC News Website, 24 July 2013: http://www.bbc.co.uk/news/science-environment-23436303 last access 28 August 2014
[66] Sonenshein, David and Fitzpatrick, Charles, 'The Problem of Partisan Experts and the Potential for Reform through Concurrent Evidence', *The Review of Litigation* 2013, 32, 1-64. P.53, and p. 59
[67] Ibid. p.37
[68] Ibid. p.38
[69] Ibid. pp.40-41
[70] Ibid. P.44
[71] Sara Lind Eggertsdóttir v. Iceland, no. 31930/04, § 47, 5 July 2007
[72] Low v. la Suisse, 21440/93, 28 June 1995 (French only)
[73] Elsholz v. Germany [GC], no. 25735/94, § 66, 13 July 2000; see also Sommerfeld v. Germany 31871/96, paragraphs 71-75, 8 July 2003
[74] Elsholz v. Germany [GC], no. 25735/94, § 66, 13 July 2000; see also Sommerfeld v. Germany 31871/96, paragraphs 71-75, 8 July 2003
[75] Lashin V. Russia no. 33117/02 § 83-84, 87-88 22 January 2013

Whilst it is possible to have a single joint expert in England, this was qualified “Ordinarily the Court does not, however, if more than one defendant wants to introduce expert evidence on an issue at trial, the court may direct that the evidence on that issue is to be given by one expert only”. The Irish respondent said that they could only appoint a single joint expert “after hearing the parties” In France, the respondent said yes, although for a French concept: the expert is common to all parties. In Switzerland an expert is appointed for a case, not for the parties.

Aside from being a more efficient way, this is also more agreeable where one expert respected by both parties can be appointed. This would lead to fewer challenges to expert competence and issues of independence and impartiality and would reduce the time needed to present the report.

b. Lists

It was asked whether there were lists of experts to choose from, and whether it was obligatory on judges to use those lists. Generally speaking, the practice varies. Some places, there are lists and it is compulsory to use them;[77] some places have lists, but it is not compulsory to use them;[78] and some places have no lists.[79]

Norway is somewhat anomalous as the respondent said that there are no lists, but “according to legislation yes, but these lists have in practice been abandoned” In Sweden, there are no lists for the court of appeal in civil and criminal cases, but there are lists for the administrative court, and it is compulsory for them to use the list for some experts.

Whilst there are lists in Germany, the respondent from the criminal court clarified that these are “lists of specific professional associations, which are not only for courts.” The French, like the Germans, have lists of experts. Whilst judges are not obliged to use them, they do so "... because of convenience and a sense of quality control."[80] In Switzerland on the other hand, the practice appears to be that there is “no official list, but a folder in which information and expert applications are being collected for further use” but it is not compulsory to use this list. In Monaco there should be a list under the Code of Civil Procedure, but this has not been established. Instead they use lists from the French Court of Appeal or the Court of Cassation.[81] In Italy, the Code of Civil Procedure “…provides that the [expert] must be selected from the "Albo dei Periti," which is a register that divides individuals qualified to render technical assistance into various categories depending on their area of expertise."[82]

Where there are lists, these could be to control the quality of experts. In several countries, the impression is given that these lists are a resource for courts and practitioners to find established experts in a variety of fields. This data shows varied practices in terms of court appointment of experts. There are no hard and fast rules operating throughout these different countries. There appears to be some consensus that parties should also agree, at least implicitly, in some places to the choice of the court before making a final decision.

B. Sanctions

Aside from questions of selection, issues of sanctions for non-performance, errors and criminal liability are also important for quality control.

a. Sanctions for non-performance

In the literature surveyed, there was very little comparative work as to sanctions for non-performance of experts. Poor performance could result in a bad reputation in both types legal systems, and make them less

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[76] Norway, Sweden, Finland, Ireland; Austria, Germany, Netherlands, Monaco, Switzerland, Italy, Czech Republic, Turey, Azerbaijan, Bosnia-Herzogovina; Not single joint experts in Lithuanian administrative court, Hungary, and Croatia. Slovenia has a mixed practice between courts.

[77] Lithuania, Estonia, Czech Republic, Hungary, Bosnia-Herzogovina, Croatia, and Slovenia

[78] Denmark, Austria, Germany, Netherlands (National index for court experts (NRGD)), France, Italy, and Turkey

[79] Finland, England, Ireland, Monaco, and Azerbaijan

[80] Sonenshein, David and Fitzpatrick, Charles, 'The Problem of Partisan Experts and the Potential for Reform through Concurrent Evidence', *The Review of Litigation* 2013, 32, 1-64. p.41

[81] This list is available at the following link: http://www.courdecassation.fr/informations_services_6/experts_judiciaires_8700.html#experts accessed 29 August 2014

[82] Sonenshein, David and Fitzpatrick, Charles, 'The Problem of Partisan Experts and the Potential for Reform through Concurrent Evidence', *The Review of Litigation* 2013, 32, 1-64. P.44

likely to be chosen in future.[83] Here, it was possible to use the questionnaire to fill in the gap in the literature. It was first asked whether there are sanctions for none performance.[84]

The majority of respondents stated that some form of financial penalty[85] was available to them.[86] Disallowing evidence is an important procedural tool, though not all respondents stated this as a possibility.[87] Courts that do not disallow evidence, may have free evaluation of the expert report, and may not need to use this procedural tool.

The majority of respondents also stated that there was some form of legal liability,[88] though not all.[89] Whilst there is legal liability in many of the countries where respondents come from, it is understandable if it is rarely used, as it could have a chilling effect on the few court experts available to the courts. On the one side, in Norway, "There are no special rules for criminal sanctions or liability against experts, but these may follow from general legislation" On the other hand, in Azerbaijan,

"If expert gives false opinion intentionally at the court procedure or preliminary investigation, he responds (bears) criminal responsibility; he could be punished by several ways, to fine, public works, and disciplinary works or to imprison for certain period. While the cases of administrative offences proceedings if expert gives false opinion intentionally, or if he does not want to come to the procedure by invitation purposely, or if he refuses to give his opinion, he responds (bears) administrative responsibility or to be warned or to be fined."

The last tool in the kit is the possibility to strike experts off an official list. Bearing in mind that not all of the respondents have lists available, or where they have, are not always compulsory to use, not all of the respondents here have this option.[90] Of those who have this possibility, only the Czech Republic treats this as legal liability, and will only be able to strike an expert off the list after an administrative procedure. Given the possible ramifications for an expert in terms of reputation and career, some form of protection through an administrative procedure is important.

A balance needs to be found within this toolkit of sanctions to help maintain high quality, independent and impartial expert reporting to the courts. A question remains as to whether financial sanctions are sufficient when experts' work carries so much consequence for the parties.

b. Sanctions for errors

It was further asked if the expert could be held responsible for any eventual errors or mistakes committed in the performance of their services and if so, whether it was through criminal, civil or other forms of liability, and who would be responsible for verifying the existence of this liability. The majority of respondents answered that there was some form of legal liability for errors, with a few exceptions.[91] Of these exceptions, the Irish respondent explained that:

"No unless there is contempt. An expert is considered to be the same as any other witness and may be criticised for errors or mistakes. The Supreme Court has held (E.O'K. v. D.K., and Ors [2001] 3IR 568) that an expert witness, in common with any other witness, enjoys immunity from proceedings in respect of the evidence given by that witness except where the expert witness acts with a malicious purpose or so departs from the duties which (s)he is performing an expert as to have abused his/her position… this is to be verified by the judge"

This is an important point to make at the start. Whilst it is important to ensure independence and impartiality, this must be balanced with the practicalities of delivering justice. This balance can be seen from many responses, where criminal liability can only be incurred where a crime has been committed, i.e. for submitting

[83] Ward, Tony, 'Expert Evidence, Ethics and the Law', in *The Wiley-Blackwell Handbook of Legal and Ethical Aspects of Sex Offender Treatment and Management*, (eds), John Wiley & Sons, Ltd, 2013p. 89

[84] These were the possibilities: Disallowing evidence in court; ii. Fining the late party; iii. Strike the expert off the official list of experts; iv. Reducing expert fees; v. Criminal sanctions; vi. Civil liability; vii. Fining the expert.

[85] Fining the late party, reducing expert fees, and/or fining the expert

[86] Exceptions include England, Ireland, Azerbaijan, Germany, Austria,

[87] Those that did not choose this included Finland, Estonia, Lithuania, Germany, Austria, Czech Republic, Bosnia-Herzogovina, Croatia, and Slovenia

[88] Either criminal or civil

[89] The exceptions are England, Ireland, Sweden, Germany, Austria, Monaco, Bosnia-Herzogovina, Croatia,

[90] Those that do have this available to them include: Sweden, Lithuania, the Netherlands, France, Monaco, Switzerland, Italy, Czech Republic, Turkey, and Slovenia. Whilst England does not have an official list, judges can complain to a professional body about professional misconduct

[91] There was also a variation within countries of different jurisdictions. Those that said no, include Finland's administrative court, Ireland, Lithuania administrative court, Bosnia-Herzogovina, Croatia

maliciously false reports.[92] Whilst not all countries have criminal liability, civil liability is common and can be incurred through tort or contract law. Included in some of the country responses is the possibility of liability under disciplinary law and is usually left to the professional body to which the expert is a member.[93]

Given the possibility of civil liability, it was also asked whether experts needed specific insurance to cover that. The majority said no.[94] Whilst some places state that experts have covered their liability with insurance without a legal obligation to do so, such as the Netherlands, and Monaco.[95] Germany has said that professional bodies may impose the requirement of having insurance.

c. Status and legal responsibility

It was finally asked whether the status of the expert has an impact for civil and criminal liability of the expert. Of the twenty two countries represented, ten of them gave a clear no.[96] One example is Sweden, where the status can lead to greater responsibility only if the expert works for a public authority and has special status as a civil servant. France explained that an error or fault is connected to the assignment rather than the status. There is no difference between an expert on or off the list to the judge in terms of status of the expert.

On the issue of sanctions, there does not appear to be any particular pattern in the way that liabilities are incurred in different countries, it can be either criminal and/or civil, occasionally both. What one can occasionally see is a difference in responsibility given to an expert between jurisdictions of some countries.

In the interests of not deterring witnesses and expert witnesses from going to court, where there is criminal liability it should be limited, and it has been explained in some cases that this would only be for the most severe cases, where intentionally false information has been given.

It may be that the status of the expert should be elevated to that of a witness, similarly to the Irish: to protect experts as witnesses unless malpractice, corruption or other crime can be proven. This would protect the work of the expert, and assume independence and impartiality. Sanctions for non-performance is one thing (and mostly contractual), but sanctioning errors is another, and should be used sparingly.

C. Initial and continuous training

As the fields of expertise required by the courts are so vast, states have only appeared to place minimum standards on initial and/or continuous training, through either accreditation,[97] and as a basic requirement, through membership of a professional organisation, such as a Medical Association.[98] To this end, the questionnaire asked whether there is a system of licensing and accreditation, and whether there is a way to guarantee the quality of experts.[99]

Nine out of twenty two countries that sent in responses said that there was no system of licensing or accreditation per se,[100] though licensing and accreditation can exist within various fields of expertise, imposed by professional bodies (e.g. medical).[101] This means that the majority have some form of licensing and accreditation. In Germany, this means that “experts of specific professions are public appointed and attested by official bodies according to public law. Judges should assign a public appointed and attested

[92] Examples of this can be found in Norway, Sweden’s ordinary jurisdiction, Estonia, Lithuania, Germany, and the Netherlands (though rarely)
[93] England, the Netherlands, and Turkey
[94] Only the Swedish administrative court, England, Austria, Hungary, and Croatia.
[95] This respondent said that any expert on the list of the Court of Appeal of France are all covered. Otherwise Swedish administrative court, England, Austria, Hungary, and Croatia also indicated that insurance was used
[96] The following gave a clear affirmative: Estonia, Lithuania, Germany (under civil law), Czech Republich, Hungary, Turkey,
[97] Champod, Christophe and Vuille, Joëlle, 'Scientific Evidence in Europe — Admissibility, Evaluation and Equality of Arms', *International Commentary on Evidence* 2011, 9, 1, P.22, p. 43, p.49, p.54; see also Lucena-Molina, Jose-Juan, Pardo-Iranzo, Virginia and Gonzalez-Rodriguez, Joaquin, 'Weakening Forensic Science in Spain: From Expert Evidence to Documentary Evidence', *Journal of Forensic Sciences* 2012, 57, 4, 952-963. And see also Vuille, Joëlle, 'Admissibility and appraisal of scientific evidence in continental European criminal justice systems: past, present and future', *Australian Journal of Forensic Sciences* 2013, 1-9.p.4
[98] Sonenshein, David and Fitzpatrick, Charles, 'The Problem of Partisan Experts and the Potential for Reform through Concurrent Evidence', *The Review of Litigation* 2013, 32, 1-64. P.17
[99] The following could be chosen: i. Accreditation; ii Licensing, iii. Professional Organisation’s standards; iv Experts’ regulator; v. Other: Please briefly state (Quality problems and solutions are discussed in a later section of this report).
[100] Denmark, Finland, Norway, England, Ireland, Monaco, Switzerland, Azerbaijan, and Bosnia-Herzogovina
[101] Such as Sweden

expert, if there exist such an expert, but he is allowed to choose another expert if he has good reason for that." The Netherlands also has a formal body for accrediting experts.[102]

It would appear that quality guarantee through continuous training is also external to the courts, with almost all countries relying on professional standards and expert regulations. Much depends on the field of expertise as to the guarantees of quality.[103]

In England and Wales, there is no system of licensing or accreditation for becoming a court expert, but "an expert's report must set out give details of his or her qualifications, relevant experience and accreditation." Therefore, the courts are able to check accreditation, licensing, professional organisation's standards and expert regulators. Similarly in Ireland there is also no system of accreditation or licensing to be a court expert. However, quality is guaranteed through "open By open assessment of their testimony in court and, if necessary, criticism of their comments in the conclusions of written judgments."

Similarly, in Switzerland there is no system of licensing or accreditation. However, in order to guarantee quality, they rely on the educational background, and how they have performed in the past in other courts for past cases. It is clear then that in Switzerland at least, it is the responsibility of the expert to have the necessary qualifications and proof of continued training to become and continue to be a court expert. In Azerbaijan, there is also no system of licensing or accreditation, but in order to guarantee high quality of experts they rely on professional organisation's standards and experts regulator, alongside regular attestation by the ministry of justice.

Some countries have further measures in place in order to be an expert in court. In Estonia for example, the respondent added

"Pursuant to article 6 of the Forensic Examination Act, the requirements for certified experts are as follows:

1) must have active legal capacity;

2) must be proficient in Estonian to the extent established by law or on the basis of an Act;

3) must have acquired higher education required in his or her field of expertise in an institution of higher education of the Republic of Estonia or if the person's education corresponds to the said level;

4) must have been employed in his or her field of expertise in a forensic or research institution or in another position for at least two years immediately prior to commencing employment as a forensic expert."

In Germany, "experts of specific professions are public appointed and attested by official bodies according to public law." In the Netherlands, alongside the NRGD for Forensic Scientists, there is also an Index of Court Experts and a Code of Conduct for experts. Furthermore, "the license has to be refreshed every 4 years" which may mean further exams and training to meet current standards.

In the majority of responses, it is the responsibility of the expert him/herself to ensure initial and continued training to meet the standards required to be appointed as a court expert and the responsibility of the professional organisation to which the expert belongs to ensure regulation of its members.

Another important feature of accreditation or licensing is that it sets out expectations for both the courts and experts clearly. In future, case law and legislation may provide an important source of information for accreditation and licensing of expert witnesses in court, so that experts know what is expected of them. However, it must work in both directions, and the courts need to be educated as to the limits of expert testimony, as discussed above.

D. Remuneration

Remuneration, as with appointment, has an impact on the perceived independence and impartiality of the expert. In common law countries, where parties hire their own experts, they pay for it themselves, and can get back costs if they win the case. In France at least, it is paid for by the court, and experts may not accept any payment or gifts from either party[104]

[102] NRGD: the Dutch Register of Court Experts for forensic institutes. Other respondents have not described the licensing/accreditation system in any detail

[103] The Norwegian respondent gave the example of psychiatric experts being controlled by the Judicial Medical Commission, which monitors reports and experts.

[104] Sonenshein, David and Fitzpatrick, Charles, 'The Problem of Partisan Experts and the Potential for Reform through Concurrent Evidence', *The Review of Litigation* 2013, 32, 1-64. P. 44

To this end, two questions were asked of the pilot courts: who sets the fees,[105] and who pays?[106] The type of case influences the answer to the first question. Where a respondent indicated that they came from a court with civil jurisdiction, the court usually sets the fees. For either criminal or civil, sometimes the legislator can set the framework for the fees, to be verified by the court.[107] Occasionally, it is also for the Ministry of Justice to set the fees, though this is somewhat rarer.[108]

In terms of who pays, this again depends on the jurisdiction of the court. If it is civil, it is usually the parties who pay.[109] In criminal cases, it is normally the state through the courts that pay.[110] However, in some countries, where a defendant loses in a criminal case, he/she may be forced to pay the costs of the expert. This can be seen in Estonia, Germany, sometimes Netherlands, Italy, and Hungary. Although it is not stated in the response to the questionnaire, this also occurs in England where it is in the interests of justice to do so.[111] This is a worrying trend as there are issues of equality of arms and fair trial, especially if defendants are limited to relying on court appointed and state mandated experts, or worse, only the prosecutors or police experts, and if there is no or limited possibility for the parties to influence the terms of reference.

Given austerity measures across Europe, and the impact on judicial budgets, it was also asked whether requests for experts were rejected on the basis of a lack of resources. The majority said none or rarely. For civil cases, experts are mostly retained and paid for by the parties themselves. For criminal cases, if it is in the interests of justice to order an expert, appointment of an expert will not be denied.[112]

Experts do not appear to be an overly burdensome resource on the courts (where the courts pay), and do not appear to have been sacrificed in recent austerity measures. This could also be due to stricter guidelines on what experts may charge and what the fee setting body is willing to pay.

Having described in some detail the general organisation surrounding the role of experts, the next sections will go on to describe the procedural and fair trial aspects on the role of the expert.

IV. The adversarial principle

The significance of the adversarial principle for the court expert is that they should expect either to have their findings challenged during cross-examination in common law countries, or to have judges and parties ask questions that the expert should seek answers to from the start of the investigation. The adversarial principle is reflected in the protection of the principle of equality of arms between parties.[113] This

"… requires equality between the parties in procedural terms, meaning that each of them must have a reasonable opportunity to present its case in conditions which do not place it at a clear disadvantage vis-à-vis the other parties. Equality of arms is not in itself a right, but a principle intended to ensure that the parties' rights are realised in a balanced manner. The parties must also have the right of equal access to relevant information and an equal opportunity to have their say and present their arguments and observations, and their scientific experts must be given equivalent status."[114]

Whilst not an absolute concept, within Europe, challenges to the ECtHR may be made on a case by case basis (as with all fair trial rights issues).[115] The ECtHR has further discussed the right of the parties to "obtain the appointment of a counter-expert"[116] especially in cases where there may be "doubts raised by

[105] Legislator, Ministry of Justice, and/or Courts
[106] Parties, Courts, Ministry of Justice
[107] Examples of this include Slovenia (commericial cases), Croatia, Azerbaijan, Hungary, Italy, Netherlands (for criminal cases), Germany, Austria, Estonia, and England.
[108] Finland, Sweden, Lithuania, Czech Republic, Bosnia-Herzogovnia, and Slovenia
[109] This can be seen in Denmark, Finland, Norway, Sweden, Lithuania, Austria, Germany, Netherlands, France, Monaco, Switzerland, Italy, Czech Republic, Turkey, Azerbaijan, Bosnia, Croatia, and Slovenia. In England, it depends on who is instructing the experts.
[110] This can be seen in Denmark, Norway, Sweden, Lithuania, Bosnia-Herzogovina, Croatia, and Slovenia
[111] Section 18 of the Prosecution of Offences Act 1985: Applying for costs against the defendant
[112] Some respondents also had no data on the subject: Denmark, Sweden, England, Lithuania, Netherlands, and Azerbaijan
[113] Champod, Christophe and Vuille, Joëlle, 'Scientific Evidence in Europe — Admissibility, Evaluation and Equality of Arms', *International Commentary on Evidence* 2011, 9, 1, pp. 93-94
[114] Ibid.p.23
[115] Cases cited include: Eggertsdottir v. Iceland 5 July 2007. p. 25; Stoimenov v. the former Yugoslav Republic of Macedonia 5 April 2007.p. 25; Bönisch v. Austria 6 May 1985. 28 August 1991. p. 26; Brandstetter v. Austria no. 13468/87, 28 August 1991 p. 26; and G.B. v. France no. 44069/98, 2 October 2001. p. 26
[116] Bönisch v. Austria, n. 8658/79 paragraph 34

appearances."[117] The presumption here is where the court gives too much weight to the court appointed expert.[118]

These principles further imply "…the defendant's right to be present at the different stages of the procedure, and, secondly, the right of the defence to an opportunity to have knowledge of and consider the arguments of the opposing party and, in particular, to comment on the evidence presented."[119]

In the examination of "the expert's position in the procedure and its effect on equality of arms"[120] Champod et al clarify that in an adversarial system, testimony by both parties' experts must be given equal consideration.[121] However, for the inquisitorial system, whilst the expert is considered impartial,[122] the ECtHR has cautioned the courts that where it can be foreseen that defence will want to challenge experts that consideration be given to this much earlier in procedures. The ECtHR also

"... call for maximum exchange of information between experts and parties, from the moment that experts are appointed, for a surprise effect can only be detrimental to a balanced and considered assessment of scientific evidence. For it is indeed expert reports or statements that need to be balanced and to reflect the respective positions of the different parties."[123]

The ECtHR has nevertheless pointed out that the principle of adversarial proceedings could not give rise to a general right to be present during the expert's activities, as the principle should be applied to the proceedings before the "tribunal" in the broad sense.[124]

A. Regular reporting to the parties

In light of this principle developed by the ECtHR, the following question was asked whether there is regular reporting to the parties on the progress of work, in order to accommodate criticisms, and concerns in respect to preliminary findings, in order to better establish the final opinion. The majority of respondents said no to this question with few explanations for any variations in practice and the deviation from ECtHR principles. There were a few respondents who said yes, but without further explanation.[125]

The Finnish respondent for the civil and criminal court stated that it's possible, but not necessary. The Austrian respondent explained "Normally no, but the judge can order the expert to inform the parties about his fact finding time as first part of the expertise. Only in very large expertise cases the judge will order the expert to give reports during his work." In the Netherlands, "it is not forbidden", and, "that's up to the expert." In Monaco this is resolved by allowing parties to help set the terms of reference for the expert to answer.[126]

In spite of the case law of the ECtHR on this issue, there does not seem to be overly much concern for or effort to protect the adversarial principle regarding the rights of parties to access information and procedures of the experts in the early stages of expert investigation.

B. The right of cross-examination

It was then asked whether there is a right to cross-examination. Here, the protection seems somewhat stronger than the right to regular reporting to the parties, with the majority saying that there is a right to cross examination.[127] The Swedish court of appeals respondent said:

"The court and the parties may put questions to the expert. The court shall reject questions that are manifestly irrelevant to the matter at issue, confusing, or otherwise inappropriate. Concerning written opinions: An expert who has submitted a written opinion shall also be examined orally if a party requests it and the examination of the expert is not plainly without importance or if the court otherwise finds it necessary."

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[117] Eggertsdottir v. Iceland 5 July 2007 paragraph 48
[118] Eggertsdottir v. Iceland 5 July 2007 52-54 See also Placi' v. Italy, n. 48754/11, 21/04/2014 § 78
[119] Champod, Christophe and Vuille, Joëlle, 'Scientific Evidence in Europe — Admissibility, Evaluation and Equality of Arms', *International Commentary on Evidence* 2011, 9, 1, p.24
[120] Ibid. p.24
[121] Ibid. p.24
[122] And the literature says that this should also not be taken at face value
[123] Champod, Christophe and Vuille, Joëlle, 'Scientific Evidence in Europe — Admissibility, Evaluation and Equality of Arms', *International Commentary on Evidence* 2011, 9, 1, p.27
[124] Ibid.p.28
[125] England, France, Italy, Bosnia-Herzogovina and Slovenia
[126] Article 353 Code of Civil Procedure (see Monaco response for more detail)
[127] Turkey, Austria and Italy said no

In the Netherlands, the respondent of the criminal court said yes, “but not in the way as in common law. The judge plays a significant role in the examination of the expert (report) by the prosecution or the defence”. Whereas the other Dutch respondent said “No, but the judge can grant a request to hear the expert as an expert-witness”

In France there is no right to cross examination, as the expert is not a witness. On the other hand, counter-expertise is possible to highlight possible problems with the first expert’s report, but the judge may refuse a request for this.[128] In Switzerland it is possible under article 187 Code of Civil Procedure.

The pilot courts vary in their protection of this aspect of the adversarial principle. More of the respondents have said yes to cross examination (or counter expertise) than they have to regular reporting to the parties. This difference maybe to do with efficiency, whereby cross examination can take place during trial within that shorter window of time, whereas the requirement of regular reporting could create delays. When balanced against other steps taken, this may or may not affect parties’ rights overly much. Ultimately that would be for the ECtHR to decide on a case by case basis.

C. Is there a right of parties to set terms of reference for a court appointed expert?

Whilst there is a generally mixed practices between and within countries, only a few have given a specific explanation as to how this works, whether there is a legal right, or informal possibility for parties to set the terms of reference. Where there is an informal possibility, the judge is open to the parties to suggest terms of reference, and it is at the judge’s discretion to do so. [129] There are only a small number of places where it is not possible at all.[130]

For the sake the adversarial principle, and also for accuracy and truth, even if the right is not set in law, several of the respondents have shown that, if it is within their discretion to allow questions to be posed at the start of proceedings, and it has been found to be useful to allow parties to help set the terms of reference for the expert. Either in law or informally in practice, many of the respondents adhere to this particular aspect of the principle of the adversariality, as protected by the ECtHR.

D. The right of parties to hire or propose their own experts

The majority of respondents answered in the positive as to the right to hire or propose own experts either as part of the procedure or as a court appointed expert,[131] however, the weight given to their reports varied. Some places give equal weight,[132] some give free evaluation of all expert reports to the judge[133] and some give lower weight and are held in lower esteem in the law as it is assumed that they will be biased towards the party that hired them.[134]

However, in Azerbaijan, one respondent said that the private expert is given equal weight as the court appointment.[135] Similarly, there is a variation in Slovenia, one respondent said that “Privately hired experts opinions are regarded as any other proof provided by the parties (so called expert pro parte as opposed to the expert pro veritae)”, and another the respondent said that private expertise is given equal weight as court appointed expertise.[136]

As the Bönisch case shows, these courts must protect the principle of the equality of arms by giving equal weight to parties’ experts, especially where the court appointed expert is the same as the one used by the prosecution or police or where it “appears that the [expert] was more like a witness against the accused.”[137] Whilst the questionnaire did not directly ask about this, the answers suggest that there is greater trust placed

[128] Similar possibility in Swizterland
[129] England, Lithaunia, Monaco, Netherlands, and Czech Republic
[130] France, Germany and Turkey
[131] It is not possible to hire a private expert in Hungary
[132] In Finland, for example, they appear to have a different status to the court appointed expert, and are “considered as witnesses, not expert witnesses” but give equal weight to their reports. Whereas, In England, Ireland, Czech Republic, Bosnia-Herzogovina, Croatia and France parties are allowed to hire their own experts, and also give equal weight to court appointed as private experts.
[133] In Norway, they are called “expert witnesses” under the civil procedural code, judges have free evaluation of all expert reports, whether court appointed or private. The respondent at the German criminal court said that they have free evaluation of all expert reports. The Dutch respondents also said it is possible for parties to hire their own experts, and they also have free evaluation of all expert reports.
[134] Ausitra, Germany, Lithuania, Switzerland, Italy.
[135] There is no explanation for the local variation
[136] There is no explanation for this local variation
[137] Paragraph 32 Bönisch v. Austria, n. 8658/79, 06 May 1985

on a court appointed expert than a party appointed expert. Nevertheless, some courts have free evaluation of all experts' evidence, whereas some show an inherent distrust for party appointed experts.

V. Principle of expeditiousness

A. Procedural means to control delays

Limited amount of literature shows that there was a complaint of overall delay in courts, and that experts could generally contribute to it, but there was no solution mentioned from procedural or structural point of view. Blom-Cooper describes the civil procedure rules after the Woolf Reforms that encourage early settlement.[138] With a view to this in mind, there are several Practice Directions, mostly aimed at parties communicating effectively between the experts and the courts with an "…emphasis on the early exchange of experts' reports."[139] This means that the courts must be notified as to why an expert is not available for specific dates..."[140]

Furthermore, as a result of practices, the English have developed a "Protocol for the Instruction of Experts", directing lawyers to instruct experts clearly and with enough time to prepare.[141] This has allowed the court to force the parties to prepare their cases during a pre-trial management stage, controlled by judges, who can then narrow the issues down as far as possible, leaving trial space for issues that cannot be agreed upon. [142]

The responsibility of the court to control the length of proceedings using experts is affirmed by the case law of the ECtHR: responsibility for the preparation of the case and the speedy conduct of the trial lies with the judge.[143] It is up to the courts to use the measures available to them under domestic law to maintain control over the proceedings. Accordingly, the ECtHR cannot but find that the judicial authorities remain largely responsible for the delays in taking the expert opinion.[144] It is also for the court to ensure that experts comply with their mandate.[145] Where it is within the discretion of the court to grant extensions or postponements, it is also their responsibility not to extend "to an exaggerated degree,"[146] and to take action against inactive experts.[147] These principles apply not only to article 6 cases on fair trial, but also to article 5 cases of pre-trial detention.[148]

a. Means for controlling the length of preparation of expert reports / assessments (as regards the requirements of Art. 6 ECHR)[149]

Generally speaking a mixture of tools is available to the judges in each of the courts that responded. The majority however did have pre-trial case management by judges to set deadlines for expert preparation of reports. This is an important tool, as indicated by the literature, as it helps the judge to immediately narrow down the case to the essential issues, and possibly settle it before it goes to trial, thereby limiting the possibility of delay. There were only a few exceptions to this.[150] In Lithuania, apparently there is no regulation of experts under procedural law and therefore only one managerial tool for the judge. A judge may contact an expert if there appears to be a delay and order the filing of the report, but

"… the duration of an examination is regulated by the regulations of expert institutions. The Regulations of the Forensic Science Centre of Lithuania approved by the Ministry of Justice of the Republic of Lithuania

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[138] Blom-Cooper, Louis Jacques, *'Experts in the civil courts'*, Oxford University Press, Oxford 2006 p.50
[139] Ibid. P.51
[140] Ibid. P. 51
[141] Ibid. P. 51
[142] A similar procedure has been developed in Scotland: Buchan, Robert and Grassie, Gill, 'Scotland's new regime for effective intellectual property dispute resolution', *Journal of Intellectual Property Law & Practice* 2013, 8, 5, 383-387. P.385
[143] Capuano v. Italy , no. 9381/81, §§ 30-31, 25 June 1987; Versini v. France, no. 40096/98, § 29, 10 July 2001; Sürmeli v. Germany [GC], §129
[144] Pospekh v. Russia, Committee, no. 31948/05, 02 May 2013
[145] Versini c. France no. 40096/98 paragraph 29-30, 10 July 2001
[146] Capuano v. Italy no. 9381/81 paragraphs 30-35, 25 June 1987
[147] Vogias c. Grèce, no. 51756/08, paragraph 29, 7 February 2012
[148] Cretello v. France, no. 2078/04, 23 January 2007
[149] Five choices: i. Pre-trial case management by judges to set deadlines for expert preparation of reports: ii. Procedural law setting deadlines for expert witnesses; iii. Judicial discretion on extensions/postponements and possible sanctions; iv. Judicial discretion to order the filing of expert reports; v Other: please briefly describe (more than one choice could be made)
[150] Other exceptions include the Regional criminal court in Berlin, Civil Court in the Netherlands, Monaco's civil court, Swiss administrative court, Italy, Czech Republic, Hungary, Azerbaijan, Croatia, and Slovenia

stipulate that examinations shall be performed in sequence according to the date of the earliest received judgment (task) ordering an examination and in the shortest possible time. The duration of an examination may be affected by the complexity of an examination, the quality of the data of an expert's examination, sufficiency and other objective reasons. The sequence order of an examination may be changed. The priority is given to such examinations where it is stated when ordering an examination that a person is detained or other important reasons are specified."

This situation is exceptional for all of the countries surveyed, as it shows that experts are completely independent from the control of the court, though it is bound to certain rules of self-regulation.

In terms of procedural law setting deadlines, the majority have indicated that there are no procedural law rules for setting deadlines.[151] This is not limited to any system in particular, and in fact can vary within countries.[152] On the other hand, more respondents stated that they have the discretion to (dis)allow extensions and postponements, and possibly apply sanctions in the event of unreasonable delays.[153] Lastly, on whether judges have the discretion to order the filing of reports, the minority had this in their toolkit to manage experts.[154] Of all the countries, only the Finnish court of civil and criminal jurisdiction, Norwegian court of appeal of general jurisdiction, Estonia's administrative court of first instance, Turkey had all of these tools available to them. Others gave a combination, with only a few stating one tool only. Of those who answered that they only had one tool, these can be divided between those with discretion, and those without. Examples of those with discretion include Denmark, Sweden, and England.[155]

For England,

"If one party fails to comply with a case management direction… the other party is encouraged to apply for sanctions to be imposed on the defaulting party 'without delay'. Sanctions include disallowing a defaulting party from relying on expert evidence, the imposition of a stay, orders for costs or payments into court, and, in extreme cases, the striking out of claims or defences."[156]

Examples of those without discretion, i.e. those who chose only procedural law as the tool by which to control experts included a Swiss court of civil law, Azerbaijan, and one of the district courts of Slovenia.[157] Lack of discretion in this area does not give room for recognising 'complexities of certain cases, the quality of the data of an expert's examination, sufficiency and other objective reasons.'[158] For these reasons, it is important to have a mixture of tools available to the judge, both procedural (legal certainty) and discretionary (justice).

b. Further management tools

Additional questions were set on the power of the judge to manage the expert during trial.[159] Practice varies between the respondents, as well as between respondents of the same country. On the issue of judicial management of expert opinions, approximately half of the respondents said that judges are not responsible for this.[160] Of those who said no, the Irish respondent was careful to clarify that whilst they cannot influence the expert's opinion, they can 'manage time limits, setting joint experts to meet and agree on areas where there is agreement, and to assess the expert report in live testimony.'[161] Similarly in Lithuania, the respondent also stated that expert cannot be managed given the risk of influence to the opinion, and the judge can only assess the final report during 'objective examination of the evidence.'

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[151] Out of 35 respondents, only 14 respondents indicated that the procedural law provides any guidelines

[152] Countries with variation include Finland (between civil/criminal and administrative court), Germany, Netherlands (between civil and criminal court), and Switzerland. Germany, and Switzerland show no discernable explanation or pattern as to why some places would have procedural law setting deadlines and others not.

[153] 22 of the 35 respondents

[154] Only 11 of the 35 respondents (representing 11 countries), there are no explanation for local variations

[155] Pre-trial case management

[156] Blom-Cooper, Louis Jacques, *'Experts in the civil courts'*, Oxford University Press, Oxford 2006 P.51

[157] There is no explanation for variations in responses between the different Swiss courts, and the different Slovenian courts.

[158] Repeated from the Lithuanian respondent above

[159] Is a judge specifically given control over the management of expert opinions? Does the judge have the power (also at the request of the parties to broaden or restrict the experts assignment; to rule on incidents occurring in the course of operations such as those relating to the coerced production of documents held by a party or an outsider; to order ex officio the expert's replacement, particularly in case of delay or breach of obligations such as failing in the duty of impartiality? Not all of these issues have been discussed here, due to a lack of space.

[160] A few gave no answer or had no data

[161] This is the same in Norway, Germany (s. 404a Code of Civil Procedure), and Switzerland (within the scope of their Code of Civil Procedure),

Concerning the question of the possibility to broaden the remit (scope) of the task of the expert, only the Hungarian and Azeri respondents said no.[162] Only three respondents gave any sort of explanation of the circumstances under which this would be allowed: In Sweden, it depends on the circumstances; in the Netherlands, the civil court judge will only do this in consultation with the parties, and a Swiss criminal court will only do this if it is to clarify or complete a point within the expert's report only.

It was also asked whether it is possible to order new expert witness in a different area of specialisation in the course of proceedings especially in cases of delay or non-performance, and whether expert opinions can be ordered prior to any proceedings by a judge at the request of the parties. As to the first question, the majority overwhelmingly said yes.[163] In Switzerland, it is only possible if the parties demand it.[164] The court may not replace any experts of its own volition after a hearing has started.

As to the second question, only nine of the respondents said they could not order expert opinions prior to any proceedings. Explanations for why this is allowed varied between the countries. In some countries it is in order to secure proof or procedure for taking evidence in criminal proceedings.[165] In Norway, it is a matter of routine for experts to be ordered in advance, in any jurisdiction. In Ireland, in the commercial court, it is for the parties to decide when to call an expert. However, other respondents from civil jurisdictions indicated that judges can order an expert prior to a trial (also at the parties' request).[166]

c. Duration and undue delays

There was a gap in literature on the issue of delays. Therefore further questions were also asked about the reality of delays in the pilot courts. Firstly, the respondents were asked to briefly describe the average duration required for experts used in court. Answers varied widely with a minimum of one month[167] to twelve months.[168] The type of case and expertise could affect the duration of the case: the respondent in Monaco described 2-3 months for medical expertise, 1-3 months for financial expertise, and 1-4 years for construction expertise.[169] Many respondents did not actually have any formal data available.[170] In order to set guidelines on what is a reasonable time in such cases, it can be recommended that courts start to keep data on the length of time that experts use in the various different typologies of cases.

It was also further asked what percentage of cases using experts experience undue delays in the jurisdiction of the pilot court. Twenty respondents had either no data available to them or gave no answer. However, some of these respondents gave an estimate based on their experience. Germany respondents estimated that in between 20-50% of their cases, experts caused the undue delay. Norway on the other hand estimated that 'close to 0%' of experts were responsible for undue delays.[171] Lithuania was the only country with formal data available, where the respondent stated that "Of all delayed civil cases in 2012, from 17.2 to 25.6 percent of delays occurred because of prolonged expertise. In the yearly reports of National Court Administration it is constantly mentioned as one of main reasons for prolonged judicial process."

The fact that so few have data on this issue may indicate that it is not an area of concern in the majority of responding courts. However, once a policy is in place to collect data, many times, practitioners are surprised by the outcomes. It is a useful statistic to have, in order to understand what further tools should be made available to judges to manage the hearing and the role of the expert within that context. Furthermore, investigation between the discretion to grant extensions and the undue delays may also yield a connection between practice and undue delays.

d. Causes of undue delays

The questionnaire also asked the pilot courts what the main causes of delay were.[172] Lack of experts was cited by the majority of these respondents for causes of delay.[173] However, for those who cited lack of

[162] Without any further explanation
[163] The exceptions were Denmark, Sweden (general jurisdiction only) and Ireland ("Save in the case of an expert appointed by the court"- This is the same in the Netherlands)
[164] Under article 189 of the Code of Civil Procedure
[165] Denmark, Sweden, England, Austria, Germany, and Azerbaijan
[166] The Netherlands, Monaco, Switzerland (though exceptionally), Germany, under s. 358a Code of Civil Procedure)
[167] Administrative court in Finland
[168] Court of General Jurisdiction Slovenia
[169] Many respondents, though not having formal data, gave an estimated guess in this way.
[170] Denmark, Sweden, England, Lithuania, Austria, Germany, Netherlands, France, Turkey, Bosnia-Herzogovina
[171] Finnish respondents described the undue delays as 'very few' and 'hardly any',
[172] Respondents were given the following options, and could choose more than one: a) Lack of experts; b) Technology; c) Rules of procedure; d) Challenges to expert competence; e) Continuous instructions to experts; f) Other: please briefly describe.

experts, some of the respondents also made it clear that it was a more prevalent problem in some areas than others. In Turkey, e.g., it is particularly hard to find experts in small cities for certain types of cases, such as cyber-crimes and forensics. Where such cases do occur, evidence is sent to larger courts to find an appropriate expert, where possible.[174] In Slovenia, along the same lines, it has been described that some 'good experts are overloaded with different cases in different courts.'[175] Lack of experts is not something that can be generally controlled by the courts.

Challenges to expert competence must be allowed as part of the adversarial principle, but may be controlled so as not to let the case become unduly delayed.[176] For example, in Ireland at the commercial court, 'delay is often caused by the necessity for a wide preparation due to the inevitability of challenge from an opposing expert.'[177]

Regarding continuous instructions to experts, only respondents from Ireland and Switzerland named this as a problem that caused experts further delay. Continuous instructions to experts can be controlled by judges, especially when thinking to the discretion which they may have to limit the scope of an expert's remit. This is fewer, even than the four respondents who stated that procedural rules were also a reason for expert delays,[178] or that technology was an issue.[179]

A few respondents gave other reasons for possible undue delays. Norway stated that experts generally perform within their set limits, but where they stray, it would be due to the complexity of the case.[180] In England, the reason is entirely bureaucratic: they must wait for 'authorisation of funding from the legal services commission in conjunction with timeframes set by the court at case management hearing.' In the Netherlands, there are often challenges to the expert's independence.

The biggest problem is the lack of experts. This is something that policy makers in access to justice issues must pay attention to in order to maintain high quality and integrity of the expert bodies in their respective jurisdictions.

C. Management of delays

There was a gap in knowledge in the literature for such a practical issue. Therefore, attention was given to this issue in the questionnaire.

a. Managing the submission of expert reports

It was asked whether there is a system to manage the submission of reports, and whether this extends to the expert opinions ordered prior to any proceedings by a judge, where such expert opinions exist. The majority stated that there is no such system in place.[181] Of those who said that there is management system, there was a mixed response as to whether it extended to pre-trial expert reports.[182] In Norway, England, Austria, and the Netherlands, the management of expert reports is incorporated into the case management system, but does not extend to pre-trial proceedings.

Electronic management of cases and experts can give information to judges about where the delays are situated and help courts manage that better and reduce delays, and possibly increase the likelihood of settlement if expertise is used in pre-trial or preliminary proceedings, thereby also reducing cost.

b. Organisation

A few organisational questions were also asked to see if these issues have been addressed to make life somewhat easier on managing experts. Firstly, it was asked whether there is an office supervising the return of reports. The majority said no.[183] However, some respondents described that it is usually the role of the

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[173] Twenty-three out of thirty five (Five of the respondents had no data or gave no answer)
[174] Also in Austria, and Switzerland
[175] Overloading is a reason also given by Swiss respondents, and one of the Azeri respondents
[176] Nine respondents stated that this was an issue in some form or another.
[177] Others include Estonia administrative court, Lithuania administrative court, Germany regional court of civil cases, Netherlands civil court, Swiss administrative court, Italy (general jurisdiction), Turkey (general jurisdiction), and Croatia (general jurisdiction)
[178] Denmark, Monaco (continuous appeals and challenges under Civil Procedure Code- especially construction cases); Italy and Azerbaijan
[179] Finland, Estonia, Italy and Bosnia-Herzogovina
[180] Czech Republic respondent gave the same reason
[181] Twenty respondents
[182] There is a system that also extends to pre-trial proceedings in Sweden, the German Court of Appeals, France (pilot system), Monaco, Switzerland (JURIS case management system), Hungary
[183] Twenty four respondents

judge in charge of a case to supervise the return of expert reports.[184] England on the other hand, has an office of case progression officers to oversee this activity. The Dutch, Swiss and French have the general court administration to oversee the return of expert reports. These are not offices or systems especially designed for overseeing the return of expert reports, rather these are offices which have absorbed it as one of their many tasks in administration of the court.

Secondly, it was asked whether there is a computer system comprising alerts in the event of delay beyond the set date. If such a system exists, whether it also tells the court the number of cases assigned to a particular expert; their average duration; and their cost. Seventeen of the respondents said that there is no computer system for this at all. For those that said there is one, it was usually limited in its functionality, so it could alert a user in the event of a delay, but would not indicate the workload of the expert, costs or duration.[185] In a small handful of countries, the computer systems have a bit more functionality, but not for everything asked. In Austria, and France, it also informs the courts of the experts' workload and delays. In Monaco, it informs about expert workload, duration and delays, but not expenses. In the Czech Republic, there is no system, but a case file on the computer keeps track of costs. For a majority of countries therefore, there is no formal system to oversee the return of reports, or to indicate delays, or reasons for delays, or to keep track of costs.

Thirdly, from a standardisation point of view, it was also asked, if there is a written report, whether there is a compulsory or recommended structure for the report. The majority do not have a standardised format or structure.[186] However, practices have developed in some places, such as Norway, where psychiatric reports in criminal cases generally follow a set pattern; Sweden, authorities providing reports also tend to use a uniform structure; and Switzerland, they set questionnaires, which they expect the experts to answer. Uniquely, Lithuania is the only country that has a compulsory structure for experts to use.

Depending on how a report is delivered to the court (oral proceedings, written report) may affect the importance of this. In standardised format, it may be easier to analyse, and possible to do it quickly. However, a standardised format may hide certain important or relevant information behind smaller questions or questions deemed less relevant by the person setting the terms of reference. If delivered during trial through cross examination or oral proceedings in the court, again, the evidence from a standardised format may not have an impact.

It is therefore important to know how the final work is delivered and when the expert's role is completed.[187] Almost all respondents indicated that the expert's role can be completed with a written report.[188] Almost all of the respondents also indicated that the expert's role can be completed with oral testimony, if there is an oral hearing.[189] Confrontation with the parties was somewhat less used,[190] but still the majority did indicate that the expert's role could be ended with confrontation with the parties.

There are a few question marks thrown up about the operation of the adversarial principle, where there is no oral testimony or confrontation with the parties (reducing the possibility of cross-examination of the expert, or where the expert does not appear before the parties involved). Further investigation is warranted to see if there are specific problems in this area of procedure, management and standardisation, and whether regulating this aspect of expert work would help to increase protections of the adversarial principle concerning issues of setting terms of reference, regular reporting to the parties, and the possibility of cross-examination.

D. Facts and figures: Impact?

In order to assess the actual impact of expert work on court cases, pilot courts were asked about the numbers of experts used and ratios of cases over five years.

[184] Finland, Germany (criminal court), and Czech Republic

[185] Denmark, Finland, Norway, Sweden, Netherlands, Switzerland (Juris), Hungary, Bosnia-Herzogovina, Slovenia (commercial court)

[186] Twenty two respondents said no.

[187] There were four options: a) written report; b) oral testimony; c) confrontation with parties at hearing; d) other.

[188] The exceptions were for Azerbaijan, which said that the expert's role ends 'with the coming into force of the final court decision, and Bosnia-Herzogovina

[189] The exceptions to this were Hungary (written report is the only way to end the role of the expert in Hungary), Italy (written report is the only way to end the role of the expert in Italy), France, Netherlands (civil), and Estonia

[190] Eighteen respondents indicated that confrontation with the parties can indicate the end of an expert's role. Some variation can be seen within countries, such as Lithuania, and Switzerland.

Quite a few respondents did not have any available data to describe the average numbers of experts used over five years.[191] The only respondent that appeared to have any official data was from Lithuania's district court in Vilnius. Whilst they could not give an overage of the last five years due to reorganisation, they did give figures from 2009-2012 which averaged out at 240 per year. In Austria, the respondent said that the average is about 650 per year, with a 1000 more for psychiatric evaluations for psychiatric confinement. The respondent in the criminal court in Berlin said 2556. Monaco gave an average of 85 per year over the last five years. In Switzerland the numbers varied from 15-90 depending on the court. On the other hand, the Finnish administrative court said only 1-2 cases per year needed experts.

Similarly, the amount of data available on the ratio of cases was also somewhat limited. There were a few with the information such as the Irish, who said 15%, or Slovenia, where 1.7% (650 cases) used experts. The Norwegian respondent estimated that 20% of civil cases, and 10% of criminal cases needed experts, where as in Estonia, it was 1 in 100. The respondent in Berlin stated that 4% of all cases needed experts. One of the Swiss courts gave an average of about 0.5%. No respondent went higher than this.

Although these numbers are quite divergent, the percentages show that the majority of cases are probably routine cases that do not require an expert opinion. It can be considered a worrying trend therefore, that lack of experts was the most cited problem for undue delays. If there is a sudden increase in court cases with a commensurate increase in demand for experts, this may lead to further delays for several countries. Developing technology to manage the existing experts, and a policy made to maintain a body of experts to meet the demands of justice may be recommended.

The next question was to look at the fields in which the respondents use experts the most frequently.[192] Five respondents had no data on this issue.[193] It is quite clear from this that medical, construction and automobile experts are most needed. The type of jurisdiction changed the type of expertise required. For those courts with general jurisdiction (i.e. civil and criminal), respondents cited medical as the most used. Construction occasionally came first, especially for commercial or administrative courts, [194] followed closely by scientific/forensic and automobile. Only a small number named financial (including tax and banking).[195]

To conclude, the majority of pilot courts do not have more than 10% of cases needing experts, and where they do, it appears mostly to be in medical, construction, automobile. However, given these small percentages, the fact that lack of experts is a cause of delay could be a cause of concern.

VI. Good Practices

A. Balancing the expectations of the courts and the work of experts

This section will review some good practices within the courts surveyed as to how to manage the expectations the courts have of experts, and the quality of work that experts actually deliver.

a. Expectations of the court: Maintaining impartiality and independence of the expert

Experts are expected to work to certain standards, to maintain impartiality and give objective advice. As explained from the start, from the literature and the responses to the questionnaires, their job is never to come to a decision that a judge or jury should make, but rather assist in their understanding the evidence so that the fact finder may come to a decision.

This is also the case for experts in criminal investigations under articles 2-3 ECHR. This is a separate issue from the article 6, right to fair trial (though connected). The ECtHR demands that investigators in criminal cases must also be independent from the accused, as well as the state. This means independence both hierarchically and institutionally. "What is at stake here is nothing less than public confidence in the State's monopoly on the use of force."[196] In particular, the investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements.[197] This is also problematic if defendants are found guilty and expected to pay the costs of the expert.

The expert should deliver reports that are "essentially objective and technical in nature."[198] This means that the expert should not already have "preconceived ideas on the subject."[199] However, where an expert is part

[191] Fourteen
[192] They were given a list: i. Medical; ii Construction; iii Automobile, iv Research, v Scientific; vi Other.
[193] Denmark, Sweden (Court of Appeal), Lithuania (regional court), Germany regional court, and Italy
[194] E.g. Ireland commercial court, Finnish general jurisdiction court, Italy, Switzerland,
[195] Ireland, Estonia, Italy, and Bosnia-Herzogovina
[196] Kolevi v. Bulgaria, no. 1108/02, paragraph 193, 5 November 2009
[197] Kolevi v. Bulgaria, no. 1108/02 paragraph 201, 5 November 2009
[198] Giuliani And Gaggio V. Italy, 23458/02, 24 March 2011

of a broader team, has not been appointed by the court but by the prosecutor, or where tests are "essentially objective and technical in nature", this may reduce the impact of any bias shown (the implication being that objectivity of a court appointed expert should meet a higher threshold).[200]

Ward describes in some detail various possibilities to maintain and enforce neutrality and objectivity, especially in sensitive cases:

"The expert's duty is not simply to say what she sincerely believes, but to put forward only inferences that are justified by the relevant data and the state of knowledge in her field. Given the reliance that others will place on their testimony, it "is unethical for expert witnesses to hold or express unjustified beliefs."[201]

Secondly, objectivity is found if the expert

"…reports what any competent expert would be likely to report – or if it does not, it explains the divergence in a way with which all competent experts could agree. In the second sense, objectivity or impartiality requires that experts' evidence should not be colored by anything that is at stake for them in the proceedings"[202]

Furthermore, experts should not allow feelings of sympathy for either party impact on how they present findings in court.[203]

This project in general seeks to establish the role of the expert in various member states of the Council of Europe. It can be stated at this point that courts expect the expert to deliver high quality of work that assists the court in understanding evidence before it, in neutral and objective manner. To this end, the questionnaire has asked various questions on what tools judges have to maintain independence and impartiality of the expert, including questions on admissibility of reports, the process of selection of the expert and adversariality, the latter two of which have been dealt with in some detail already in this work.[204] As this section of this work focusses on issues of quality and good practices, this part will concentrate on issues of admissibility, and the conditions under which an expert report may be waived. [205] The majority have chosen all three conditions as a basis to waive admissibility of an expert's report.[206] However, a few courts, where judges have free valuation of the expert's reports also said that all three could be the basis for lowering the value of the expert's report.[207] All respondents cited bias as a good enough reason to waive the admissibility of an expert's report. Unreliability of methodology was the other main reason.

The responses to the questionnaires shows that, at least within the pilot courts surveyed, within these groups, it is very important to be able to control for bias and unreliability during the process of expert reporting to the court. This is important as judges have the possibility to control for quality and independence at the same time.

b. Work of Experts

Whilst the legal literature is concerned generally with reliability and objectivity of the expert, the literature by scientists is concerned with what is done with the results of their work. This literature shows that the goals of science are very different from the goals of justice. Justice relies upon witness testimony and physical evidence to make a case. Science seeks to develop theories about how the world works, and each expert places their research within that, without making absolute claims about the "truth". [208] In the literature, "experts" in some places appear to be somewhat uncomfortable with the role they have in testifying in court,

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[199] Giuliani And Gaggio V. Italy, paragraph 323, 23458/02, 24 March 2011
[200] Giuliani And Gaggio v. Italy, paragraph 323, 23458/02, 24 March 2011
[201] Ward, Tony, 'Expert Evidence, Ethics and the Law', in *The Wiley-Blackwell Handbook of Legal and Ethical Aspects of Sex Offender Treatment and Management*, (eds), John Wiley & Sons, Ltd, 2013 P.89
[202] Ibid. P.90
[203] Ibid. P. 90
[204] Issues of adversariality and selection are dealt with in more detail earlier on in this report at section IV.D.
[205] Admissibility of a report be waived on the following bases (more than one may be chosen): a) Bias has been shown by the expert; b) The expert has been shown to use unreliable techniques in coming to their conclusions; c) Where the expert him/herself has been shown to be unreliable; or d) other.
[206] Twenty one of the thirty five respondents
[207] This is the case in Turkey, Czech Republic, the Netherlands, and Sweden. This generally coincides with what was found earlier, where judges have discretion to decide on the value of expert reports, though this must always be reasoned.
[208] Ward, Tony, 'Expert Evidence, Ethics and the Law', in *The Wiley-Blackwell Handbook of Legal and Ethical Aspects of Sex Offender Treatment and Management*, (eds), John Wiley & Sons, Ltd, 2013 p.86-87; see also Grøndahal, Pa˚l , Grønnerødb, Cato and Sexton, Joseph, 'The Magic or Myth of Expertise: A Comparison of Judgment Processes between Forensic Experts and Lay Persons Based on Psychiatric Case Vignettes', *Psychiatry, Psychology and Law* 2012, 19, 5, 662-671.

or at least with what happens with the information they submit to court.[209] Especially in the adversarial systems, many seem nervous about how they are personally treated.[210]

Finally, "In order to be intellectually complete and to serve the cause of justice as effectively as possible, the work of scientific experts must always comprise an evaluation of their technical findings in the light of two opposing hypotheses..."[211] Whilst this is compatible with the adversarial principle of presenting two sides, it is difficult to reconcile with the search for "truth" upon which life altering decisions are made. This is especially when presented in language that few but those within the scientific community can understand.

If these countries are to take seriously the idea that experts are there to assist the court in understanding certain facts in a case, then training should reflect that. Court work is different from the daily work for the average expert and understanding what is required of them may take more than one session in court chambers to hear the terms of reference to do so.

To this end, it was asked whether experts and legal professions receive training to gain perspective of expert work for the courts. Respondents could answer on a sliding scale from 1-5, 1 being a low incidence of training, and 5 being a high incidence of training.

The majority of respondents have some degree of training for experts.[212] Some pilot courts indicated a very high incidence of training.[213] One of the German respondents indicated that experts who regularly attend court often seek out training sessions, which are often organised by various professional institutions. In Monaco, they draw their experts from an official list from the French court of appeal in (Aix-en-Provence), and are usually part of an organisation that arranges continuous training for them. For other respondents which indicated the lowest incidences of training, this could indicate a high level of trust in experts and their initial training and qualifications in their respective countries.[214]

c. Multidisciplinary reports / assessments.

On quality of expert work for the courts, it was asked whether there is any multidisciplinary evaluation of expert reports; and whether judges are involved in the evaluation of experts. This is important as there needs to be a feedback loop to the expert, in order for them to understand the place of their work in court, and to understand how to behave in court.

The majority of respondents indicated that there is no multidisciplinary evaluation of expert eports.[215] In Sweden such a multidisciplinary assessment could occur "within a specific field of expertise or initiated by a specific authority authorized to furnish opinions…" The majority also responded that judges do not evaluate experts, and some were careful to point out that this is something separate from assessment of evidence presented in court by an expert witness.[216] For those who said yes, it can occur either informally or formally. In Norway, for example, judges informally exchange experiences. In France, an informally bad evaluation can lead to a judge being removed from a list or not being renewed after five years. In Switzerland, in the first instance general jurisdiction court, sometimes a judge can give personal feedback to the expert. Examples of a formal system include Austria, where "experts are listed for a restricted time of 5 years. When they apply for enlarging their period, judges are asked about the quality of their expertises and if the expertise was done in due time." The Netherlands also has a formal system, "When the case is closed, the judge is asked to fill in a form for the evaluation of the expert."

This means that there is rarely a feedback loop between the courts and experts, and contact is limited only to what the expert presents to the court in the majority of responding courts. This is an area that appears to be

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[209] Lucena-Molina, Jose-Juan, Pardo-Iranzo, Virginia and Gonzalez-Rodriguez, Joaquin, 'Weakening Forensic Science in Spain: From Expert Evidence to Documentary Evidence', *Journal of Forensic Sciences* 2012, 57, 4, 952-963.

[210] Stavrianos, C. , Papadopoulos, C. , Vasiliadis, L., Pantazis, A. and Kokkas, A., 'The Role of Expert Witness in the Adversarial English and Welsh Legal System', *Research Journal of Medical Sciences* 2011, 5, 1, 4-8.

[211] Champod, Christophe and Vuille, Joëlle, 'Scientific Evidence in Europe — Admissibility, Evaluation and Equality of Arms', *International Commentary on Evidence* 2011, 9, 1, p.27-28

[212] Only a few did not have any data on the issue: Denmark, Sweden, Lithuania (administrative court), France. Whilst the respondent from the English pilot court did not have any available data, a new programme has been introduced called "mini-pupillage scheme" to train specialist registrars (medical doctors), as the "experts of the future": for more information see: http://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/fjc/mini-pupillage-scheme/ accessed 27 August 27, 2014

[213] Estonia, Lithuania and Netherlands (for forensic experts reporting on a regular basis), Germany, Monaco, Hungary, Azerbaijan, and Slovenia's commercial court.

[214] Finland, Norway, Sweden, Austria, Switzerland, and the Czech Republic.

[215] Twenty six respondents out of thirty five. Those who indicated that there is some form of multidisciplinary evaluation were Finland, Sweden, Lithuania, Netherlands (criminal court), Monaco, Azerbaijan

[216] Such as Finland, and Ireland

lacking within the member states of the Council of Europe and could be introduced more formally as a good practice.

B. Developments in law and policy

Role of experts is of key concern, for the courts, legal professions as well as for the experts. The American legal system has addressed quality of experts for much longer than her European sisters.[217] In the USA, there is a line of cases that set out standards that experts had to fulfil in order to be considered experts, and for their testimony to be considered. It started in 1923 with the Frye case,[218] which set out the standard for "general acceptability" of scientific testimony. This simply meant that it testimony would be allowed in court if it had already been considered by the scientific community as accepted. Whilst this alone has been considered insufficient, it has continued to be one of the standards of quality in American case law.

The next is the Daubert case in 1993,[219] the Supreme Court added guidelines: "method's falsifiability; peer review and publication; the method's margins of error (known or presumed); [and] standards governing application…"[220] This gave the judge a "gatekeeping" function to check for admissibility.[221] In 1997 the General Electric case added legal relevance and in 1999,[222] the Kumho Tire Co. case further imposed the obligation on the courts to be diligent as to the reliability of expert testimony,[223] and check that "the reliability and the relevance of expert opinions were not strictly scientific, but based on observation and long experience"[224] This emphasizes that courts must not take a deferential approach to scientists in their court room, and indeed must be actively sceptical. Standards for admissibility continue to evolve.[225]

In England, expert testimony needs to meet four criteria in order for it to be admitted.[226]

"1) it concerns a subject exceeding the ordinary knowledge and experience of whoever must decide the case;

2) it concerns a subject in a field of knowledge which is sufficiently well organised and recognised to be considered a reliable source of knowledge, a field of which the expert in question has special knowledge that could assist the court in its task;

3) the expert must have acquired through study or experience sufficient knowledge to render his opinion useful to the court;

4) the expert must be impartial."[227]

If an expert is accredited in the field where he is testifying, it is also generally accepted. "In sum, the Common Law rejects expert evidence based on charlatanism (astrology for example), accepts "well established" methods, and lays down the dual requirement of relevance and reliability for the other types of expert submissions."[228]

The inquisitorial system appears to be opposite, in terms of the paucity of standards. There isquite a lot of criticism of the deference by judges towards scientists without applying standards.[229] One standard highlighted is transparency. ""Expert witnesses have a duty not only to state opinions that are justified but to state the basis of those opinions in a way that enables the court to make its own assessment of the reliance it can place on them."[230] Firstly, this requires citation of any information used; secondly, it requires that the expert states the "… substance of all facts given to the expert which are material to the opinions expressed in the report",[231] and state which facts "are within the expert's own knowledge."[232] Lastly, the expert must

[217] Champod, Christophe and Vuille, Joëlle, 'Scientific Evidence in Europe — Admissibility, Evaluation and Equality of Arms', *International Commentary on Evidence* 2011, 9, 1, P.33
[218] Frye v. United States 293 F. 1013 (D.C. Cir. 1923)
[219] Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)
[220] Champod, Christophe and Vuille, Joëlle, 'Scientific Evidence in Europe — Admissibility, Evaluation and Equality of Arms', *International Commentary on Evidence* 2011, 9, 1, P.38
[221] Ibid. P.38
[222] General Electric Co. v. Joiner, 522 U.S. 136 (1997)
[223] Kumho Tire Co. v. Carmichael 526 U.S. 137 (1999)
[224] Ibid. P.39
[225] Ibid. P.39
[226] Ibid. P.40
[227] Ibid. Pp. 40-41
[228] Ibid. P.41 However, certain changes to clarify standards of admissibility may have occurred since Champod et al article was published pp.41-42
[229] Ibid. P.45
[230] Ward, Tony, 'Expert Evidence, Ethics and the Law', in *The Wiley-Blackwell Handbook of Legal and Ethical Aspects of Sex Offender Treatment and Management*, (eds), John Wiley & Sons, Ltd, 2013 P.90
[231] Ibid. P.90

also explicitly state where his/her findings are not based specifically on their training and could be deduced by the judge or jury themselves (i.e. common knowledge)- this is to reduce the deference factor.[233] The expert must also be clear when the findings are in "disagreement within the expert community"[234] and explain why. Further explanation must be given if there is any uncertainty surrounding the findings.[235] Any conflicts of duty must be reported to the judge, and in England at least, the judge is the one to consider it as a factor in considering the other evidence.[236]

Whilst the questionnaire did not go into the substance of quality in the same way as the literature has done by setting out standards for reliability and neutrality, it was asked whether the following issues impacted on quality of experts in the respondents' legal systems: lack of experts, lack of reliability, lack of neutrality, or other.[237]

Although several respondents stated that there are no problems, and some others reported a lack of data, a majority of twenty respondents reported problems with lack of expertise.[238] In Norway, it was stated that

"Following the major terrorist case in Oslo during the summer of 2012 (Anders Behring Breivik) there has been a national debate on the role of psychiatric experts in criminal cases, particularly regarding criminal liability. On 25 January 2013 a legislative committee was appointed by the government to review the legislation concerning criminal liability and the role of forensic psychiatric experts."

Ireland, as a common law country, did not say that lack of experts is a problem but rather reliability and neutrality. The Czech Republic and Croatia similarly did not complain of a lack of experts, but of neutrality and/or reliability. Only in a few places were lack of experts chosen at the same time as lack of reliability and/or neutrality.[239] Only a minority of respondents named fields where the lack was the greatest: medical, forensics, construction, cyber crimes, chemical issues, and some specialised financial areas. A couple of places also mentioned the lack of professionality amongst experts.[240] Only one German respondent mentioned that lack of experts could be due to poor pay.

There is argument for encouraging the European Union: Justice and Home Affairs to ensure that there are sufficient numbers of experts available by opening up the market in this area. Improving this could create reliability and neutrality and ultimately improve quality, especially in areas where there is a monopoly on expertise in specific areas. However, it needs to be noted that, of those who did complain of a lack of experts, the majority did not further complain of problems of reliability or neutrality. This could indicate that judges do not consider these as connected to the issue of lack of experts.

C. Other good practices

In spite of the criticism levelled at the role of experts in courts, a few practices could be identified as being "good" in comparative literature. Sonenshein describes the Concurrent Evidence Procedure in Australia otherwise called "hot-tubbing", used to reduce the incidence of expert bias. This procedure brings opposing experts and other experts into a pre-trial session to testify and discuss areas of disagreement.[241] "If need be, courts will also allow several concurrent evidence sessions, each featuring different types of expertise, during the same trial."[242] During these sessions, experts, instead of being (cross) examined by lawyers during trial,

"...are provided with an opportunity to make extended statements, to comment on the evidence of the other expert witness, and to ask questions of other experts. During this stage, the judge suggests topics for discussion, directs the experts' testimony, and will often pose questions for the experts to respond to. In the

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[232] Ibid. P.91
[233] Ibid. P. 91
[234] Ibid. P.91
[235] Ibid. Pp. 91-92
[236] Ibid. P. 93
[237] Also remember that above, it has already been discussed whether expert reports may be waived for lack of reliability of the expert or experts' techniques and lack of neutrality under: **a. Expectations of the court: Maintaining impartiality and independence of the expert**
[238] Lack of experts already cause problems for delays in court
[239] Estonia, Germany (regional court), Netherlands, France, and Switzerland.
[240] Such as Azerbaijan and Finland
[241] Sonenshein, David and Fitzpatrick, Charles, 'The Problem of Partisan Experts and the Potential for Reform through Concurrent Evidence', *The Review of Litigation* 2013, 32, 1-64. P.59
[242] Ibid. P.59

second stage, counsel from each side is presented with the opportunity to direct questions to the experts in a manner more in line with a traditional adversarial proceeding."[243]

Furthermore, under this procedure, "… experts are asked to narrow the extent of their disagreement on their own without the influence of counsel."[244] This becomes then more like an academic conference which assists the judge in better understanding of technical and scientific issues, on his/her own terms rather than those of the lawyers. It also helps to create a less hostile atmosphere for the experts in an adversarial setting.

Another practice that could be described as good is the creation and implementation of codes of ethics. Australia has one;[245] the UK has ethics built into its practice directions and case law;[246] the European Network of Forensic Scientists has a code of conduct, even though its status is somewhat uncertain.[247]

This research project has shown that training for judges and lawyers is extremely important in managing judges understanding of how expert testimony can help them to understand certain evidence presented to court.[248] The legal professions need to be trained on the various fallacies associated with the use of experts as witnesses.[249] This is in reference to the over-deference towards experts by prosecutors when they assume and read too much into evidence given by experts. Vuille has criticized this particularly in relation to DNA profiling.[250]

Joint conferences have also been discussed in the literature as a means in the common law system of narrowing down testimony to areas where the experts disagree. It has been discussed in inquisitorial systems as part of the adversarial principle of the equality of arms to allow defence parties to put questions to the experts.

Other procedural practices, already discussed earlier in this paper, might include pre-trial case management, requiring expert reports to be submitted in time before trial begins. Likewise, the idea of having experts narrow down their work to areas of disagreement also saves time and money.

D. Solutions

The questionnaire further asked if there were any solutions, and if the problems were being discussed by policy makers, courts, practice and academic circles.

On solutions, only ten respondents described any being debated at the time of they responded to the questionnaires. In Ireland, the propartionality of expert testimony in cases is being considered by the Superior Court Rules Committee. In the Netherlands, they are discussing the idea of standard setting for experts. Counter expertise is also problematic and the NRGD has been using experts from other countries. In Lithuania, they have three solutions to quality issues related to licensing and accreditation. In France, similarly, they have passed a decree in 2012 setting out stricter conditions for being on the list of experts (especially for foreigners).[251] Furthermore, there is law passed in 2010,[252] that requires a probationary period for any new experts on the list. There is also a discussion about the lack of experts and how to increase the numbers without leading to quality deterioration. Before this, however, the Court of Cassation had held a conference about experts in civil procedure in 2007, where they discussed the very issues posed in this

[243] Ibid. P.59
[244] Ibid. P.60
[245] Ibid. P.60
[246] Ward, Tony, 'Expert Evidence, Ethics and the Law', in *The Wiley-Blackwell Handbook of Legal and Ethical Aspects of Sex Offender Treatment and Management*, (eds), John Wiley & Sons, Ltd, 2013 P.89
[247] Champod, Christophe and Vuille, Joëlle, 'Scientific Evidence in Europe — Admissibility, Evaluation and Equality of Arms', *International Commentary on Evidence* 2011, 9, 1, P.56
[248] Ibid. P.7. Initial and continued training has already been discussed earlier on in this paper.
[249] Lucena-Molina, Jose-Juan, Pardo-Iranzo, Virginia and Gonzalez-Rodriguez, Joaquin, 'Weakening Forensic Science in Spain: From Expert Evidence to Documentary Evidence', *Journal of Forensic Sciences* 2012, 57, 4, 952-963. Pp.952-953; see also Champod, Christophe and Vuille, Joëlle, 'Scientific Evidence in Europe — Admissibility, Evaluation and Equality of Arms', *International Commentary on Evidence* 2011, 9, 1, p.7
[250] Vuille, Joëlle, 'Admissibility and appraisal of scientific evidence in continental European criminal justice systems: past, present and future', *Australian Journal of Forensic Sciences* 2013, 1-9. P4
[251] Un décret n° 2012-1451 du 24 décembre 2012 relatif à l'expertise et à l'instruction des affaires devant les juridictions judiciaires a récemment précisé les conditions d'inscription sur les listes. This is to ensure that any expert qualified within another member state of the European Union meet French standards
[252] la loi n° 2010-1609 du 22 décembre 2010 a renforcé la durée de la période probatoire pour les experts nouvellement inscrits.

research.[253] Similarly, practicing lawyers also made recommendations as to good practices for experts, and published recommendations, jointly with the Conseil National des Compangies d'Experts de Justice.[254]

In Monaco, the courts organise meetings with experts so that they know what to expect.[255] They will also introduce judicial evaluation of experts and are developing questionnaires for them. In Switzerland, the also wish to set up an organisation for the training of experts, but one of the respondents recognise that it is important for judges to enforce rules of procedure to prevent delay and to choose competent experts. Finally, in Turkey, "the Project of 'Improved Court Expert System' is co-financed project by the European Union and the Turkish Ministry of Justice. The project aims to increase the usage of court experts in civil, criminal and administrative cases."[256]

That only 10 respondents described any solutions to the problems they have, out of thirty five possible responses reflects the lack of discussion also in the literature, as compared to America. However, this does not reflect the fact that discussion are taking place within these countries by the courts, governments (policy makers), legal practitioners, experts themselves and academics. In fact only seven of the respondents indicated that either no discussion was taking place, or there was no data on the issue. In fact, for the majority, courts are very much involved in the discussion on the role of experts in courts. For many also, it is a discussion taking place at policy level and with practitioners (both legal and expert).

VII. Conclusions

One cannot talk of purely adversarial or inquisitorial models,[257] especially in this field, and elements have been borrowed from the other in both types of systems.[258] Whilst the common law countries have fit within the pattern for adversarial practices (e.g. cross-examination) the other countries have picked up some of these practices, simply because of the influence of the ECtHR.

For general organisation, the most important thing is defining the role of the expert as opposed to the judge and other fact finders. This research gives a survey of how judges are asked to write, reason and justify their judgments, and how the impartiality of the judiciary and the justice system is maintained. The ECtHR has said that the role of the expert is autonomous from the name given to it. Whilst the name as such may not have a greater impact than the role of the expert in practice, it may reflect a country's approach to the expert's status. This is also reflected in the discretionary power of the judge to manage experts, and whether they have free evaluation of expert reports (which the majority do not appear to have).

An issue of concern thrown up by the responses to this questionnaire is the protection of the adversarial principle and the equality of arms, where there is limited right to set terms of reference, and even where there is limited right of cross-examination. This concern was also reflected in issues of appointing the experts. Setting out the role of the expert clearly and protecting the adversarial principle could, in theory, reduce the amounts of over-reliance reported by respondents to the questionnaire.

In comparison, the principle of expeditiousness does not appear to carry similar concerns as those of general organisation. There are only a small percentage of cases requiring experts, of those requiring experts, an even smaller percentage suffer from delays. In fact, delays were not reported to be a problem at all- only for complex cases. The biggest cause of delays- where they occurred at all- was from the lack experts. There should therefore be some project to attract "experts" to the courts even though it is sporadic. One side effect of this would also be then to improve availability of experts for the parties.

There also does not appear to be standard practices on management of experts. Given the lack of experts, it is useful to know where there are problems of unreliability and bias as a result of monopolies in certain fields of expertise. This can also cause costs of experts to rise. Having data in place would be useful to deliver this type of information.

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253 http://www.courdecassation.fr/venements_23/colloques_activites_formation_4/2007_2254/recommandations_bonnes_pratiques_juridictionnelles_11103.html accessed 29 August 2014

254 "Collection: les Bonnes Pratiques des Avocats et des Experts. Recommandations Articles 275 35 276 du Code de Procédure Civile" edition Mai 2011 Conseil National des Compagnies d'Esperts de Justice & Consei National des Barreaux

255 Similar policy in Switzerland

256 http://www.bilirkisiprojesi.adalet.gov.tr/eng/index.html Accessed 27 August 2014

257 Vuille, Joëlle, 'Admissibility and appraisal of scientific evidence in continental European criminal justice systems: past, present and future', *Australian Journal of Forensic Sciences* 2013, 1-9.

258 See the comparison from Sonenshein, David and Fitzpatrick, Charles, 'The Problem of Partisan Experts and the Potential for Reform through Concurrent Evidence', *The Review of Litigation* 2013, 32, 1-64. A key example of this borrowing, is the Italian system, which created a more adversarial criminal process in 1988

In terms of quality in good practices, it appears to be the responsibility of the court to decide on the value of expert reports, and whether to waive a report for bias or unreliability. On the other hand, it is for the expert to renew licenses and assure the court of their qualifications to deliver work to the standard expected.

There are discussions taking place at domestic level with policy makers, practitioners, courts and academics (though not always all of them, or between them), with some solutions delivered. There is also a standardisation of these roles from an international perspective, in the form of various international agencies, such as the European Network of Forensic Science Institutes, as to role, procedures and outcomes of forensic work.[259]

As stated at the beginning of this paper, it is not possible to come to concrete conclusions about specific legal families on a comparative level. However, this research has reflected on the problems in meeting legal standards and principles of access to justice.

[259] Lucena-Molina, Jose-Juan, Pardo-Iranzo, Virginia and Gonzalez-Rodriguez, Joaquin, 'Weakening Forensic Science in Spain: From Expert Evidence to Documentary Evidence', *Journal of Forensic Sciences* 2012, 57, 4, 952-963.

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<u>Ireland</u>
E.O'K. v. D.K., and Ors [2001] 3IR 568

Appendices

Appendix 1: Courts and Laws

Denmark	Finland	Norway	Sweden
District court of civil & criminal law	-Court of civil and criminal law -Court of administrative law	Court of Appeal in Civil, Criminal and some administrative cases	-Court of Appeal for civil and criminal law -Court of administrative law
Retsplejelovens (Law of Administration of Justice Act) §§ 20, 20 a, 20 b (expert judges), 450 a, 450 b, 537, stk. 2, (child experts) 562 (experts in compulsory sale)	Code of Judicial Procedure Act	The Dispute Act, Criminal Procedure Act, Act relating to the Courts of Justice	Code of Judicial Procedure

England & Wales	Ireland
Magistrates' court	High Court, civil (commercial list)
Criminal Procedure Rules 2013 - Part 33, see link: http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2012/crim-proc-rules-2013-part-33.pdf	Order 63A of the Rules of the Superior Courts 1986-2014 (RSC) set out rules of court to facilitate the operation of the Commercial List and Part II of that Order regulates pre-trial procedure in the Commercial List

Estonia	Lithuania
Court of First Instance: administrative law	-Regional court of civil, criminal, small penalty cases (admin law) -District court of first instance for civil, criminal and administrative offenses -Court of administrative law
Codes of admin court procedure Code of civil procedure, Forensic Examination Act, Code of criminal procedure. Code of misdemeanour procedure, Sworn Translators Act, Penal code	Judicial expertise Act, Code of criminal procedure, Code of civil procedure, Law on administrative proceedings Code of Administrative Infringements Law on Forensic Science

Austria	Germany	Netherlands
District court of civil and criminal law	- Court of Appeals (Higher Regional Court) for civil and criminal law - Regional court for civil law - Criminal court	Criminal court Civil court
Civil Procedural Law, Non-litigious procedural law, Criminal procedures law, Experts fee law	Code Criminal Procedure Code of Civil Procedure (s. 402-414)	Code of Criminal procedure Code of Civil Procedure

France	Monaco	Switzerland	Italy
All jurisdictions (civil) (cassation?)	First Instance, civil law	- Court of administrative law (including social welfare) -First instance court of criminal law - Court of civil law -First instance in civil	- First instance court of civil and criminal law

		and criminal law	
Loi n° 71-498 du 29 juin 1971 relative aux experts judiciaires, Décret n° 2004-1463 du 23 décembre 2004 relatif aux experts judiciaires, Les articles 232 à 284-1 du code de procédure civile	TITRE V : DE L'EXPERTISE (Loi n° 1.135 du 16 juillet 1990) – articles 344 à 368 du Code de procédure civile	- Law of administrative procedure - Code of Criminal Procedure (art. 182-191) -Code of Civil Procedure (article 183-)	-Code of civil procedure -Code of criminal procedure

Czech Republic	Hungary	Turkey	Azerbaijan
First/second level instance All Jurisdiction	second level, criminal law	Court of civil, criminal, administrative	Court of first instance, general jurisdiction (civil, criminal) (Khatai & Yasamal)
- Act No. 36/1967 Coll., on Experts and Interpreters - Decree of the Ministry of Justice No. 37/1967 Coll., implementing the Act on Experts and Interpreters - Section 111 of Act No. 141/1961 Coll., the Criminal Procedure Code - Section 127 and 139 of Act No. 99/1963 Coll., the Civil Procedure Code	Act XIX 1998 on Criminal Proceedings Title IV The Expert opinion / Employment of an expert Section 99(1)	-Code of Criminal procedure -Code of Civil Procedure	- Law "about the functioning of the state court expertise" dated 18 November,1999; - 97th, 118th, 127th, 140th, 195-198th, 264-272nd, 332th articles of Crime Procedural Code; - 20th, 63rd, 97-103rd, 115th articles of Civil Procedural Code; - 308th, 370th, 381st,392nd articles of Administrative Offences Code; - Administrative Procedural Code

Bosnia-Herzogovina	Croatia	Slovenia
Court of First instance and second instance court: - civil, criminal and administrative law	Municipal court of criminal and civil law	- First instance, Nova Gorica, civil, criminal, commercial - District court of Commercial cases: Novo Mesto - District court for civil, criminal and trade cases: Maribor
1. Law on Experts 2. Law of Criminal Procedure of the Federation of Bosnia and Herzegovina: Section 7 ("Expertise") articles 109.-129. Chapter XIX ("Investigation") article 236. ("Insight and expertise") Chapter XXI ("Trial") article 264. ("Non-attendance of a witness or expert in the main trial") Chapter XXI ("Trial") articles 284.-287. 3. Law of Civil Procedure of the Federation of Bosnia and	- Courts Act - Law on Public Prosecution, - The court rules -– Rules on permanent court experts - The law of civil procedure - Family law - Law of inheritance - Law on enforcement - Law of criminal procedure - Criminal law -Law on general administrative procedure -Law on bankruptcy	- Courts Act, chapter 12, articles from 84. to 96., - Rule book of legal experts and legal appraisers, - Civil proceedings law, articles from 243. to 255., - Criminal proceedings law, chapter XVIII. subchapter 7., articles from 248. to 267 - Rules of court experts and court interpreters

Herzegovina Article 82. Article 105.-106. Article 147.-162. We have selected the regulations which are in force in Cantonal Court in Novi Travnik. In Bosnia and Herzegovina there are also in use Code of Criminal Procedure of Bosnia and Herzegovina and Code of Criminal Procedure of the Republika Srpska, Law of Civil Procedure of Bosnia and Herzegovina, Law of Civile Procedure of Republika Srpska		

Appendix II National Bibliographies and websites (provided by respondents)

Denmark:
http://www.retslaegeraadet.dk/
Sweden:
Henrik Edelstam Expert opinion- A study of nominations of experts in the proceedings, Juridisk tidskrift (journal) vid Stockholms Universitet 2013-14,Peter Westberg: Witness,expert in the crime proceeding
Ireland:
Hilary Delany & Declan McGrath,Civil Procedure in the Superior Courts, (Dublin, 2012).
The Courts Service website: www.courts.ie where judgments of the pilot court are available, some of which contain detailed explanation of expert evidence.
Estonia:
Herbert Lindmäe. Kohtuekspertiis ("Forensic Examination"). Tallinn, 1982.
Geidi Sile. Kohtuekspertiis kriminaalmenetlusliku tõendamise süsteemis("The Role of Forensic Examination in Evidence Providing System of the Criminal Procedure"). Magistritöö. Tartu Ülikool, õigusteaduskond, kriminaalõiguse, kriminoloogia ja kognitiivse psühholoogia õppetool, 2011
Lithuania: Vidmantas Egidijus Kurapka, Snieguole Matuliene. Criminalistics: theory and practise (2012)
Scientific Concept of Application of Knowledge in Criminal Investigations and Mechanism of Its Implementation (2012)
http://www.ltec.lt :Criminalistics and forensic examination: science, studies, practice Germany: Journals: e.g.
http://www.bvs-ev.de/leistungen/der-sachverstaendige/
http://www.derbausv.de/
http://www.medsach.de/
https://shop.bundesanzeiger-verlag.de/kfz-unfall-verkehr/der-kfz-sachverstaendige/
Online: e.g.
http://svv.ihk.de/content/home/home.ihk
http://www.bvs-ev.de/home/
http://www.aerztekammer-berlin.de/10arzt/37_Gutachter-Verzeichnis/index.html, (Chamber of Physicians Berlin)
Bayerlein, Praxishandbuch Sachverständigenrecht, 3. Aufl. 2002;
Jessnitzer/Ulrich/Frieling, Der gerichtliche Sachverständige, 12. Aufl. 2007;
Stamm, Zur Rechtsstellung des Sachverständigen im Zivilprozess, ZZP 124 (2011); Weidhaas/Wellmann, Der Sachverständige in der Praxis, 2004
There are some specialized websites, e.g.
• the website of the Federal Association of Publicly Certified and Qualified Experts (B.V.S), http://www.bvs-ev.de/home/
• the list of experts provided by the Chamber of Commerce (IHK), http://svv.ihk.de/content/home/home.ihk
The B.V.S. also publishes a regular journal called "Der Sachverständige" ("The expert"), informing experts on new technological und legal developments
Netherlands: Specialised journal: 'Expertise en recht'.
J.A. Coster van Voorhout, NRGD, member of the IEEE (jacvv@xs4all.nl)
France: La revue Experts est une publication bimestrielle à caractère scientifique.
Par ailleurs, en mai 2011, la mission de réflexion sur l'expertise judiciaire a remis un rapport à la Chancellerie. Mis en place par l'ancien garde des Sceaux, Michèle Alliot-Marie, en mai 2010, le groupe présidé par Chantal BUSSIERE, premier président à la cour d'appel de Bordeaux et Stéphane AUTIN, procureur général à la cour d'appel de Pau, était chargé de formuler des propositions pour répondre aux critiques formulées en matière d'expertise dans tous les domaines (civils, commerciaux et pénaux) et améliorer le fonctionnement de la justice sur ce point pour répondre aux attentes des usagers.
Les 38 propositions du rapport s'articulent autour de deux thèmes : « l'expertise et l'accès à la justice » et « l'expertise et la qualité de la justice ». Ont été analysées les problématiques liées à la place de l'expertise au regard des autres mesures d'instruction, de l'information du justiciable et enfin du coût de la mesure.
Ont également été évoqués les liens entre qualité de la justice et choix de l'expert, mais aussi entre qualité de la justice et déroulement des opérations d'expertise.
Monaco: See France
Switzerland: En matière d'expertise médicale, il existe certains ouvrages et surtout des articles, surtout dans le domaine médical. On peut principalement se référer à l'ouvrage « L'expertise médicale », du médical au juridique, Editions Médecines et Hygiène, 2008
(site internet : http://www.medhyg.ch/boutique/index.php/medecine-et-societe.html)
L'expertise médicale dans l'assurance-invalidité suisse, Jean Pirrotta, in cahiers genevois et romandes de sécurité sociale, Genève, no 25, 2005

Articles concernant ce thème sont régulièrement publiés dans des revues juridiques, notamment dans le Journal Criminalistique Suisse, la Jusletter publiée par www.weblaw.ch ou encore la Revue de l'avocat (http://www.anwaltsrevue.recht.ch/).

- François BOHNET/Jacques HALDY/Nicolas JEANDIN/Philippe SCHWEIZER/Denis TAPPY, Code de procédure civile commenté, Bâle 2011
- Pierre-Yves BOSSHARD: La "bonne" expertise judiciaire, in RSPC (Revue suisse de procédure civile) 2009, p. 207ss
- Pierre-Yves BOSSHARD: L'appréciation de l'expertise judiciaire par le juge, in RSPC (Revue suisse de procédure civile) 2007, p. 321ss
- HEER Marianne/SCHÖBI Christian (éd.), La justice et l'expertise, Berne 2005

http://www.bilirkisiprojesi.adalet.gov.tr/eng/index.html (English)
www.bilirkisilik.org (Turkish)
Italy: Pollastrini Serena, Il manuale del c.t.u., Wolters Kluwer Italia, Milano, 2013.
www.ilportaledelctu.it/home.html - www.ctu.unimi.it
Czech Republic: Dörfl, L. Zákon o znalcích a tlumočnících. Komentář. 1. Edition, Prague 2009,
Dörfl, L., Kratěna, J., Ort, J., Vácha, V. Soudní znalectví. Praha : ČVUT, Česká technika – nakladatelství ČVUT, 2009
Journals: Znalec (Expert), Soudní inženýrství (Forensic Engineering), Oceňování (Appraisal)
Websites: http://www.kszcr.cz/casopis-znalec-archiv.html, http://www.sinz.cz/cz/redakcni_rada.php, http://www.ckom.cz/index.php/asopis
Hungary: publications from 1979 and 1989 by one author: Gyula Molnar; and Experts' lists: http://igazsagugyiinformaciok.kormany.hu/igazsagugyi-szakertok, or iszfo@kim.gov.hu
Experts books and homepagesis :http://miszk.hu/, http://miszk.hu/tudastar/utmutatok-modszertani-elvek.html
Budapest, 09.02.2014
Dr. Czine Ágnes Ph.D
Head of the Criminal District
Municipal High Court of Appeal
Budapest
email: czinea@fovitb.birosag.hu
Turkey:
1. A group of authors, Commentary on the Code of Criminal Procedure of the Republic of Lithuania, Chapters I–IV, V–XI, Vilnius, 2003.
2. Goda G., Kazlauskas M., Kuconis P., Criminal Procedure Law, 2005.
3. Contribution of Pijus Zigmantas Pošiūnas to the Development of Criminalistics and Forensic Expertise in Lithuania // Criminalistics and Forensic Expertise: Science, Studies, Practice. Papers of science, Vilnius, 2007.
4. Fair Criminal Process: Problematic Aspects, Vilnius, 2009.
5. Rolandas Krikščiūnas, Tactical Characteristics and Jurisprudence of Ordering an Expert's Examination in Civil Proceedings, 2003.
6. Valickis G., Justickis V., Čėsnienė I., Forensic Psychological Examination in Lithuania: Present Situation, Problems and Possible Solutions, 2006.
Every expert institution has their own website where they specify the types of performed examinations and methods used as well as prices of examinations.
Croatia: In Republic of Croatia there is a Croatian association of court expert witnesses. This association has its own website (www.sudski-vjestaci.hr). They publish a magazine "Court expert", and also organize professional meetings and conferences
Slovenia: The Socitey of court experts has a website: www.sodni-izvedenec.com.
Within the Ministry of Justice the is a special unit (Judicial Training Centre) for seminars, exams and providing information for the court experts.