

## EuroExpert e-bulletin

The legal year here in London has just begun. It provides a good opportunity to once again take stock of what is happening in the world of experts and dispute resolvers around the globe. Case law in the Common Law Jurisdictions continues to evolve and it is interesting to note that there seems to be much more of a convergence across the different jurisdictions including those practising in Civil Law. The need for a greater understanding of the role of the expert and dispute resolver and their limitations is increasingly important.

In different jurisdictions the process places restrictions on what an expert should or should not do. One of the areas which still causes much debate is whether or not the expert should be able to act as a finder of fact and or negotiator. In part this seems to be a philosophical difference between those acting in the common law and civil law jurisdictions and the way in which the systems operate. If the expert is to maintain his true status as an impartial and independent person with an overriding duty to the court then the expert cannot be a negotiator. For example, it is expressly stated in the English Civil

Procedure Rules when referring to discussions between experts that it is not their role to settle a case but to agree and narrow the expert issues.



The fact that the expert should not act as a negotiator does not however prevent them from participating in different dispute resolution processes which provide opportunities for their expertise to be used. Similarly the role of finder of facts is clearly for the judge in the common law jurisdictions. In the Civil Law where the expert is the 'court expert' the distinction appears more blurred.

As always it is incumbent on the expert to make sure he understands the role he will play and ensure that those instructing (mainly lawyers) are aware of any conflicts that may arise. Alternative Dispute Resolution (ADR) is increasing in importance and is one of the themes that will be addressed by German Experts when they meet

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**EuroExpert Finder**



The e-Bulletin is published periodically. It provides useful information for those who are either acting as an expert, who use their services or are in charge of setting standards for experts. EuroExpert (EE) is a point of contact between national and European judicial and legal authorities, government departments, official and private bodies and other appropriate tribunals.

### EuroExpert

#### The Organisation

EuroExpert (EE) is a membership organisation whose members are representing substantial bodies of Experts in their own country. Each organisation must demonstrate to EE that they have appropriate standards for Experts.

#### Philosophy

EuroExpert's philosophy is self-regulation by Experts and the establishment of agreed common professional standards is in the best interests of society.

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in Leipzig in November. They will be considering the differences between Mediation, Expert Determination and Adjudication and their status in different countries such as Austria, Belgium, France, Germany and the UK. In the next bulletin we hope to be able to bring you a report of the event and their discussions.

Yet again standards and qualifications are at the forefront of the topics dominating the role and work of the expert. We have, for example, recently seen a new Practice Direction introduced in Northern Ireland (<https://goo.gl/nLxH8G>) which for the first time states that there is a requirement for experts to have some accreditation and training. EuroExpert has always believed that training is essential and to ensure commonality has published a Core Curriculum for the Training of Experts (see below). This highlights the key areas that Experts must understand irrespective of whether they are working in a civil or common law jurisdiction or whether they practice in the criminal, civil or family courts.

It is interesting to note that over the last year or so the spotlight has been very much focused on experts

qualifications and their veracity. There have been a number of cases where experts have been convicted of perjury or had their fitness to practice called into question. There was the case of the medical expert who it was found had falsely stated that he had held certain specialist qualifications and memberships of professional bodies. As a result of his actions the Medical Practitioners Tribunal Service handed down a judgement which saw him being removed from the Medical Register and therefore unable to continue to practice.

Another example was of an accountant in Florida who misdescribed his qualifications. The story ran under the banner "Fake Degree on Resume Brings Down Miami Forensic Accountant". At the very heart of his mis-statement was the challenge to his credibility. It was noted that "he is not a truthful person, and expert witnesses must be truthful."

The internet and its myriad of search engines has made the world a much smaller place and it is considerably easier to find information about experts and the work they have undertaken in other cases. An important lesson to learn is that

experts need to be accurate and honest about any credentials and experience as well as membership of professional bodies. These should always be clearly stated when giving evidence in court and of course in the expert's report. CVs and profiles need to be regularly updated to reflect changes as they are one of the key selection tools used to find the right expert. This has recently been highlighted for example in the UK by the publication of 'The Model Form of Expert Witness CV' by the Academy of Experts' Judicial Committee. Its purpose is to ensure that the cvs provided to the courts will assist the judiciary in assessing the suitability of the expert for the matter they are hearing and of the evidence they are giving.

It is always interesting to learn of new developments and I am very pleased to include in this edition a paper on the recent changes that have taken place in Poland within their Criminal System. It will bring about many changes and challenges both for the experts and those using them. I am sure that over the coming year that there will be more lessons to be shared. The opportunity for sharing and developing our knowledge also comes from attending conferences and events.

I am very pleased to say that within this bulletin are details of a number of upcoming events in Leipzig, Prague and Zagreb. I hope that you will be able to attend one or more of these events. I look forward to being able to share with you some of the developments from those events in coming bulletins.

## EuroExpert Core Curriculum for the Training of Experts

EuroExpert in its aims includes the development, promotion and convergence of and education in common ethical and professional standards for experts within the European Union, based upon the principles of high qualification. As part of this aim it has agreed a core curriculum for the training of expert witnesses.

Experts are required to be "fit and proper" persons and both having and maintaining a high standard of technical knowledge and practical experience in their professional field. The curriculum is designed to enhance this.

### Codes of Practice:

- National/Regional Code of Practice for Experts (this includes the principles of the EuroExpert Code of Practice)

### Justice System:

- Overview of National Justice Systems including differences between the inquisitorial and adversarial system
- Basic Law to include contract, tort, fees, advertising and liability

### Procedure Rules applicable to experts:

- Criminal
- Civil
- Others, where applicable

### Role & Responsibilities of The Expert:

- Appointment procedures
- Terms of engagement
- Conflicts of interest
- Giving evidence including requirements for reports

### Alternatives to the Court Process:

- ADR including methods such as mediation and expert determination
- The role of expert in different processes

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**Changes to the Polish Criminal Procedure Code have far reaching consequences for experts**

## From inquisitorial towards more adversarial – new challenges for experts

### Introduction

In Poland, there are around 18,000 expert witnesses registered on the expert witness lists. They are compiled and updated by the Presidents of the Polish Provincial Courts. The court may also appoint individuals who do not have the status of an expert witness, but who have specific expertise – i.e. ad hoc experts.

After the latest amendments to the Polish Criminal Procedure Code (CPC), which has

affected the way of conducting criminal cases, the matter of expert witnesses has been given a new dimension. It can be expected that the changes will have a certain impact on the current market of forensic science services, as the introduced amendment stands for a greater role of “private opinions”, i.e. the opinions formed by experts hired by defence lawyers.

### Changes to the Polish law

The changes to the CPC entered into force on 1 July 2015 were introduced because of the excessive length of current criminal proceedings. The solution, which according to the initiators shall solve that problem, is empowering the parties to adduce the evidence more proactively. Thus, from now on judges will not be able to initiate the evidence on their own initiative, with the exception “specially

justified cases” only. The model of proceedings is referred to as adversarial, the changes, however, are defined as ‘from inquisitorial towards more adversarial system’. The jury trials have not been implemented.

As a consequence, judges, prosecutors and defence lawyers will now perform a different role during criminal proceedings. The new role of judges is centred on the assessment of evidence gathered by the parties. The changed role of prosecutors limits their efforts to the collection of evidence necessary only to bring a charge against somebody. For defence lawyers, the amendment increases their involvement, by making them obliged to effectively search for, collect and retrieve the evidence in favour of their clients or actively argue with the evidence gathered by prosecution. Otherwise, they will be negatively assessed by the market.

### Role of experts

The amendment does not introduce any revolutionary changes concerning expert witnesses and therefore does not affect their position. Expert witnesses still act as sources of special knowledge, are still asked to form their opinions, for which they receive relevant remuneration, and are appointed by courts.

The new law, however, broadens the catalogue of sources of special knowledge by introducing new categories. They are: private opinions, that is any private documents created for the purpose of any given criminal proceeding and publications – documents existing outside but useful for the purpose of the proceedings. These new categories cannot be introduced into evidence directly but only through the expert witness opinion. That is why it will translate into new duties of expert witnesses, and as a consequence, they will have to face new tasks and practical problems.

As far as the way of conducting preparatory proceedings is concerned, the amendment does not contain any significant changes. However, in comparison to the previous regime, in which the prosecution only was allowed to ask for support of the expert witness, now both parties are allowed to present the experts' statement with their proposals concerning evidence, at this stage.

As far as the new court procedure is concerned, the party who has doubts about the presented evidence and wishes to question the opponent's experts, if accepted by the court, shall present their evidence and are allowed to ask questions in front of the court. As a consequence of the proceeding conducted in the above mentioned way, expert witnesses will not only have to form their opinions, as it was done before, but they will be additionally responsible to actively defend those opinions to the court.

## Private experts – emerging problems

Unfortunately, the amended CPC contains numerous procedural ambiguities related to the evidence emerging from private experts

opinions. For example, the law introduces private opinions but it does not as yet regulate the status of private experts. In addition, the regulations do not even guarantee that the private experts opinions will be taken into account in the course of a given proceeding, as it is based judge's discretion. Also, the amendment does not regulate the access of private experts to case files. If a prosecutor appoints an expert witness, then such an expert has a full access to case files. However, if defence hires a private expert, then, the access to all the case files is not fully guaranteed and as such can be detrimental to the private experts' opinions.

Another issue is related to the remuneration of private experts. The new regulations do not mention anything on the reimbursement of their costs. This raises a problem of creating 'justice for the rich', as only those with the financial means will be able to pay for good quality opinions. On the other hand, there are some arguments that, due to the introduction of the adversarial model of court proceedings, the prosecution may need additional resources to prepare professional responses to the opinions of private experts presented during trials.

Some hold the opinion that although there are theoretically equal rights to present evidence in court, there is a huge disparity between the parties in terms of producing and providing it for the purposes of trials. Inquisitorial model, which was in existence for many years, empowered the national authorities (prosecution and police) to develop effective system of producing evidence. As the result, most of the currently existing forensic laboratories and institutes are linked, both functionally and financially, to the national authorities, which in

principle support the prosecution. Defence lawyers, on the other hand, do not possess any experience in working with material evidence and do not have any facilities to effectively examine them. The existing market of the private forensic services, as being relatively new one, is very fragmented and raises numerous doubts as to the quality of the delivered opinions.

It seems that the changes paved the way for private opinions, but without taking care to create relevant criteria assuring the quality of such opinions and developing appropriate tools for the assessment of private experts. Without such solutions it will be up to the court to decide, in every single case, whether the expert who has prepared the opinion was properly qualified, possessed relevant experience, and has an appropriate level of ethics. This casts doubt on the length of criminal proceedings bearing in mind that the amendment was introduced in order to make the proceedings simpler and shorter.

## The continuing uncertainty for expert witnesses

Some opponents of the introduced amendment to the CPC point to the lack of parallel work on law on expert witnesses, as one of the weak points of the implemented changes. The existing regulations does not form a well-unified system, assuring decent rights for expert witnesses, as well as proper guarantees for the court and other participants of criminal proceedings. According to some legal practitioners, the quality of the opinions issued by expert witnesses leaves a great deal to be desired. One can also see opinions where experts, forgetting about the scope of their duties, speak in a way reserved for the defence, the prosecution or even the judge itself. Also, the waiting time for the opinions is often very long.

The most important reason of the above mentioned situation is related to the fact that currently there does not exist any effective mechanism of verification and elimination of expert witnesses who are dishonest, unreliable or those who issue opinions without proper preparation, educational background or relevant experience. Another problem can be attributed to low remuneration of expert witnesses, which most professional experts find really unprofitable. As a result, the number of people with high-level knowledge and willing to issue opinions for the criminal justice system is not enough.

In the past years, the Ministry of Justice took numerous attempts to change the situation, by proposing many different projects for a single and comprehensive regulation covering all aspects of experts' work. They were strongly supported by legal practitioners and expert witnesses themselves. However, the regulation has never been

implemented. Since last year, the new project is under preparation, but in comparison to the previous ones, it is very far from the stakeholders' expectations and as such provokes a lot of controversy.

## Summary

The introduction of the adversarial model of court proceeding into the Polish criminal justice system has launched an animated public discussion in the context of the right to reliable criminal proceedings.

The public has raised numerous questions and doubts as to the new model. Will the defence lawyers be able to protect the interests of the accused? Will their experts be able to confront the evidence presented by the prosecution? Will the judge be able to assess the evidence presented by the parties and decide which is the prevailing one? And finally, what if experts offering their services to the justice system turn out to be mere charlatans?

Paweł Rybicki, – chairman of the management board of the European Forensic Initiatives Centre (EFIC) Foundation, director of Forensic Watch Programme. In the years 2007-2011, director of the Central Forensic Laboratory of the Police. The originator of Research Institute – Central Forensic Laboratory of the Police, which he managed in the years 2011-2013. The initiator of the European committee for standardization in forensic science (CEN/TC419 "Forensic Science Processes"), and its first chairman in the years 2012-2014. In the years 2011-2013, chairman of the European Network of Forensic Science Institutes (ENFSI) and in 2011, chairman of International Forensic Strategic Alliance (IFSA). The initiator of the Polish Forensic Initiative introducing to the European legislation the term "European Forensic Science Area". The author of several dozen publications in the area of forensic sciences.



## 4TH CONGRESS OF EXPERT WITNESSES AND VALUERS

**23/24.10.2015 Zagreb**

The Croatian Association of Court Expert Witnesses and Valuers – CACEWaV (Hrvatsko društvo sudskih vještaka i procjenitelja) was incorporated 35 years ago (in 1980) in order to gather the court expert witnesses and valuers of all professions.

The 4th Congress, organised under the auspices of Mrs Kolinda Grabar Kitarović, President of the Republic of Croatia, will bring together court expert witnesses and valuers in order to exchange the professional opinions, together with invited representatives of the judiciary and legislative.



HRVATSKO DRUŠTVO  
SUDSKIH VJEŠTAKA  
I PROCJENITELJA

CROATIAN ASSOCIATION OF COURT  
EXPERT WITNESSES AND VALUERS

This year CACEWaV Congress will also host representatives from both EuroExpert and TEGoVA as well as guests from Slovenia, Serbia and Montenegro.

For full details of the Congress see the EuroExpert website:

[www.euroexpert.org](http://www.euroexpert.org)

TEGoVA is the European Group of Valuers' Associations comprising of 61 professional bodies from 33 countries, headquartered in Bruxelles.



The European Court of Justice

on the dossier for the Legal Affairs committee, Antonio Marinho Pinto MEP, who strongly opposes the reform. In previous committee meetings he has been vocal about the fact that the current General Court judges had not been listened to when discussing increasing their number. As a result he invited Skouris, Jaeger and four CJEU judges, who are known to oppose the reform, to the meeting. Skouris refused to attend.

## COURT OF JUSTICE OF THE EUROPEAN UNION

# An EU bakers' dozen: 28 more CJEU Judges

On 28<sup>th</sup> April the European Parliament met in Strasbourg behind closed doors to discuss the European Court of Justice's (CJEU) proposed reform of increasing the number of European Court of Justice judges by 28. This has proved to be a controversial topic with the President of the CJEU, Vassilos Skouris, in favour, and the President of the General Court, Marc Jaeger, who is against, clashing over the issue.

Increasing the number of judges has been proposed as a solution to the problem of the large backlog of cases in the CJEU and excessive delays experienced by parties.

In March 2011 the

President of the CJEU asked for an increase of 12 judges to deal with the backlog. This was approved by the European institutions in principle. However since an increase of 12 judges between 28 Member States would mean only some would be allocated extra judgeships a unanimous decision from the Council has been difficult to achieve. To deal with this problem in October 2014 the Court submitted a new text proposing a gradual increase in the number of new judges to 28 - providing every Member State with an additional judge - giving a final overall figure of 56 judges.

The cost, estimated at over €23 million a

year, has drawn a large amount of criticism from opponents of the reform. Antonio Marinho Pinto MEP (Portugal, ALDE) has stated this to be excessive and wasteful. Furthermore there have been suggestions of alternate, cheaper solutions to the problem. President of the General Court Marc Jaeger has suggested that increasing the number of support staff in the CJEU would be a more appropriate solution.

The meeting in April was organised by the rapporteur

The judges argued that the backlog was not as bad as it was made to appear and stated that there had only been a problem with a large backlog in 2010. However, since then improvements had been made and 80 percent of the backlog had been solved and the rest of the backlog is continuing to decrease. As can be evidenced by this recent meeting the debate continues to cause controversy.



Vassilos Skouris & Marc Jaeger are at odds over the changes

## German Experts Day

### DEUTSCHER SACHVERSTÄNDIGENTAG 2015

The German Sachverständigentag (DST) is one of Germany's biggest and most important events of the expert system.

As a responsible co-sponsor of the Federal Association of Publicly certified and qualified experts eV biennial organized the two-day conference for professional exchange and discussion of the scientific experts. Supported by over 20 organizations, the DST represents approximately 20,000 experts.

Enhance knowledge, cultivate contacts, share experiences - the DST as a forum offers interdisciplinary dialogue with colleagues and representatives of politics, business, administration and judiciary. Even consumers are addressed - competent and qualified experts are needed in virtually every area of life.

The DST provides specific information on the various fields of activities and areas of expertise of the experts. Expert speakers information on technical and scientific innovation; Problem cases and possible solutions are presented and discussed.

[www.deutscher-sachverstaendigentag.de](http://www.deutscher-sachverstaendigentag.de)



### 13TH ANNUAL INTERNATIONAL CONFERENCE Construction and real estate: expertise and appraisal & INTERNATIONAL SYMPOSIUM Expert Witnesses and evidence in arbitration and ADR

Prague 26-27 November 2015

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