EUREXPERTISE PROJECT

PROGRESS REPORT - 25 March 2012

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Over the last two years, a working group made up of magistrates, lawyers, and experts and led by Expert Philippe JACQUEMIN carried out an inventory of national practices concerning judicial expertise in the various countries of the European Union.

With the help of a questionnaire created to facilitate comparative analysis, each Supreme Court described the principles governing judicial expertise in its country, and often complemented its reply with literal details and a relevant bibliography.

After an analysis by the members of the working group and a verification by the

same Supreme Courts, Mr Daniel CHABANOL, honorary councillor of the French State Council and former President of the Administrative Court of Appeal of Versailles, and Mr Alain NUEE, First President of the Court of Appeal of Versailles, summarised the gathered information in order to identify the commonalities and differences in the studied items.

On this basis and with the support of the European Commission, the European Expertise and Expert Institute organised the first multidisciplinary Symposium on civil judicial expertise in the European Union. It was held in Brussels on 16 and 17 March, with the dual objective of:

- generating a common reflection from all the stakeholders in judicial expertise at the European level,
- determining commonalities and recommendations likely to contribute to a White Paper on judicial expertise at the European level.

The number of participants (>170) and represented countries (18), the active participation in the roundtables of magistrates, experts, lawyers, and academics from ten different countries, as well as the quality of the public figures who contributed to the joint reflection, were a prompt statement that the first objective had been reached, in a very promising spirit of open-mindedness.

Now we need to take stock of the concrete achievements.

Dedicated to four main subjects linked to judicial expertise and in order to encourage everyone's effective participation, the roundtables were divided into one English-speaking group and one French-speaking group.
At the end, for each of the debated topics, the moderators of both groups worked together to present a joint summary of proceedings.
Two of the addressed issues had to do with expertise per se:

- appointing an expert: mission and expectations,
- expertise proceedings and the expert's report.

The other two more closely concerned the expert:

- qualifications, competence and the assessment of experts,
- the status and ethics of experts – free exercise and liability.

Although we can maintain this dichotomy because it makes the presentation of the adopted recommendations easier, it was clear that the four roundtables were highly interdependent.

The following presentation will comment on the conclusions of the roundtable proceedings that were approved in plenary session and whose text is attached to the present document, and will suggest some points that call for further reflection.

In this regard, I found the term 'progress report' to be the best suited to the present document. Indeed, given its program of events as much as its achievements, this symposium is a landmark event that has closed the first stage of analysis and outlined the expected follow-up to the Eurexpertise project.

Expert examination

It was obvious from the two roundtables dedicated to expertise itself that there is a clear consensus on the attributions of each and every actor of judicial expertise and on a certain number of recommendations brought about by the requirements of a fair trial.

The presentation by Mr Alain HENDERICKX, who is a lawyer in Belgium, of the conclusions reached in the roundtable on the appointment and mission of an expert revealed a strong consensus on the judge's imperium when calling for an expert opinion.

Likewise, the works of the roundtable on expertise proceedings presented by Mr Anthony FORDE, University professor in the United Kingdom, concluded that the judge should be able to intervene during the course of expertise proceedings and should have the necessary tools to manage the pending case and to verify the requirements ensuring a fair trial, of which he is the guardian.

It also emerged that beyond the differences between European justice systems, which were actually little mentioned during the symposium, participants seemed to agree that a high quality judicial expert measure entails that the judge have the authority to effectively obtain from the ordered measure what he expects from it, and thus should, for example, have the power to restrict or extend the mission or to replace the expert…

At the same time, a high quality expert examination implies that the judge exercises all his prerogatives and takes on the obligations that are attached to them. Thus the judge must appreciate the relevance of the required expert measure, precisely determine the expert's mission, meet his requests for instructions, and hear the parties' views.

I think the wording of the two roundtable recommendations exactly reflects everyone's belief that it is essential for the stakeholders in the judicial expertise process to remain independent from each other but also to be able to take part in a necessary dialogue with the others.
Thus, while affirming that the mission imposes itself on the expert, the participants recommend an exchange between the judge and the expert at the beginning of the expert examination in order to adapt the schedule of operations, enable the expert to ask the judge for instructions and for the parties to request or be consulted on any changes made to the mission.

In this regard, the temptation to delegate powers as brought up by Mr VIGNEAU in the general symposium report, or the call for 'comfort' expertise examinations, which are clearly contrary to the consensus reached, deserve an

independent reflection on the mechanism of the judge's decision-making.

Beyond the judge's and the expert's prerogatives, the principles of necessity and subsidiarity that were clearly stated by the participants in the first roundtable do have an impact on the division of tasks between the actors of an expertise measure.

Presented as a necessary limit to the judge's imperium in calling for an expert opinion, they are also an obligation for the parties and even more so for their lawyers.

Indeed, a judge quite rarely calls for an expert opinion unless at least one the parties has requested it.

Thus the necessary nature of the expert opinion to solve the dispute and the fact that there are no easier, faster or less expensive means of evidence – if they must be verified by the judge - must first and foremost be justified by the party requesting the expert opinion.

A strict application of the principle of subsidiarity could thus lead the judge to reject a request for an expert opinion to which the opposing party consents, since these parties are able to agree to call for a joint amicable expert opinion.

It could opportunistically focus judicial expertise on only the most conflicting, complex factual bases, or those in which there is an obvious financial imbalance between the parties which requires the judge's control over the expertise process.

The criteria of necessity and subsidiarity should thus encourage the use of amicable expert opinions, provided that the guarantees they offer to the person involved in the process are sufficient (as it already the case in some countries such as Spain) and, in this context, should reinforce the role of lawyers and the expert's authority in out of court proceedings.

It thus seems essential to keep in mind that the common rules that may be determined by the actors of civil judicial expertise in Europe will have a significant impact on the more general calls for expert opinions in out of court proceedings.

Article 6-1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Court of Human Rights' case law were guiding principles in the participants' reflection.

Thus, members of the first roundtable highlighted that any change to the expert's mission should meet the demands of a 'contradictory evolution of the (initial) mission'.

Those in the second roundtable defined the conditions for the parties to be able to effectively discuss the expert's technical findings:

- ensure they are aware of the evidence submitted to the expert's examination and the technical basis on which he grounds his opinion,
- submit the expert's technical opinion in writing to the parties prior to the discussion before the judge.

Indeed the weight of the expert opinion on the ruling judge's decision as well as its technical nature mean that the parties must be fully informed of it prior to the legal debate before the judge.

The participants raised questions about the timing and content of this information.

Although the participants did not all agree on the idea of imposing a preliminary report on the expert - who would have to communicate it to the parties in order to get their comments and remarks before handing in his final report - nevertheless they seemed to agree on the fact that the parties should be aware of the main elements of the expert's findings before the formal submittal of the report. This could be done for example by a verbal exchange leading to a written report.

This preliminary information contributes meaningfully to the contradictory nature of expert operations of which the judge is again confirmed as the guardian.

In order to be effective this 'guarantee' implies that the judge has a written tool to control it.

In this respect, the consensus that appeared on the content necessary in an expert's report makes the report a prime tool. Indeed, it informs the judge namely of the chronology of the expert measure, the elements of evidence that are to be examined, the parties remarks concerning the expert's preliminary findings and the expert's replies to these observations.
The participants put forward their belief that it is essential to structure the content of the report in order to retain the essential elements of what is expected of the expert's opinion. Thus, it should be more than just a rigid formatting that would in any case be difficult to adapt to the various fields of expertise.

Beyond the wording of each of the recommendations made within one or the other of the roundtables, it is more particularly the homogenous nature of the proceedings of both roundtables that proves the depth of the participants' consensual approach as much as relates to the perfectly structured method that was proposed to them as to the substance of the addressed issues.

These dynamics were also typical of the roundtables devoted to the expert.

The expert

The state of play on the current situation in the European Union revealed significant differences in how judicial expert activity is organised from one country to another.

And yet, as regards the provisions that need to be implemented in order to ensure that an expert has the required qualities or the definition of a code of ethics for experts, the rapporteurs of the relevant roundtables Ms Nienke MULDER, a member of the Experts registration office in the Netherlands, and Mr

Rafa ORELLANA, president of an expert company in Spain and representing the Bar of Barcelona, reported on broadly converging views.

The qualities expected from an expert – high degree of competence in the relevant technical field, impartiality, independence, and loyalty - are so consensual that they raised little debate. The participants also agreed on the fact that these qualities should be sanctioned by a process ending in the registration of the expert on a data repository accessible to all the actors in the field of expertise.
Mr HENDERICKX highlighted the practical importance of providing the judge with a reliable repository that guarantees that the registered experts have the required qualities and comply with ethical obligations.

Beyond the language difficulties arising from the same term covering various concepts in different languages, which will have to be taken into account in the next steps of this project (eventually with the help of the personnel of the Court of Justice of the European Union, who are confronted with this terminology on a regular basis), there was a consensus on the capacitation mechanism leading to the expert's registration on a list.
The participants suggested a separation between national and European remits and recommend:

- at the European level, a definition of the capacitation criteria for experts and a common register based on the collection of existing registries in the various countries of the European Union,
- at the national level, the creation of a procedure that would ensure that the expert-candidate meets the required qualities.

They laid the groundwork for an expert's capacitation criteria - diplomas, professional experience, morality and knowledge of expertise practices - and

insisted on the need for a periodic reassessment of the expert's abilities in light of the continuous vocational training that experts should be made to comply to.

The proposal to establish a European list based on existing national lists is a clear example of the participants' pragmatism and their will to achieve a common data repository as promptly as possible, but it also reflects a more general awareness of the most practical way to advance European construction based on mutual trust and the respect of institutional, structural or cultural differences.

In this respect, the discussions on the nature of the bodies currently in charge of establishing registers of experts in the countries that have them provided precious lessons in that they revealed that very different entities can respond to this mission depending on the considered country (chambers of commerce and industry in Germany, an especially established public body in the Netherlands, judge panels in France).

A reflection on the qualities that give these entities the acknowledged authority in the countries considered should facilitate the designation, in all the countries that do not yet have one, of the most appropriate national authority to establish a register of experts and reinforce mutual trust in the national registration processes.

Clearly, the lively exchanges sparked by the methods adopted within the Eurexpertise project and in particular the organisation of this symposium already in themselves encourage the mutual understanding by the various stakeholders of the mechanisms set up in countries other than their own.

The participants recommended the establishment of a 'status' or corpus of rules setting out the expert's rights and obligations.

Indeed, everyone agrees that being an expert is not an independent profession,

but a position that is taken on more or less frequently by professionals that are recognised in their specialist field – this position does not depend on the professional rules that apply in each specialisation and is submitted to the requirements bestowed on it by its judicial nature.

This specificity of the judicial expert also led the participants to speak in favour of the obligation for judicial experts to sign into an insurance guaranteeing their civil liability.
Indeed, with the exception of immunity from libel suits granted to judicial experts in some countries, experts' civil liability can always be engaged and the obligation of insurance thus appears to be a guarantee for the persons subject to trial as much as for the expert himself.

It is important to note that although few European countries currently have an official judicial status, most of them have adopted codes of ethics that are applicable to the said expert.
Participants ruled in favour of establishing a corpus of rules and a code of ethics that would be recognised at the European level.
They noted that besides executing their mission, judicial experts must have a certain number of virtues, such as integrity and morality, simply *because* they can be called upon to participate in the work of justice, just as judges or lawyers do.
Mr ORELLANA in his presentation drew our attention to considerations for a crucial reflection on the possible scope – the desirable scope - of the content of a code of ethics.
This issue should be the subject of specific work based on the numerous norms that exist in the various countries in order to reach a proposal for a common European norm.

Aware of the importance of complementing the free movement of persons and goods within the European Union with provisions that guarantee the equal treatment of all persons subject to a trial and the judicial security of actions accomplished within the framework of a dispute that is subject to a national jurisdiction and that has cross-border repercussions, all the stakeholders in civil judicial expertise that took part in the symposium expressed their readiness to contribute to a harmonisation of judicial expertise practices in Europe.
They expressed strong agreement on the rules that should frame the call for a judicial expert opinion and the various stages of the measure, namely with regard to the requirements of the European Convention on Human rights and Fundamental Freedoms.

They also laid the groundwork for a European status of judicial experts.
As an answer to the dynamics that had thus been launched, the First President of the Court of Appeal of Versailles, Mr Alain NUEE, closed the proceedings by proposing a European consensus conference in order to harmonise national practices in civil judicial expertise matters and presented the mechanisms for this particular scientific procedure.

Lastly, the reflection already launched by the various stakeholders led them to recommend the creation of a European procedure for civil expertise. This would most certainly contribute to simplifying and accelerating the resolution of cross-border disputes and would remove some of the obstacles in the access to an effective justice system.

Mr NUEE presented a collection of provisions that could make up the core of a European procedure of civil judicial expertise, usable in cross-border disputes or in any court proceedings that could have repercussions in several European Union countries.

Undertaken concurrently, these two complementary approaches should themselves converge and thus reinforce the effectiveness of a uniform European legal framework.