

Civil Justice Procedures and Experts in the European Union

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**New opportunities for experts within alternative dispute resolution –
Requirements for Experts working in ADR**

Michael Cohen and Bernhard Floter



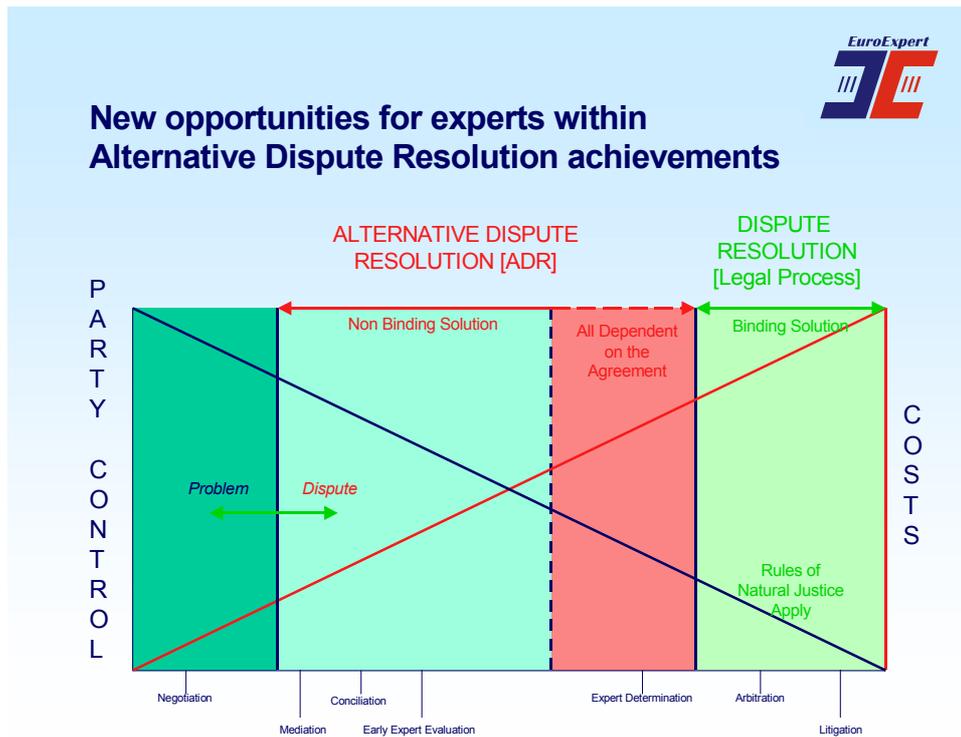
**New opportunities for experts
within alternative dispute resolution
Requirements for Experts working in ADR**

**Bernhard Floter
Michael Cohen**



**ADR (Alternate Dispute Resolution)
is:**

- **Expert Determination**
- **Early Expert Evaluation**
- **Conciliation**
- **Mediation**



Requirements for Experts

- a) **Technical Requirements**
- b) **Personal Requirements**



Requirements for Experts

a) Technical Requirements

- General understanding of the methods of Dispute Resolution
- Knowledge of the chosen Dispute Resolution Method
- Understanding of the anatomy and philosophy of the Method
- Not necessarily Expert in the field of the dispute
- Properly trained



Requirements for Experts

b) Personal Requirements

Ability

- to listen
- to communicate
- to inspire confidence/trust

Interpersonal Skills



Standards for Mediation Training

General Requirements

- **Qualified and experienced trainers/tutors**
- **Training organisation itself complies with standards**
- **Courses shall comply with EU-Standards**



Standards for Mediation Training

Course Requirements

- **Minimum Training and assessment of 40 hours (60 Minutes/hour)**
- **8 practical Role plays**
- **Practical assessment of 3 hours**
- **Assessors should not have taught participants to be assessed**



ABOUT US

EuroExpert - The Organisation for European Expert Associations

For many years national organisations involving Experts and specialist expertise have sought contacts in other countries. Over recent years most organisations involving Experts and specialist expertise have tended to look beyond their national boundaries and have sought cross frontier co-operation and recruitment. Co-operation has quite properly been growing, and this has resulted in the exchange of views and information between the organisations...[\[more\]](#)

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Remuneration of Experts in Europe – Report on the Leipzig research study by EuroExpert

RA Katharina Bleutge

Within the framework of growing legal and economic cross-frontier relationships between the European States, the field of activities for experts is expanding. The demand for well-qualified, international working experts is growing as well.

Next to many other important aspects of this development, e.g. questions of contract law, liability and quantum there is one subject, that is surely of especial interest for the experts - the system and the measurement of the remuneration of an expert in the member states.

For this reason, EuroExpert carried out a study to compare similarities and differences between the systems and delineated important points. With this in mind a questionnaire was produced and answered by members of EuroExpert (Austria, Czech, France, Germany, Hungary, Portugal, Slovakia, Slovenia, Spain & the UK). On the basis of these responses to identical questions it is possible to evaluate, where the systems are comparable and where they are different -in particular the amount and the system of remuneration.

The analysis has shown, that the deviations of the systems are slight. It follows, that the situation in the different states is more similar than expected. For example it can be detected that the remuneration of court appointed experts or experts appointed by public authorities is primarily based on a legally prescribed scale of charge. When privately appointed experts (Party Appointed Expert) are used they are paid on basis of the contract between the parties.

Another similarity is, that the compensation of the experts is normally calculated on an hourly rate - moreover, in all countries there does exist the interdiction of the fee being based on or dependent on the outcome of the case. This shows, that in every member state of EuroExpert, principles of the expert´s work, like independence, impartiality, objectivity and integrity, are also rooted in the remuneration systems.

There are many other similarities such as the process to get paid or questions of additional payments. In some points there are also differences between the states, e.g., different average compensation rates (fees). For example, the average compensation for an expert in Germany lies between € 50 and € 150 per hour whereas in Great Britain the majority of experts earn about € 150 per hour and can possibly earn up to € 750 per hour.

The following shows the questions asked and the responses given by each country. They give a detailed synopsis of similarities and differences of the remuneration-systems of the EuroExpert member states.

Comparative Analysis of the Remuneration-Systems of the EuroExpert Member States of the European Union.

The questions and responses

1.) Is there a legally prescribed scale of charges for experts in your country for

- a. court appointed experts**
- b. experts appointed by public authorities or**
- c. experts appointed by a private client?**

Austria

a. Yes. The charges of court appointed experts are prescribed in the 1975 Fee Entitlement Act. It also includes the procedure for claiming and quantifying the fees and the different elements the expert can claim.

b. Yes. The expert appointed by a public authority in an administration proceeding is equal to an expert in court proceedings with his regard to his entitlement to charges. Many administrative regulations have interpreted the provisions of the Fee Entitlement Act to be also applicable to administration proceedings.

Experts who are staff members of an authority ("ex officio experts") can not claim a remuneration. They have to provide their services in the framework of their service duties.

c. The remuneration normally depends on the contract between the parties; if the agreement is lacking, an adequate remuneration is owed. There are regulations in certain professions (doctors, civil engineers), that contain specific provisions regarding fees.

Often, fee scales, guidelines or recommendations of professional bodies are basis for the determination of which fees are commensurate.

Czech

a./b. Yes. The fees for court appointed experts and experts appointed by public authorities are prescribed in the decree of the ministry of justice.

c. The fees can be based on the same decree but also be agreed differing by the parties.

France

a. No. But there are recommendations and guidelines of each of the "Cour d'Appel", that are strictly applied all over France.

b. Yes. The authorities have prescribed scales, that can differ from ministry to ministry.

c. The remuneration is based on the agreement between the expert and the client. Usually it is three or four times higher than the fee for an CAE.

Germany

a. Yes. There does exist a legally prescribed scale of charge for the CAE since 1931. It was just amended and is called "Justizvergütungs- und Entschädigungsgesetz".

b. Yes. In most of the administrative Proceedings where an expert is appointed, he is paid on the basis of the JVEG (like a CAE). Either this law regulates the applicability in these cases or there are administrative regulations that relegates to the JVEG.

If the expert is part of the authority, he does not get an additional fee when he is acting in compliance with his duties of work.

c. Normally the remuneration depends on the contract between the expert and his client. But there are some professions where there is a scale of charge (e.g. architects and engineers).

Hungary

a./b. Yes. The fees are based on a prescription of the ministry of justice.

c. No. The compensation is based on the agreement between the parties. The prescription of the ministry of justice can be the basis for this contract.

Portugal

- a.** Yes. There is a special code (Código de Custas, CdC) that determines the remuneration of CAE.
- b.** Yes. If the expert is part of a panel of experts, he is paid on the basis of the CdC as well as the CAE. If the expert is acting as an expert witness, the remuneration is based on the agreement between the expert and the authority.
- c.** Yes. The PAE is also remunerated on the basis of the CdC. If he is working as an advisor or an expert witness there are no objections to agree the compensation.

Slovakia

a./b./c. Yes. In all cases the expert's remuneration is based on § 3 of the "Act on Experts, Interpreters and Translators" that was decreed by the ministry of justice. In private cases it is possible, too, to make an agreement with the appointing party.

Slovenia

- a.** Yes.
- b.** No.
- c.** No.

Spain

- a.** No. The fees are fixed by the expert, based on schedules established by Professional Associations or fixed by jurisdictional bodies. Article 423 of the LECiv/1881 defines, that the fees of experts shall be ruled by the persons who are concerned in a detailed and signed statement of fees. The definition of the fees shall correspond to the persons who are concerned, on their own or subject to the regulations established by their Professional Associations. These Professional Associations shall regulate the minimum fees of professions.
- b.** Dito.
- c.** No. The fees of a PAE as an independent professional is freely convenanted between the parties. In some cases the fee is conditioned by the labour relations between the expert and the company that engages his services.

UK

- a.** No. Moreover the CAE is not found too often. Although there are attempts to control fees, there is no prescribed tariff.
- b.** No.
- c.** No.

2. What are the criteria for calculating the compensation?

- a. hourly rate?**
- b. Based on value of the claim/amount of damage?**
- c. Based on outcome of case?**

Austria

There are two different types of calculating the remuneration.

One is, to determine the compensation by the income that the expert would customarily obtain for the same or a similar professional activity outside of court.

In other areas, where the payment of the charges is in the responsibility of the state (e.g. legal aid, penal cases, social-law cases) the fee for the expert is only a fair approximation of the income outside the court. In this area the most important services by experts are compensated on the basis of a scale of lump-sum remunerations contained in a catalogue of services.

- a.** Yes. It contains the time input, the compensation of effort in simple cases and for taking part in hearings. Hourly rates are also used when the income of experts outside of court is also measured in hourly rates.

- b.** Value-based charges are only found for valuating vehicles and real estate. When taking the incomes outside of court as a basis, the amounts indicated in fee scales are also decisive.
- c.** No. This is not contained in the Fee Entitlement Act. Aside from this it would not be compatible to there code of ethics

Czech

- a.** Yes. The fee can be advanced or decreased. Only in criminal proceedings the experts get a fixed charge.
- b.** No.
- c.** No.

France

- a.** Yes. The hourly rate is between 80,- € and 100,- € for CAE or public appointed experts. The hourly rate for a PAE is about 300,- €.
- b.** Usually no. For CAE it is forbidden to claim a compensation based on the value of claim or the amount of damage. This does not apply to private experts, who belong to a judiciary expert company.
- c.** The same answer as b.

Germany

- a.** Yes. For CAE the hourly rate is prescribed in the JVEG and is distinguished by the different professions of the experts. The hourly rate of a PAE can be free agreed and is oriented on the profession and the severity of the expertise.
- b.** Yes. In some areas (e.g. experts for automobiles) it is usual to measure the compensation by the value of the claim or the amount of damage. But there does not exist any legal scale of charges.
- c.** No. it is not possible to base the remuneration of the expert on the outcome of the case. This would be a contradiction to the expert ´s neutrality and objectivity.

Hungary

- a.** Yes. The expert is payed per hour. Only in cases of medical analyses he gets a fixed compensation.
- b.** No.
- c.** No.

Portugal

- a.** Yes, but only for experts that are not appointed by court. In these cases the remuneration is normally agreed on a hourly rate.
- b.** Yes. The remuneration of the CAE is based on the amounts of the dispute prescribed by the regulations of the CdC. There are only rarely cases, where an expert that is not appointed by court, is compensated on the basis of the claim amount.
- c.** No. It is not allowed to base the compensation on the basis of the outcome of the case. This is exceptionally possible, when the expert is acting as an expert advisor.

Slovakia

- a.** Yes. The expert has to define the number of hours that were necessary to produce the expert opinion.
- b.** Yes. The remuneration can be defined by a share from the outcome value.

Slovenia

- a. No.
- b. No.
- c. No.

The compensation is divided in several sections. The experts get a certain amount for sections, e.g.:

- study of the file
- collecting and studying extra materials
- examination (person) or viewing (location)
- written report of the expert opinion
- comment on the expert opinion in a hearing

Spain

- a. Yes.
- b. Yes.

UK

- a. Yes. The normal fee basis is on hourly rate for preparation and daily rate for court appearance.
- b. No.
- c. No. It is strictly forbidden for an expert to work on a payment by result basis.

3. Are there differences in the scale of payment between the various specialisations (e.g. medical, IT, construction) of the expert? If the answer is “yes”, which criteria are used?**Austria**

Yes. The Fee Entitlement Act distinguishes charges for different types of activities, e.g. doctors, anthropologists, vehicle matters valuation of buildings etc. The law refers in this case to the income for work outside of court.

Czech

No. There are no differences between the specialisations.

France

Yes. The CAE are submitted to a non-prescribed, but indicative scale of charges of each “Cour d’ Appel”. There are three differences:

Translators and Interpreters are paid less than the other experts

Experts by the “Cour de Cassation” have a compensation that is 20%-30% higher than the usual hourly rate

In difficult cases it is possible for the court to double the hourly rate. It is necessary – but normally no problem – to get the permission of the Ministry of finance or the controllers in charge of their budget

Germany

Yes. There are broad differences between the various specialisation of PAE as well as the CAE. Usually the craft-experts get a lower compensation as an academic-expert. The CAE gets a remuneration based on the scale of charges that is legally prescribed in the JVEG. The hourly rate depends on what profession the expert is acting in.

Hungary

No. There are no differences in the scale of charges for the different scopes of expert opinions. In spite of this the level of compensation is conditioned by the subject of the expert.

Portugal

Based on the principle, that the court should appoint a public body as an expert, the remuneration is paid as cost. So the difference depends on what costs the public body (e.g. a forensic institute) expends.

Slovakia

Yes. There are differences in the remuneration, depending on the scope of the expert. The minimum fee defined in the Ordinance 491/2004 Coll. is about € 20. An expert in medicine and an expert in law can charge about € 15 for every started hour.

Slovenia

No.

Spain

The experts are usually academic persons (with the exception of car-experts) – there fees are normally fixed by agreement.

UK

Yes. There are differences between disciplines and individual experts. The criteria are primarily market forces.

4. Is the degree of difficulty to formulate an expert opinion a reason for a different compensation? If the answer is “yes”, which criteria are used?**Austria**

Yes. This is also prescribed in the Fees Entitlement Act and plays a role e.g. in the charges established in the FEA with medical examinations or expert opinions on vehicle technology.

Czech

Yes. It depends on the degree of difficulty and the required expertise.

France

Generally not. But there can be reasons for a higher compensation, e.g. a drastically increase of the necessary time because of high technical difficulties. It is also thinkable in cases, where it is difficult to find an expert that corresponds to the criteria of the court.

Germany

Not for CAE. The compensation is only based on the profession and the necessary time he had to invest. But a difficult case normally increases the time the expert needs, so that his remuneration is accordingly higher.

Hungary

Yes. It depends on the complexity and the methods.

Portugal

The degree of difficulty is a reason for a different compensation for experts that are not appointed by the court. For latter, this is no reason, unless you are a public body appointed as expert.

Slovakia

Yes. In difficult cases the remuneration of the expert can increase at most 30 % over the base fee.

Slovenia

Yes. The experts defines the degree of difficulty of his expert opinion.

Spain

Yes. The higher the degree of difficulty is the higher will be the contracted fee.

UK

Yes. But this is also depending on the market forces.

5. Are there additional payments (beyond the fee proper) permitted – for example an expense allowance? If “yes”, what can be claimed for the following, for example:

travel costs
photocopies
software
tests
equipment
others

Austria

Yes. All variable expenses necessarily incurred with the work of an expert can be claimed, other than fixed overheads. The expert can claim:

travel costs
costs for auxiliary staff
other expenses
remuneration for time input
compensation for effort

Czech

Yes. All of the mentioned expenses can be charged. The expert can also claim the expenses for his loss of profit and the transcription of his expertise.

France

Yes. All the mentioned items can be compensated.

Germany

Yes.

The PAE can charge all the mentioned expenses, when he agreed this in the contract with his client. The CAE can charge the expenses that are prescribed in the “JVEG”; these are those mentioned above.

Hungary

Yes. The additional expenses can be recalimed by the expert. They are part of the complete charge.

Portugal

Yes. When the expert is a public body, these payments are paid as cost.

The PAE can only charge the costs for travelling, if his domicile is outside the court circle.

Slovakia

Yes. All reasonable expenses according to the order can be charged. Next to the mentioned points he can also reclaim the costs for loss of time.

Slovenia

Yes. The expert can also get additional payments for expenses for food, lodging and loss of wage.

Spain

Yes. All expenses that results from the commission can be reimbursed.

UK

Yes. All of the above can be claimed plus other legitimate expense that are reasonable.

6. Are you permitted to have assistance when preparing expert opinions? If so, are there any requirements and are you able to reclaim the costs?**Austria**

These expenses are refundable when the auxiliary staff was indispensable and necessary, in line with the line of scope of the expert's activities. The amount of the costs for the assistance depends on the actual expense. The fee scales can also be used as a guidance.

Czech

Yes. The costs for this assistance can be reclaimed if the court or the public authority agreed with the usage of this assistance.

France

In cases that deal with the subject area of the expert, it is not allowed to have assistance. In other fields of competence the court has to decide if this is necessary and can be accepted. The cost may be (?) compensated separately.

Germany

Yes.

Although the CAE expert has the duty to make his expertise "in person", he is allowed to have assistance. Premise is, that he controls and supervises his auxiliary staff. He is responsible for the work of this personal,, that is only allowed to assist.

This applies also to the PAE. But it is possible to make an agreement allowing the auxiliary staff to have more competence and responsibility than just assistance.

In every case the expert has to signify type and extend of the assistance.

Hungary

Yes. If the expert has no special knowledge in some parts of the expertise he can call in another expert. The costs for this assistance can be charged.

Portugal

Yes.

But the extend and type of assistance has to be signified.

The PAE can not claim the costs of this assistance.

Slovakia

Yes. For partial questions the expert can call in a professional consultant. The court decides about this additional cost; normally these expenses can be charged when they were reasonable.

Slovenia

No.

Spain

Yes. The costs for the assistance are included in the fee of the expert.

UK

Yes.

It should be discussed with those appointing and instructing the expert. In any event it should be clearly shown on the face of the report. Secretarial assistance is normally expected to be included within the expert's fees, but other assistance, if approved, is claimable.

7. What is the average compensation (fee) for an expert (between...and)?**Austria**

It can not be given an average fee, because it depends on the income earned by the expert outside of court appointment and there are no surveys on this subject.

Czech

There is no presentable average compensation. The basic fee can be defined in between three and eleven Euro per hour.

France

The average hourly compensation for a CAE can be estimated between 80,- and 105,- Euro.

Germany

The remuneration of a PAE is between 50,- and 150,- Euro per hour plus tax.

The CAE compensation fee lies between 50,- and 95,- Euro plus tax.

Hungary

The compensation defined in the fee decree is between € 8 and € 40 per hour. It is difficult to define an average compensation out of this, but it can be fixed about € 400.

Portugal

The average compensation for a CAE depends on the value of claim. E.g.: if the value of claim is 25.000 € the daily rate of the expert is between 95,- and 190,- €; if it is 50.000,- €, it is between 135,- and 270,- per day.

The expert witness or the expert advisor gets a hourly rate that is rarely lower than 40,- €.

Spain

Because the fees are freely fixed, it can't be given an average compensation.

Slovakia

Because of the differences in remuneration of experts it is hard to define an average compensation. It can be fixed between € 100 and € 380 and depends on the complexity and circumstances of the case.

Slovenia

The average compensation fee is between € 450 and € 1.000.

UK

The average fee is hard to specify, because there are differences between professions, regions of the country, inexperienced or world-known experts.

The majority of experts earns about 150,00 € per hour. The lowest is in the region of 75,00 € and the highest about 750,00 € per hour.

8. Can there be deviations from any fee tariff that is in force? If so, what? How does the expert ensure that he is paid and what remedies are available to him if he is not?**Austria**

The PAE can make contract-agreements about the height of his compensation. But he has to heed the codes of ethics.

The CAE can get a higher fee based on the consent of the parties. It is also possible – in discretion of the court – to reduce the fee up to one fourth for the expert's effort, when he is culpable of delay or deficiencies in his work as an expert.

The claim of the expert against the state is ensured by rule. If he wants to get the full amount of his income outside of court, he has to waive the state-compensation and collect his fee from the parties. This can be risky, unless advance payments were made to cover the costs.

Normally the compensation is fixed as a fair approximation to the income obtained outside of court.

Czech

Next to the base fee the expert can assert additional value in cases of "express" – work (50 %) or a night shift or weekend shift premium. He can charge 10 % over the base fee for proving another's expert opinion and 20 % for an expertise with a high difficulty.

The expert has got legal remedies to claim his charge either against the court or the public body or against the party of the contract.

France

Usually you can not deviate from the guidelines of the "Cour d'Appel", except the cases, where the court cannot take the expert up on his promise.

The expert has to ask for a "taxation ordinance", that the court has to sign. The court can evaluate the tax in its discretion.

If the parties contest this ordinance, the dispute is solved by the president of the Court of Appeal. Its decision can only be discussed by the "Cour de Cassation".

It is possible and suggestive to ask for the deposit of his estimated costs to ensure his claim.

Germany

Irrespective architects and engineers there are no tariffs for the remuneration of PAEs. In the former case it is not possible to deviate from the prescribed tariffs; it is only allowed to claim additional costs next to the fee.

A deviation from the fee tariff of CAEs is not allowed. If the expert is not listed in this legal tariff, he can request the court to fix a remuneration. Against this assessment the expert can enter caveat.

The PAE has to sue to enforce his claim.

Hungary

Yes. If the expert has to pass an expert opinion that is very difficult, he has got the possibility to charge two and a half times of the base fee.

In private cases the party that requires the expert opinion has to make a payment in advance to make sure that the expert's fee is covered. In criminal cases the state has to pay this advancement. The fee is then fixed by the court. Against this decision the expert can appeal.

Portugal

For the remuneration of a CAE the court is responsible and has the duty to compensate the expert-opinion. The PAE has to enforce his claim by the common law.

Slovakia

Yes. If there is an agreement between the parties, the remuneration can be fixed different from the defined tariff.

The court decides about the expert fee. This decision may be appealed by the expert and also by the parties.

Slovenia

It exists no possibility for any deviations from the fee tariff that is in force.

There are neither legal remedies available for the expert to claim his remuneration. His fee is ensured by the court which orders the party to advance the necessary amount to cover the expert's costs. If this amount is not paid the expert opinion shall not be produced.

Spain

The expert can claim the fees derived from his procedural actions from the party that is obligated to compensate the experts costs, without waiting for the end of the proceeding. When the decision which party has to pay the costs is firm, the expert should submit a detailed and justified statement of his fees and expenses at the office of the court clerk, so these costs can be included in the appraisal of costs. These fees can be challenged, according to the General Standards. In this case the affected party and the Professional Association are heard to come to a conclusion.

UK

There do not exist any fee tariffs – most things are negotiable. To ensure that the expert gets his compensation it is recommended, that he has an effective contract with his client. The Client and the lawyer are responsible for payment of the entire fees.

The expert can sue them for breach of contract, when the client and/or the lawyer don't pay the agreed compensation.

9. Can the expert receive either fees in advance ore stage payments?**Austria**

Yes. It must be paid an adequate amount in advance, if the expert applies it. There is also the possibility to apply multiple advance payments, when the work of the expert takes a longer period of time.

Although the Fee Entitlement Act prescribes, that there should be only one single decision about the expert's fee to cover his remuneration, the case law of first-instant courts allow the settlement of fees in several stages.

Czech

Yes. In reasonable cases, especially to compensate his cash expenditures.

France

Yes. They can be claimed in penal cases in amount of ca. 30%, when payments are justified by costs and technical advances. Otherwise the payment is not anticipated.

Germany

Yes. The CAE as well as the PAE can claim fees in advance and stage payments. The CAE has to request the advanced payments, especially when the work takes a long time.

The PAE has to make an agreement with his client. If he doesn't, he only can claim the compensation after he finished his expert opinion.

Hungary

No. When the expert opinion is submitted to the court, the compensation of the expert is defined by the court. Then the expert gets the complete charge.

Slovakia

Yes. The expert may require an adequate advance payment from the party that appointed him. In particular cases the expert is authorized to refuse the appointment for an expert opinion, if he doesn't get an advance payment.

Slovenia

No. The expert can neither receive fees in advance nor stage payments.

Spain

Yes. The expert may request whatever financial cover he considers is necessary. This will be on account of the final settlement. The party that proposed the expertise evidence, has to deposit the specified amount in the "Court's Deposits and Consignment Account."

UK

Yes, either or both. In some sectors of the market, for example construction, this is more common than others.

List of abbreviations:

CAE: Court appointed expert

PAE: Private appointed expert

FEA: Fee Entitlement Act

JVEG: Justizvergütungs- und -entschädigungsgesetz

CdC: Código de Custas

e.g.: for example

Relaunch of the Lisbon Strategy – Services and Experts

A summary by Alan Tyrrell, Queens Counsel, former Member of the European Parliament

The name “LISBON” has reverberated throughout the European Union for 5 years as a one-word summary of a vast programme of reform comprising 28 main objectives, 128 sub-objectives and 117 indicators, giving rise to 300 annual reports. It set out to create a Union “capable of sustained economic growth with more and better jobs, greater social cohesion, and respect for the environment.” It foresaw “the most dynamic and competitive knowledge-based economy in the world by 2010”. It was adopted by the Heads of Government of the Member States at the summit meeting held in Lisbon in March 2000.

The result of all the activity following Lisbon was visibly disappointing. Various unforeseen events were suggested as the culprits; the dot-com bubble burst; there was a downturn in world trade; terrorist attacks; the war in Iraq. And others. The Commission has blamed the lack of effort by some Member States. So in 2004 the Council and the Commission decided that progress should be reviewed in 2005 at the half-way stage. Wim Kok, the former prime Minister of the Netherlands, was appointed to conduct it. His report was presented at the summit meeting in March this year. He concluded that little progress had been made in the first 5 years. Growth was stuck at around 1% Productivity growth had actually fallen. Unemployment remained at above 8%, and much more in some key countries. He made some recommendations which were adopted: most importantly that the Lisbon strategy should concentrate on growth and unemployment. “If we do not act immediately, our social and environmental models will be unaffordable”. The Lisbon strategy was relaunched.

It was against this background that in March 2004 the Commission proposed the Services Directive. It was the most daring Commission initiative for many years.

Of the four freedoms established by the Treaty of Rome, three have been substantially achieved in the last half century. Free movement of capital is virtually complete. Free movement of goods is now taken for granted, with some few exceptions. Free movement of workers is well under way and widely used. But free movement of services is still a dream.

Yet during that half century the EU economy has veered from being primarily a market in goods to a market in services. The market in services generates 66% of the gross national product of the European Union and provides 70% of its jobs. This proportion is increasing. The Commission realised that the relaunched Lisbon strategy could only be found in the expansion of the market in services. It had claimed that “there is a huge gap between the vision of a EU economy and the reality as experienced by European citizens and service providers”. It envisaged that if the gap were closed, the EU economy would be stimulated to such an extent that the Lisbon strategy came into eyeshot. Amongst those services, of course, are experts. They are quite few in numbers but make a disproportionate contribution to EU competitiveness.

From the 1970s the Commission had been working away at creating a common market in services on a sector-by-sector basis. Starting with medical practitioners, then lawyers, it produced a succession of directives harmonising professional practices and providing for the mutual recognition of qualifications demonstrating knowledge and skill. These however involved authorisations, registrations, and other barriers. They remained complex, confusing, and costly. They were hugely discouraging. They continued to have the effect of depriving, in particular, small business and the self-employed of their Treaty right to provide services outside their own State. The UK Federation of Small Business surveyed its 187000 members and found that only 1% provided services in other Member States. Since small business accounts for 58% of the GDP in the EU, this is a major loss not only to them but to all Europeans, whose choice of service provider is limited, with anti-competitive consequences and whose standard and quality of life, income and pensions are adversely affected by the lack of growth.

The draft Services Directive, through its 47 articles, broadly breaks down into three action areas.

First, it deals with the right of service providers to establish. This right has been hemmed in by discouraging barriers. The draft proposes to reduce these. It requires Member States to set up a

contact point, being a one-stop shop to which all providers can go to get all formalities completed. It lays down criteria for authorisations, and proposals to simplify and clarify them. Some well-favoured national provisions are banned. These include requirements on the location of a registered office, a prohibition on being established in more than one Member State, a requirement to demonstrate demand, and an obligation to register. Other national provisions, although not banned, may only be retained if they are shown to be in the public interest and objectively justified: e.g. a minimum capital requirement, or maximum or minimum tariffs. Secondly, for those established in one State, but seeking to provide services in another without establishing there, the Commission proposes a new regime. It is called "the country of origin principle". It means that the service provider is subject only to the law of the country in which he is established wherever in the EU the service is provided. These services are to come under the supervision of his "home" country, where he is established. A mechanism is proposed to provide assistance to the recipient of such services, but consumers will have the legal right to choose to receive them. As with establishment, certain common barriers erected by Member States are to be banned. The provider need not have an establishment in the visited State. He need not get authorisation or register or even notify the visited State's authorities. He need have no address or agent in the visited State. But he may set up such infrastructure as he needs to provide the service, including an office. He need not comply with national requirements as to the way he works, but is entitled freely to contract with the recipient. This includes choice of law. However, some services are excluded. These include some where there are already in place sectoral directives, such as financial services, and some special/official occupations such as notaries.

Thirdly, obligations are imposed on Member States to make the Directive work.

The draft Directive ran into a political storm. The French and German Governments have said they cannot accept it. In the French referendum campaign posters pictured a Polish plumber as a nightmare figure who would come to France to take French jobs. In particular, opposition has focussed on the "country of origin principle". In response, the Commission has said it will amend the proposal, but only after the European Parliament, which is a co-legislator, has voted on it as it stands. Its Rapporteur produced a report in committee calling on the Commission to withdraw it, but that made insufficient headway. The committee was due to vote last month, but since there are some 1500 amendments tabled which would take an estimated 012 hours to vote on, the vote has been delayed until 20/21 November, with the final vote in plenary session in the week 16-19 January 2006.

The opening-up of the the internal market in services will have a long-term effect on experts. Many of them have a professional or academic qualification which, if recognised in their home State, will be automatically recognised wherever in the EU their services are required. Some are already entitled to rely on that qualification under mutual recognition of qualifications provisions put in place by sectoral directives, though as experience shows these are sometimes subject to "topping-up" requirements in some other Member States. Under the draft Directive, experts in extra-judicial proceedings will be accountable only to their own professional body and their client. The Rules of Procedure of the European Court of Justice provide for expert evidence to be given in that Court, and although the way in which such evidence may be given and the circumstances in which it may be given are regulated by the Rules, there is no definition of expert to set up a restrictive barrier. As far as I am aware, this freedom has not given rise to any problems. It is to be expected that experts will be able to contribute to and benefit from the growth foreseen to follow, if a free common market in services is created.

Questionnaire session:**European civil law: convergence and future schedules steps – evaluation of the Practices of Austria, France, Germany, Portugal and UK****1. Is the expert liable for an incorrect expert opinion?**

YES / NO

If the answer is “yes”

Is there a special procedure for establishing a claim against the expert (or is it the normal legal process)?

Who can claim against the expert (the court / the party commissioning the report/ any of the parties in the case?)

is there a possibility to exclude or limit the liability?

is there a possibility to limit the amount for which the expert would be responsible?

Is there a formula eg the expert’s fees?

2. Can the expert be replaced?

by a party

YES / NO

If the answer is “yes”

In what circumstances eg the expert is not impartial or is not competent in the specific area of the dispute

What is the procedure for replacement?

by the court

YES / NO?

If the answer is “yes”

Can the court on its own initiative replace an expert?

If so in what circumstances eg the expert is not impartial or is not competent in the specific area of the dispute?

What is the procedure for replacement?

3. Is the expert allowed to advertise his expert activities in litigation and other dispute resolution for example, arbitration?

YES / NO

If the answer is “yes”

What restrictions (if any) are there on the expert’s advertising and other activities?

Do any restrictions apply to all professions or only to some eg doctors? In which case give details.

Questionnaire session: Responses France

Peter James

1. Is the expert liable for an incorrect expert opinion?

Yes, we have cases of experts who have been sued because of that.

1.1. Is there a special procedure for establishing a claim against the expert (or is it the normal legal process)?

There is a special procedure to establish a claim against the experts in the specific case of an incorrect expert opinion. In that case, the claim of perjury is brought against the expert and the case goes to the Court of Assises, which may be considered as normal legal process, but on a high level.

1.2. Who can claim against the expert (the court/the party commissioning the report/any for the parties in the case ?)

Any party in the case can claim against the expert, and the court will deal with the case.

1.3 Is there a possibility to exclude or limit the liability ?

No, there is no possibility to exclude or limit the liability of the expert.

1.4. Is there a possibility to limit the amount for which the expert would be responsible ?

No, there isn't

2. Can the expert be replaced by a party ?

In France, the expert is nominated by the judge and can only be replaced by him, and not by a party.

by a party YES / NO

Yes

2.1. In what circumstances eg the expert is not impartial or is not competent in the specific area of the dispute ?

There is practically no way to stop the expert from going to the end of the case for which he has been nominated by the judge, even if he is incompetent. However, if partiality may be demonstrated while the expert is operating, one can make an incident of procedure, go to the court to have it discussed, and may eventually have the expert replaced as the case is ongoing.

2.2. What is the procedure for replacement ?

See 2.1.

b) by the court? YES / NO

Yes.

2.3. Can the court on its own initiative replace an expert ?

See 2.1. In France, sometimes, it happens that the court extends the expertise to more than one expert, creating thereby a "Group of experts" which includes the first one, but thereby diminishes his influence on the issue of the case.

2.4. If so, in what circumstances eg the expert is not impartial or is not competent in the specific area of the dispute ?

See 2.1.

2.5. What is the procedure for replacement ?

An incident for the replacement of the expert may be presented to the Court ends. The judge in front of whom the incident is pleaded, may then decide to replace the expert. His decision is binding to the expert.

3. Is the expert allowed to advertise his expert activities in litigation and other dispute resolution for example, arbitration ?

No

Questionnaire session: Responses Germany

RA Wolfgang Jacobs

1. Is the expert liable for an incorrect expert opinion?

Yes. The expert is liable for an incorrect expert opinion when commissioned by private persons and courts alike.

If the answer is “yes”

1.1. Is there a special procedure for establishing a claim against the expert (or is it the normal legal process)?

a. If the expert working for the courts prepared an incorrect expert opinion with wilful intent or gross negligence and this incorrect expert opinion forms the basis of a court decision, the party suffering damage due to the subsequent (incorrect) judgement must take legal action against the expert in ordinary proceedings for compensation of this damage (§ 839 a of the German Civil Code, BGB).

b. In the area of private law there is also no special procedure to assert claims against an expert. Giving instructions to prepare an expert opinion constitutes a “normal” contract for work and services between client and expert so that the general provisions on contractual liability and/or liability in tort and the assertion in court apply.

1.2. Who can claim against the expert (the court / the party commissioning the report/ any of the parties in the case?)

The party suffering damage from the demonstrably incorrect expert opinion can always bring action, whether this damage results from a decision based on the incorrect expert opinion or from a breach of contractual duties under private contract law. The court itself cannot assert damage claims against the expert. Under certain circumstances a third party may have his own liability claim against an expert. Liability of an expert towards any such third party comes into consideration if the expert opinion was also recognisably prepared for submission to third parties by the client (e.g. the buyer of a plot of land, an insurance company or the bank) and if he then suffers damage as a result of the incorrect expert opinion.

1.3. Is there a possibility to exclude or limit the liability?

a. The expert has no possibility to rule out liability or restrict liability when commissioned by a court. However, the law restricts his liability to wilful intent and gross negligence (§ 839 a German Civil Code - BGB).

b. If the expert receives his instructions from a private person it is possible to limit liability to a certain extent: it may be ruled out for gross and simple negligence in cases of individual agreement, whereby the limits of unconscionability (§ 138 German Civil Code - BGB) and law infringement (§134 German Civil Code - BGB) must be observed. Liability cannot be ruled out for wilful intent. By contrast, publicly certified experts may not rule out liability for gross negligence in individual agreements according to the rules of the bodies responsible for them (refer, for example, to § 14 of the Specimen Code of Practise for Experts of the Federation of German Chambers of Industry and Commerce).

c. With respect to contractual clauses in a specimen contract (General Terms of Business) it is only usually possible to rule out liability for slight negligence of an accessory contractual duty. The amount of liability in this case can be limited to typical damage foreseeable when entering into the contract.

1.4 Is there a possibility to limit the amount for which the expert would be responsible?

Yes. There is a possibility to limit the amount for which the expert would be responsible; in addition to the case explained under point c, this (only) applies to individual agreements. In this respect the amount of liability can be restricted for every type of negligence.

1.5. Is there a formula e.g. the expert's fees?

No. The general statutory provisions apply.

2. Can the expert be replaced?

a) by a party

Yes.

If the answer is “yes”

2.1 In what circumstances e.g. the expert is not impartial or is not competent in the specific area of the dispute

Yes. The expert can be refused by both parties if there is a reason for this refusal.

The expert can be refused for the following reasons:

friendship or animosity or also business relations with one party;

taking up contact with only one party when preparing the expert opinion;

inspection of site with only one party;

preparation of a private expert opinion before court proceedings;

inappropriate choice of expression when making comment on views of the parties;

giving of advice to only one party after commissioning;

acceptance of (pecuniary) gifts.

2.2. What is the procedure for replacement?

The party rejecting the expert must give reasons for the rejection. This must happen before the expert opinion is prepared unless the reason for the rejection is derived from the expert opinion itself. The court decides on replacement.

b) by the court

Yes.

If the answer is “yes”

2.3. Can the court on its own initiative replace an expert?

Yes.

2.4 If so in what circumstances e.g. the expert is not impartial or is not competent in the specific area of the dispute?

Pursuant to §§ 404 (1), (2), 408 (1) of the German Code of Civil Procedure (ZPO) the court may decide at its own discretion to appoint a different expert to replace the first and also to release an expert from the duty to prepare an expert opinion if there are substantial reasons so to do (e.g. due to excessive work load).

The court may also replace the expert if he fails to prepare the expert opinion after a lengthy period of time despite reminder.

2.5 . What is the procedure for replacement?

The replacement is effected by amending the court decision (order to take evidence) and appointing a new expert.

3. Is the expert allowed to advertise his expert activities in litigation and other dispute resolution for example, arbitration?

Yes. Experts may advertise but are subject to certain restrictions.

If the answer is “yes”

3.1. What restrictions (if any) are there on the expert’s advertising and other activities?

There is no special law regulating the possibilities of and limits to advertising by experts.

Whether advertising activities are admissible or not is generally determined by the German Act on Unfair Competition (§§ 3, 5 UWG) which is applicable to all parties. Accordingly, misleading or unconscionable advertising activities are forbidden.

Greater constraints are placed on the advertising activities of publicly appointed and certified experts. Owing to their special position of trust with courts and consumers the regulations of the respective certification bodies apply (rules of procedure for experts) in that special attention must be given to serious, objective and restrained advertising activities. Advertising using the public certification and the official stamp of the publicly certified expert is only admissible in the area for which the certification has been granted. It is even a punishable offence to advertise a public certification if none exists (§ 132 a (1) No. 3 German Criminal Code).

3.2. Do any restrictions apply to all professions or only to some e.g. doctors? In which case give details.

Irrespective of his professional activities every expert is subject to the provisions of the German Act on Unfair Competition (UWG) and (in the case of public certification) the corresponding rules of procedure for experts. However, differences exist in the case of publicly certified experts for craft trades in that these are merely restricted to pure information advertising and that in all cases advertising must be separated from other commercial activities. Furthermore, the publicly certified expert for the craft trades may only form partnerships with other publicly certified experts, whilst publicly certified experts from other areas may also form partnerships with experts having no public certification.

Questionnaire session: Responses Portugal
António Louro

1. Is the expert liable for an incorrect expert opinion?

YES / NO

The answer is Yes. The judge can fine or destitute the Expert if he/she does not perform with diligence and competence.

1.1. Is there a special procedure for establishing a claim against the expert (or is it the normal legal process)?

No this is to be done by the Judge (only)

1.2. Who can claim against the expert (the court / the party commissioning the report / any of the parties in the case)?

The Judge e.g. the Court

1.3. Is there a possibility to exclude or limit the liability?

No but the liability is limit to the fine, in accordance with the Law

1.4. Is there the possibility to limit the amount for which the expert would be responsible?

No

1.5. Is there a formula, e.g. the expert's fees?

No

2. Can the expert be replaced by a party ?

Yes

a) by a party YES / NO

Yes

2.1. In what circumstances, e.g. the expert is not impartial or is not competent in the specific area of the dispute?

The Expert can be replaced if he breaches in any way the rules of independence and impartiality applicable. (Similar to the judges and Magistrates)

2.2. What is the procedure for replacement?

The party must bring to the Judge attention the fact, and he will discharge the Expert

b) by the Court Yes / No

Yes

2.3. Can the court replace an expert on its own initiative?

Yes if the Expert is not competent and diligent and, or breaches the independence and impartiality code

2.4. If so, in what circumstances, e.g. the expert is not impartial or is not competent in the specific area of the dispute?

Not competent and diligent

2.5. What is the procedure for replacement?

The Judge will discharge the Expert

3. Is the expert allowed to advertise his expert activities in litigation and other dispute resolution, for example, arbitration?

YES / NO

Yes

3.1. What restrictions (if any) are there on the expert's advertising and other activities?

There are no restrictions

3.2. Do any restrictions apply to all professions or only to some, e.g. doctors? In which case give details.

No

Questionnaire session: Responses United Kingdom

Nicola Cohen

Introduction

The United Kingdom is not a single legal jurisdiction in the way that, for example, Austria appears to be. The following are the principal jurisdictions:

England & Wales (This is a single jurisdiction)

Scotland

Northern Ireland.

Other jurisdictions also exist – Isle of Man, Channel Islands which is split into Guernsey and Jersey.

Although there are similarities between each of the jurisdictions there are also differences and it can therefore be misleading or even wrong to assume that what pertains to one will also apply to another. This Response addresses the jurisdiction of England & Wales, which administers English Law. Throughout these notes ‘expert’ means ‘expert witness’ unless otherwise specified. Questions are numbered 9 – 11 as they follow on from those of the Leipzig Symposium.

1. Is the expert liable for an incorrect expert opinion?

YES/NO

It is not possible to answer this yes or no as the answer will depend upon the status of the expert and possibly the work that was being undertaken. In simple terms an expert witness has immunity from suit and cannot be sued. This raises the question of who is an expert witness. Unlike the Civil Law system the Common Law only recognises an expert witness for a specific case. Furthermore there is a problem with knowing when an expert who may be researching and preparing actually can be termed an expert witness.

It is generally agreed that when the expert wrote his report and gave evidence he cannot be sued should he have been negligent. It should also be noted that in English Law there is no duty to be right or correct, only a duty to take proper care with the work. What is being provided by an expert is his opinion based on his expertise and experience – as opposed to a guarantee that the judge will accept his opinion.

As an alternative to being an expert witness an expert may be an expert adviser. The expert advise does not appear before the court or tribunal and his duty is solely to the party appointing him. Accordingly he is fully liable should he be negligent (fail to take proper care) with his opinion or advice.

If the answer is “yes”

These questions are answered on the assumption that the expert has a liability.

1.1. Is there a special procedure for establishing a claim against the expert (or is it the normal legal process)?

The normal legal process

1.2. Who can claim against the expert (the court/the party commissioning the report/any of the parties in the case?)

Definitely the commissioning party. There is a possible argument that other parties in the case might have a claim but we have no experience if this and it seems unlikely to succeed. It is however possible for an expert witness to be liable for what is known as ‘wasted costs’ to any party. This would involve a court order

1.3. Is there a possibility to exclude or limit the liability?

Yes there is a possibility however any such attempt would have to be ‘reasonable’ in the eyes of the law. It is not normal for an expert to try to limit or exclude his liability. . It is interesting that Barristers have recently been advised by the Bar Council that for them to do so in their opinions

may be professional misconduct – this is also a small risk for an expert should he seek to limit his liability for his opinions.

1.4. Is there a possibility to limit the amount for which the expert would be responsible?

The same answer as 1.3

1.5. Is there a formula eg the expert's fees?

No

2. Can the expert be replaced?

a) by a party YES/NO?

The answer once again is neither a straight yes or no. A party is not obliged to continue with an expert witness but cannot adduce evidence from a replacement expert witness without the permission of the court. This is not a formality. Permission can be refused completely or could be granted on condition that, for example, the other expert's report or draft report is disclosed to the court and to the other side (as it may be that the reason for replacing the first expert was because he gave an adverse opinion) but cannot replace the expert without the permission of the court. This is not a formality.

If the answer is "yes"

These questions are answered on the basis that the party wishes to replace

2.1. In what circumstances eg the expert is not impartial or is not competent in the specific area of the dispute

It can be for any reason. – but for the court's permission be granted there would need to be good grounds

2.2. What is the procedure for replacement?

Application has to be made to the court.

b) by the court YES/NO?

NO. The court does not have the ability to replace an expert.

3. Is the expert allowed to advertise his expert activities in litigation and other dispute resolution for example, arbitration?

YES / NO

YES

3.1. What restrictions (if any) are there on the expert's advertising and other activities?

There are no restrictions. However The Academy of Experts Code of Practice requires:

"An Expert shall not publicise their practice in any manner that may reasonably be regarded as being in bad taste. Publicity must not be inaccurate or misleading in any way."

3.2. Do any restrictions apply to all professions or only to some eg doctors? In which case give details.

The answer given to Question 3.1 applies to all experts irrespective of their profession. However each expert also has to comply with the regulations of his primary profession. These vary. Some are without restriction whilst others, for example medical doctors do have restrictions. The restrictions are less onerous now than they were a few years ago.

Questionnaire session Responses Austria

Prof. Dr. Matthias Rant

1. Is the expert liable for an incorrect expert opinion?

YES / NO

Yes.

1.1. Is there a special procedure for establishing a claim against the expert (or is it the normal legal process)?

The liability on expert witnesses appointed by the court does not differ from the liability under general private law and may therefore be claimed in the same manner. In particular, the activities of expert witnesses in court proceedings do not trigger any official liability of the state.

1.2. Who can claim against the expert (the court / the party commissioning the report / any of the parties in the case)?

As a rule, the state – in which jurisdiction is vested – cannot raise a claim, because the state usually does not suffer any damage from an incorrect expert opinion. However, incorrect expert reports have disciplinary consequences. It is a well-established fact that the parties in a litigation may file claims regarding the damage that is caused by an incorrect opinion/report by an expert appointed by the court. To what extent third parties, who have suffered a damage, are entitled to submit claims is a question that causes difficulties as to the applicable limits, but which also crops up in connection with general legislation on damages.

1.3. Is there a possibility to exclude or limit the liability?

It is not possible to do so in case of an expert appointed by court. Experts commissioned by parties may exclude their liability within the general limits (i.e. as a rule not for deliberate actions, and only to a limited extent with regard to gross negligence).

1.4. Is there the possibility to limit the amount for which the expert would be responsible?

Again, experts appointed by the court do not have this possibility. General rules apply to experts commissioned by the parties.

1.5 Is there a formula, e.g. the expert's fees?

No.

2. Can the expert be replaced (rejected)?

a) by a party YES / NO

Yes, an expert may be rejected.

2.1. In what circumstances, e.g. the expert is not impartial or is not competent in the specific area of the dispute?

It is not possible to reject an expert without giving any reason.

If the expert himself/herself is a party, a representative of a party or a relative or in-law relative of a party, as well as in cases pertaining to foster relatives, then he/she cannot assume an activity for the court. The parties may reject an expert who is nevertheless appointed by the court.

Moreover, an expert may be rejected – just like a judge – if there is sufficient ground to doubt his/her full impartiality.

Examples in this respect are to side with one party (one-sided, non-objective conduct), prejudice, a close relationship to one of the parties, conflicts with one of the parties, or the expert's own material, legal or other interests of social relevance in the outcome of the litigation.

2.2. What is the procedure for replacement?

First, one of the parties submits a motion of rejection, or the expert himself/herself may report the situation. After making inquiries or obtaining opinions, as to whether the expert should be relieved of his/her duty, the court will take a decision.

b) by the court? YES / NO

Yes.

2.3 Can the court replace an expert on its own initiative?

Yes.

2.4. If so, in what circumstances, e.g. the expert is not impartial or is not competent in the specific area of the dispute?

In case of preclusion and under circumstances that also entitle a party to reject an expert.

2.5. What is the procedure for replacement?

The expert is relieved of the appointment and another expert is appointed – both steps are taken by court decision.

3. Is the expert allowed to advertise his expert activities in litigation and other dispute resolution, for example, arbitration?

YES / NO

Yes, on a limited scale.

3.1 What restrictions (if any) are there on the expert's advertising and other activities?

Court-appointed experts are subject to a ban under their code of ethics to engage in advertising activities. He/She may refer to this function only (and without any advertising emphasis) when there is a need for information regarding this function, i.e. in connection with an activity as a court-appointed expert, but also when acting as an expert for a party. Any linkage to a possibly maintained commercial undertaking is prohibited.

3.2. Do any restrictions apply to all professions or only to some, e.g. doctors? In which case give details.

The advertising ban applies in general and not only to some groups of occupations/professions.

**Comparative analysis of submissions from
national representative bodies of EUROEXPERT on key issues relating to the
use of expert evidence in litigation conducted in Nation States of the European
Union**

Within the European Union (EU) there are many approaches to the application of law, whether based on Common Law or Civil Law traditions. Europe has two basic systems of law operating within it. The UK with its various jurisdictions England & Wales being the principal jurisdiction and Ireland are the countries with Common Law jurisdictions. The remaining countries of continental Europe, currently 23 in number, have Civil Law jurisdictions. Civil Law is often referred to a Roman Law or Roman Dutch Law.

There are variations between countries within each of the systems of law. For example France and Germany do not have a common approach on all matters in much the same way as England differs from Ireland. More surprisingly there are similarities between Common Law and Civil Law Countries, for example the German and English approach to some problems is closer than the Franco German approach.

The object of this study was to take a limited number of key issues involving Experts and their use and to examine how each of 6 countries (Austria, France, Germany, Portugal, Spain & the UK) dealt with them. A questionnaire was produced so that each respondent could answer identical questions. This would aid understanding and give clear indicators of similarities and differences.

Surprisingly it would appear that there is much more that we do in a similar manner than stark differences. The divider did not appear to be Common or Civil Law.

It is hoped that after this initial study further questions will be added and the work will be extended to include more EU member countries. Whether we will achieve 25 remains to be seen.

We hope that the studies will point the way to convergence in a number of areas thereby bringing together the best of all systems. EuroExpert seeks a standard of excellence for all practising as Experts within the EU irrespective of their nationality or jurisdiction. Experts should be able to operate in both Civil and Common Law countries.

THE QUESTIONS and RESPONSES follow:

THE QUESTIONS and RESPONSES

1. Is there a statement/definition of the Expert's legal role and responsibilities?

Austria

Yes. Under Austrian procedural law, the expert is meant to provide the court with the knowledge of experience obtained in his/her particular field and/or to help determine relevant facts to a litigation, or draw conclusions from such facts. The Expert provides the court with important evidence based on his/her findings and expert opinions.

France

No. Although recognized generally as "one of the most qualified person(s) in a given field of knowledge," such a definition of an expert covers only the technical competence of the Expert, and has nothing to do with courts and cases. A judge may, at his discretion, nominate an Expert to investigate a case for him, and make decisions based on the results of the technical investigation found in the expert's report.

Germany

Yes. The definition is found in the German Code of Civil Procedure (ZPO) §§ 402-416, § 1049, the law regulating the course of civil cases. These functions, however, apply to the courts of arbitration, criminal cases and cases before specialised courts as well.

Portugal

No. There is no precise statement of the Expert legal role and responsibilities in the Portuguese Civil Code, although one may deduce the role and responsibilities through analysis of the code. The Expert has the duty to cooperate with the Court or Tribunal, to find facts, and comment upon said facts in order to find the truth, while acting with diligence, competence, and impartiality. Judges may fine Experts for breaches of diligence and non-compliance with the rules of independence and impartiality.

Spain

Yes. It is on the "fringe" of the present definition of the Court Appraiser Expert in the Spanish Code of Civil Procedure. The Expert is a Professional of Justice and expert in his specialty. He is a figure to give an opinion, and is required to provide professional competence, impartiality, and specialisation, (According to Art. 340 L.E.C.) Experts may be appointed from lists supplied by professional associations, scientific entities, etc.

UK

1.1 There is no universally accepted definition or statement of the role and responsibilities of an Expert. There are references in various places but nothing that is so all embracing as to make other references unnecessary. The most comprehensive definition is to be found in the Civil Procedure Rules (CPR). These Rules consist of Rules (which are called Parts) and Practice Directions (PD), which have the same practical effect as a Rule. Part 35 and the PD attached to it lay down the essential requirements. Copies of these two documents are attached to this Response as Appendix 'A' and 'B' respectively. CPR now incorporates what are known as the Ikarian Reefer Rules which were laid down in a case and which were affirmed by the House of Lords which is the Final Court of Appeal. The 'CPR Code of Guidance for Experts and those instructing them' does not have the same technical authority as the Rules but is the commonly accepted advisory document that is referred to by Experts, lawyers and Judges. This is attached as Appendix 'C'.

1.2 The essence of the Expert's responsibilities can be found in Part 35.3, which defines the Expert's duty as to help the court which duty is OVERRIDING. It overrides any obligation to anybody who has instructed or paid the Expert.

1.3 Part 35.5 states that the Expert's evidence is to be given in a written Report unless the court otherwise directs. This it seldom does. The basis is that the Expert's Report contains his opinions and is put into evidence. The Expert may also be cross-examined in open court on any aspect of the Report or other matters within his expertise. The general rule is that if there is no written report or it is found inadmissible, the Expert cannot give evidence.

1.4 The instructions he is given by the lawyers of the party or parties who are instructing him define the Expert's role in each case. He may be asked to investigate and 'find' facts, carry out tests or research in addition to giving his opinion.

2. What role does the Expert play in civil proceedings for the ascertainment of facts and opinions?

Austria

Experts provide their assistance to judges, put their knowledge at the court's disposal. They become directly active in the determination of facts and may also conduct investigations independently.

France

The Expert, working within the financial amount set by the judge, is empowered as the "investigative power of the judge," and may ask questions to the parties and request documents from them, within the limits of the terms of his "mission."

Germany

The court or a party may request an Expert to prepare an Expert opinion to clarify opposing allegations. The commission of an expert is referred to as an "order to take evidence," and it is in this order that the expert is given defined tasks and the questions of evidence, which are to be answered in his expert opinion.

Portugal

The Expert's role is primarily fact finding. The expert explains his findings in precise and concise terms in order to fulfil his duty towards the Court and Tribunal. The primary duty is aiding the judge(s) and parties in understanding the facts and their impact upon the case.

Spain

Experts give opinions on specific questions, and the Expert often participates decisively in the judicial sentence. The expert fixes with precision the fact that is the subject of the judicial matter.

UK

It is not possible to give a simple answer, as it will depend largely upon the nature of the case before the court. The Expert will where appropriate investigate the facts, for example, measuring and testing. In all cases he will consider those matters that are within both his expertise and his instructions and will opine on them.

3. Is the Expert a “finder of facts?”**Austria**

No. The “consideration of the evidence” is reserved to judges. The role of the Expert is an “ascertainer,” and the limitation of their activities is the evaluation of facts.

France

To some degree an “Expert by the court” may be regarded as a “finder of facts.” The Expert may question parties and request documents from each party. The parties may send the Expert written statements known as “DIRES” to which the expert is legally forced to answer in writing within his final report. The written final report is issued to the judge.

Germany

Yes, the Expert may be a fact finder, depending if he is so ordered by the court. The role of “fact finder” may be a task issued from the order of the court to take evidence. Additionally he can, also be instructed to draw consequences out of the found facts.

Portugal

Yes. The Expert’s primary role is a “finder of facts.” The Expert report must be properly substantiated and it must address in detail all the issues laid out by the judge in his request.

Spain

To some degree and Expert may be regarded as a “finder of facts.” The Court Appraiser Expert provides the Judge/Court with evidence on the fact that is in dispute, and it is the Expert who observes and defines the evidence of the litigation. It is the Judge/Court however, that has absolute freedom and discretion (following its best judgment) to apply the Expert’s findings in its final conclusion.

UK

The short answer is ‘no’. The judge is the finder of facts. The Expert may present his opinion on the facts for the judge to adopt or reject.

4. If “yes” –

- a. Are the facts challengeable by the parties?
- b. Does the position vary if the expert is appointed by the court or by the parties?
- c. Who bears the cost of the expert’s findings?
- d. Does the judge have to follow the facts determined by the expert or may he ignore or only partially follow them?
- e. Does the judge have to take into account or follow the expert’s opinion (as distinct from the facts) or may he adopt a contrary view?
- f. In either case if he does not allow the expert, is he under an obligation to say why he has not done so?

Austria

- a. No. The parties may challenge by means of legal remedy, the decision of the court based on the determination of the facts, however, there are no provisions to independently challenge the findings of the Expert. Parties may comment on the results, ask for explanations, and in the oral hearing ask questions of the Expert.
- b. Yes. The CAE (i.e. Court Appointed Expert¹) enters into a public-law relationship to his contracting party (the state represented by the court). The PAE (i.e. Party Appointed Expert) may be commissioned on behalf of a party to render an Expert opinion, falling within the framework of a private-law relationship.
- c. Austrian civil proceedings are primarily dominated by the “principle of success,” therefore it is ultimately the losing party that must eventually pay the costs. In a case of partial defeat, the costs may be split between the parties. Costs paid by a party to a private expert, under some circumstances, may be claimed as costs of the litigation, and will be treated accordingly.
- d. Judges must carefully review the results obtained from the evidence and assess which facts need to be taken as proven. The judge may base his decision partly on the facts determined by the Expert, or not at all.
- e. Judges are not bound by the opinion of the Expert and as a result of their independent consideration of the evidence, judges may also arrive at the conclusion that the Expert opinion need not be followed.
- f. Judges must provide detailed reasons why they chose not to follow the Expert.

France

- a. The parties may effectively “challenge” facts by submitting DIRES to the Expert, which he must address and answer in his report.
- b. Yes. CAEs are the Investigative Power of the judge, whereas PAEs act as advisors to a party, and may never be in contact with the judge. Both CAE and PAE, however, are subject to the same “Code of Practice.”
- c. The CAE is paid through a taxation court ordinance. The PAE is paid by the party.
- d – f. The judge may either make a decision purely on a legal basis, without taking into consideration any technical explanations, or nominate an Expert by the court to investigate for him, and deliver to him the results of his technical investigations in a final report. The relationship of the CAE is a very close tie with the judge. The report of the PAE may be communicated to the judge during the procedure but normally does not carry the evidential weight of the CAE report.

¹ To be distinguished from Spain’s Court *Appraiser* Expert

Germany

- a. Parties may challenge the facts to be untrue, but must prove that the facts determined by the Expert are incorrect.
- b. Yes. The CAE must adhere to the order to take evidence when preparing his Expert opinion. The Expert is an assistant to the court and must accept instructions from the court only. The court can only give instructions on what work is to be undertaken but not on how it is to be done. Parties may strengthen their position, however, by consulting with a PAE, but this opinion is not regarded as a court Expert opinion, but is rather viewed as an argument of one party.
- c. Where the Expert is commissioned by the court, the loser pays the costs of the legal dispute (If a party does not win the dispute completely but only a 60% share, it must bear 40% of all costs, including the costs of the CAE's opinion). The costs for an Expert opinion commissioned by one party must normally be paid by this party. However, it is possible to declare these costs as party of the cost of the entire legal dispute if the PAE opinion played a major role in determining the legal dispute. There are also cases, where the costs of a PAE can be refunded by the loser. This is exceptionally possible, when the enlistment of an Expert is necessary for an adequate enforcement of a legal title.
- d. The principle of free, i.e. independent assessment of the evidence by the judges applies, and the court is free to follow the expert's facts in whole, part, or ignore them completely.
- e. No. If the court believes the opinion does not clarify the legal issues in dispute, it has the option to request supplemental information, or commission additional Experts.
- f. There is no explicit statutory requirement to substantiate the decision of the court to not base its decision on the result of the Expert opinion. But there does exist a statement in the German Code of Civil Procedure (§ 313 ZPO) that prescribes, that the court generally has to substantiate the adjudication. In addition to that the jurisdiction postulates, that the court has to justify, why it did not follow the Expert opinion. Consequently the court does address this issue as the absence of such substantiation almost always constitutes a reason to challenge the judgment of the court by appeal.

Portugal

- a. Yes. The parties may question any imprecisions, obscurities, or lack of proper conclusions in the Expert's report, and can, within 10 days after receiving the report, ask the Court for a second expertise. The request must clearly list the reasons why the party disagrees with the findings.
- b. Yes. The CAE must address in detail all the issues laid out by the judge in his request. The parties, at any time, may appoint a PAE to act as a witness or advisor.
- c – f. Requires more information from the Portuguese EuroExpert representative which is not available at the time of the preparation of this paper.

Spain

- a. Yes. The parties may determine whether they consider it necessary for the Expert to attend proceedings in order to provide explanations or clarifications to the opinion rendered by the expert. Additionally, there are a number of grounds for challenging and objecting to the facts provided by the Expert, including: blood relation or by affinity within the fourth civil degree or the expert to the parties or lawyers, direct or indirect interests in the lawsuit, association or conflictive interests, friendship with any of the parties or lawyers, or if the Expert has previously given a contrary opinion on the same matter, provided Expert services to the other party in the litigation in the past, or if the Expert has an interest in the partnership, establishment, or company that is party to the litigation.
- b. An Expert may be appointed by the court or by the parties (according to L.E.C.) or a party may request appointment of an expert from the court.
- c. When a party requests appointment of an Expert, the report will be paid for by the party who has requested it, without prejudice to what it is agreed in the court costs.
- d. The judges are not bound to the Expert opinion. Judges may consider the Expert opinion in order to decide, but they are totally independent to perform.

e.-f. By the principle of freedom and independence the judge may or may not follow the Expert opinion. They have the final decision and there does not exist any obligation to explain why they do or don't follow the Expert opinion.

UK

(Although the answer is 'no' and therefore this part is inapplicable some comments are included where it thought they would be helpful.)

- a. Where there are PAE, each party can challenge the other.
- b. Where there is an SJE (i.e. Single Joint Expert)², either or both parties can challenge him.
- c. The party appointing has the underlying responsibility for costs of the expert. In the case of the SJE, both are responsible and normally pay half each. However, when the case has been finally determined, it is usual for the Court to order that the losing party reimburse the winner's costs.
- d. It is the judge's choice and decision.
- e. It is the judge's choice and decision. However, if the judge does not reach his decision judicially, he may be overturned on appeal to a higher court.
- f. English judge's decisions (known as judgments) virtually always include their reasons so that it is possible to see – and hopefully understand – how they have reached their decision.

5. How do Judges assess the value of the Expert's opinion?

Austria

The views of the CAE are generally followed. The CAE enjoys high prestige because CAEs are independent appointees of the judiciary bound by objectiveness and impartiality, whose opinion has special authority. The value of the PAE is not held in such high esteem. The PAE's opinion is classified as a party submission evidenced by documents. When PAEs have differing views, the court looks to the CAE, so it is evident that the CAE carries more weight.

France

CAEs are literally empowered as the "investigative power of the judge" and a high value is placed on the judge-Expert relationship. PAE, however, acts as an advisor to the party.

Germany

Of the five forms of evidence provided for in German civil law cases, Expert opinion bears great significance and has the greatest value as evidence.

Portugal

Because it seems rather easy to challenge the Expert, and request a second Expert, it seems as though less value is placed on the expert than can be found in the other Legal Systems.

Spain

It seems as though the weight to be given to expert evidence is determined on a case by case basis. The court may rule a sentence requiring the presence of the expert at the proceedings or trial for a better understanding and valuation of the opinion delivered.

UK

The arcane workings of a judge's mind are just that. They have to use their experience and knowledge to reach their assessment having listened to the evidence and to the arguments put by the lawyers. They have to decide 'judicially'.

² A SJE is a form of expert used in England and Wales and which has been created by the Civil Procedure Rules. A SJE is not a CAE but is appointed by the parties jointly, such appointment having been previously permitted or ordered by the Court.

- 6. Are there prescribed requirements for –**
- a. the qualifications that an expert must have?**
 - b. form and presentation of the expert's report?**
 - c. the expert's relationship with the judge (the court) or parties?**
 - d. Is the expert permitted to meet with others (including the representatives of the parties?) If so, for what purposes?**

Austria

- a. According to Austrian Private Law, every person may be regarded as an Expert who has special knowledge and skills regarding that particular field. Procedural Law, however, requires a certified Expert be appointed. These persons must have successfully passed a certification procedure.
- b. The Expert report may be given in oral or written format. The written format is essentially an outline of the court instructions which is a presentation of the established findings, describing all the facts of relevance, methods applied, auxiliary findings, assisting staff involved, etc. The Expert must describe his/her conclusions.
- c. The position of the Expert is as an auxiliary body of the court, with a primary obligation to closely cooperate with the judge.
- d. Yes, the expert may enlist the cooperation of the parties and they must invite them when establishing the findings in the absence of the judge, in order to ensure that they are heard lawfully. They will meet with party representatives, however, establishing contacts with only one side or meeting only one party would be inadmissible.

France

- a. Simply one of the most qualified persons in a given field or knowledge.
- b. The form of the expert's report must be a written account of his findings.
- c. The CAE's relationship to the judge (court) is the Investigative Arm of the court. The PAE, however, is an advisor to the party, and/or may supplement the CAE's investigation.
- d. Yes, the CAE may request documentation from and question both parties.

Germany

- a. Civil case law does not provide any definition or description of the qualifications of an Expert. However, § 404 (ZPO) states that publicly certified Experts are to be given preference by the court for the preparation of an expert opinion over experts not publicly certified. Technically, anyone with a particularly high level of expertise in a specific area, who has integrity, and is objectively independent and neutral, may be appointed by the court to provide an opinion. Publicly certified experts, however, are sworn in by the Chambers of Industry and Commerce or on the basis of § 91 Crafts Regulation Ordinance (Handwerksordnung) after the successful conclusion of an appropriate examination procedure.
- b. They arise solely from the questions posed and the basic logical structure of an Expert opinion. The relevant expert-opinions in literature developed, however, requirements for a logical configuration of the Expert's Report, that are accepted and required in professional circles.
- c. The Expert is an assistant to the court. His sole "partner" is the court. PAE, however, are viewed as part of the respective party to the action.
- d. The expert may only meet the parties if this meeting takes place, for example, to view the subject matter of the Expert opinion. The parties are entitled, but not obliged, to attend. Neutrality obliges the expert to invite all parties in dispute to the appointment.

Portugal

- a. The Expert must comply with the rules of independence and impartiality applicable to Judges and Magistrates.
- b. The Expert report must properly substantiate and address in detail all the issues laid down by

the Judge in his request.

- c. The Expert is a finder of facts and aids the judges and parties in understanding the facts and their impact upon the case itself.
- d. Any of the parties can demand the presence of the Experts during the trial, in order that they answer under oath to any and all the clarifications deemed fit by the parties' lawyers.

Spain

- a. In January each year, different professional associations, cultural, scientific, and academic entities, are asked to submit a list of their members or associations who are willing to act as Experts.
- b. The Expert who is appointed to the court will deliver his opinion in writing to the court within the period that he has been notified.
- c. The Expert observes and defines the evidence of the litigation, and the Judge/Court, following its best judgment, applies the rule in its final conclusion.
- d. The Expert can request judicial aid in some cases in order to clarify the object of the trial. In some cases the expert could be requested by the parties or the court to clarify the facts.

UK

- a. Although there are no legally prescribed qualifications there is fairly general agreement on what is required. The qualifications for an Expert include having appropriate qualifications and experience within the expertise in question. In addition the Expert should be a 'fit and proper' person with high standards of integrity. He should be properly trained and be independent, impartial and objective.
- b. This is laid down in CPR with the primary requirements showing in the PD. These can be seen in the Appendix B. In addition The Academy has a Model Form of Experts Report that was prepared by its Judicial Committee. This consists of senior judges who represent the major jurisdictions in the UK. The Model Report is currently being revised to take into account Rule changes and practice. It is not thought that the changes will be more than minor. A copy of the current Model Form is attached as Appendix 'D'.
- c. There are no rules about the relationship between the judge and the Expert. However the basic requirement is absolute independence between them. Each has his own role and the Rules of Natural Justice prescribe this separation. This having been said there are some practical points that need to be considered.
 - When the Expert prepares his report he is unlikely to know who the trial judge will be. This means that any relationship that there may be with the trial judge is unlikely to have influenced the report.
 - If any Expert becomes aware of any relationship that he may have with the judge he should immediately communicate this to those instructing him. The lawyers would communicate the information to the judge.
 - It is unwise for an Expert to have a relationship with any party to the action as this may distort or be perceived to distort his independence. In any event the existence of any relationship should be disclosed at the earliest possible to those instructing him. It should also be clearly and transparently stated in his Report.
 - The expert should disclose anything that might give rise to questions about his ability to be independent.
- d. A PAE will meet and work the party instructing him. He would not normally meet with the other party and would only do so with the clearest of instructions, an example of this could be a medical examination of the Claimant by the Defendant's medical expert. The Expert should not meet or discuss any matter with the other side's Expert or others unless there are clear instructions from the party or an Order from the Court. There is no objection to the SJE meeting the parties when they are together but it is not good practice to meet them or their advisers individually. There is a process known as Discussions between Experts (Part 35.12) or meetings of Experts, where the parties have a PAE. The PAE is normally Ordered by the Court to meet the PAE from the other party. The object of this meeting is to narrow the technical issues by preparing a memorandum showing what they agree and what they do

not agree and why they disagree.

7. Is there any limitation on the number of Experts in a case?

Austria

The number of experts is usually 1, however, it is the sole discretion of the court to determine the number necessary in any given case.

France

The number is limited by reasonableness and practicality. Additionally, a CAE may not be nominated based on the cost versus the amount in contention.

Germany

No, but the party requesting the CAE must pay the fees to the court.

Portugal

No. There are usually between 1 and 7, however, the number rarely exceeds more than 3.

Spain

No, there is no limit on this.

UK

The technical answer is 'no'. However the court has a duty to restrict Expert evidence to that that is reasonably required (Part 35.2) and the court has to give specific permission for each Expert (Rule 35.4). These Rules have the effect of limiting the number of Experts, usually to one per discipline per party.

8. Can a party appoint their own Expert Witness where there is a Court appointed Expert?

Austria

Yes, but ultimately, a convincing court-commissioned expert opinion cannot be rebutted by a private Expert opinion.

France

Yes. The PAE may act as a party advisor, or help supplement the CAE's investigation.

Germany

Yes, but the PAE act in the capacity of party advisors, and will not be Experts of the court.

Portugal

It is quite usual to have Expert advisors.

Spain

Not stated in the Spanish EuroExpert representative responses at the time of the preparation of this paper.

UK

The answer to this question is not known because Court Appointed Experts (CAE) are not in use in England. There is in fact doubt as to whether the court has the power to appoint an Expert. However, in many ways the SJE is similar to the CAE. They are not the same but similar. The court can give permission for a PAE to be appointed when there is an SJE. It is not the norm, but equally it is not rare. There is of course, nothing except expense, to stop a party from

appointing their own Expert (usually known as an Expert Advisor or Shadow Expert) to advise them. However, this expert would not give evidence and is therefore not an Expert Witness.

Code of Practice for Experts within EuroExpert

Preamble

This Code of Practice shows minimum standards of practice that should be maintained by all Experts.

It is recognized that there are different systems of law and many jurisdictions in Europe, any of which may impose additional duties and responsibilities which must be complied with by the Expert. There are in addition to the Code of Practice General Professional Principles with which an Expert should comply.

These include the Expert:

Being a “fit and proper” person

Having and maintaining a high standard of technical knowledge and practical experience in their professional field

Keeping their knowledge up to date both in their expertise and as Experts and undertaking appropriate continuing professional developments and training.

The Code

1. Experts shall not do anything in the course of practising as an Expert, in any manner which compromises or impairs or is likely to compromise or impair any of the following:
 - a) the Expert’s independence, impartiality, objectivity and integrity
 - b) the Expert’s duty to the Court or Tribunal
 - c) the good repute of the Expert or of Experts generally
 - d) the Expert’s proper standard work
 - e) the Expert’s duty to maintain confidentiality.
2. An Expert who is retained or employed in any contentious proceeding shall not enter into any arrangement which could compromise his impartiality nor make his fee dependent on the outcome of the case nor should he accept any benefits other than his fee and expenses.
3. An Expert should not accept instructions in any matter where there is an actual or potential conflict of interests. Notwithstanding this rule if full disclosure is made to the judge or to those appointing him the Expert may in appropriate cases accept instruction when those concerned specifically acknowledge the disclosure. Should an actual or potential conflict occur after instructions have been accepted, the Expert shall immediately notify all concerned and in appropriate cases resign his appointment.
4. An Expert shall for the protection of his client maintain with a reputable insurer proper insurance for an adequate indemnity.
5. Experts shall not publicise their practices in any manner which may reasonably be regarded as being in bad taste. Publicity must not be inaccurate or misleading in any way.

Association Standards within EuroExpert

Within the European Union and the member associations of EuroExpert the acceptance of individual members as experts is characterised by different procedures and designations.

In some countries experts are accepted by demonstrating their competence in an application procedure by the association
other experts are registered by the courts and have to demonstrate their qualification to these authorities
others accept members through a third party certification by private or public authorities

The experts are then called recognized, accredited, certified, registered etc.

One of the aims of EuroExpert is the
Development,
Promotion,
Convergence

of and education in common ethical and professional standards for experts within the European Union, based upon the principles of high qualification. The code of Practise, adopted within EuroExpert in 2000, includes the expert being a "fit and proper" person, having and maintaining a high standard of technical knowledge and practical experience in their professional field.

To assure these high standards the associations of EuroExpert shall have the following requirements for the acceptance and maintaining of individual membership as expert:

To be registered in a EuroExpert member association the applicant has to demonstrate to the association or the relevant authorities that:

He has appropriate qualifications, training, experience and a satisfactory knowledge of the requirements of the scope to be carried out as expert. This includes that the applicant has sufficient practical experience in his field of activity and in his scope of expertise.
He has demonstrated his competence by submitting a proper documentation (e.g. CV, copies of certificates for all relevant Academic and Professional qualifications, work experience and experience as expert, referees, reports, training).
He has given evidence of his competence as expert by oral, written, practical, a combination of the before mentioned methods, or other assessment, to a committee or instructed specialists with appropriate knowledge and experience in the field of activity of the applying candidate

The association shall have adopted policies which:

maintain confidentiality of all information obtained in the process of its activities concerning membership.
define a development process (e.g. further training, Continuing professional development) to monitor members' compliance to the actual technical and ethical standards required in the field of their expert activity.
define policies and procedures for granting, maintaining, renewing, suspending or withdrawal of membership