Guide to good practice and outline of a professional code of ethics for european experts

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Guide to good practice and outline of a professional code of ethics for european experts

Alain Nuée¹

Summary: Guide to good practice and outline of a professional code of ethics for european experts.

In November, after more than ten years of research and discussions, the European Expertise and Expert Institute, presided over by Jean-Raymond Lemaire, presented its guide to good practice in civil judicial expertise within the European Union. In this article, Alain Nuée puts forward the main features of this document, whose objective is to improve judicial procedures and enable both private citizens and companies to have increased confidence in the system of justice. Among the proposals made in this guide are: the compiling of lists of regional and national Experts, which would then be in the public domain; the creation of expert status, with recognition of the rights and obligations involved and, in particular, respect for the same rules of professional ethics for all European judicial Experts, whether they are appointed by the court or by a party; the standardisation of Expert reports with a list of essential information, so that the quality of these reports can be checked more rapidly; and so on.

Key-words: European Expertise and Expert Institute; Good practice; Code of ethics.

Resumo: Guia de boas práticas e proposta de um código de ética profissional para os peritos europeus.

Em Novembro, após mais de dez anos de investigação e discussão, o European Expertise and Expert Institute, presidido por Jean-Raymond Lemaire, apresentou o seu guia de boas práticas em matéria de peritagem no âmbito do Direito Civil na União Europeia. Neste artigo, Alain Nuée apresenta as principais características deste documento, cujo objectivo é melhorar os procedimentos judiciais e permitir que cidadãos e empresas tenham maior confiança no sistema de justiça. Entre as propostas feitas neste guia estão: a organização de listas de peritos regionais e nacionais, que seriam do domínio público; a criação de um

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estatuto de perito, com reconhecimento dos seus direitos e obrigações e, em particular, o respeito pelas mesmas regras deontológicas para todos os peritos judiciais europeus, quer sejam designados pelo tribunal quer por uma das partes; a normalização dos relatórios de peritos com uma lista das informações essenciais, para que a qualidade desses relatórios possa ser verificada mais rapidamente; e assim sucessivamente.

Palavras-chave: Instituto Europeu de Perícias e Peritos; boas práticas; Código de Ética.

The European Expertise and Expert Institute is proud to present the **Guide to Good Practice in Civil Judicial Expertise in the European Union**.

It is the outcome of more than ten years of research, discussions and exchanges between all concerned parties in Europe. Their objective has been to improve judicial procedures and enable both private citizens and companies to have increased confidence in the system of justice, whether in their own Member State or when they are living or working in a host country and have to deal with cross-border issues.

Under the name of EGLE – *European Guide for Legal Expertise* – and with financial support from the Directorate-General for Justice of the European Commission, a community of judges, lawyers, judicial Experts, academics and law students met regularly for two years in order to discuss the main aspects of civil judicial expertise, find ways to harmonise and improve the various systems in force and propose a basis for working which would be made up of the best practices in Europe.

The tool used – the Consensus Conference – proved to be extremely effective for highlighting the similarities emerging from the various ways in which judicial expertise and judicial Experts work. The method by which the conference was organised allowed participants to play an active role in bringing together these various practices and experiences, produced by very different systems of common law and civil law. The best of these practices could then be chosen in order to propose a common basis for improvement of civil judicial expertise.

The project was taken forward by the members of the four working groups, by those participating in the plenary conference organised in Rome by the Italian Court of Cassation on 29 May 2015, who shared reactions and suggestions, and by the jury of nine important European figures who

discussed, debated and finally succeeded in extracting from all these exchanges, the key elements of practices from each country and each experience.

This jury met for the first time in Rome, behind closed doors, and then again during the course of two intensive working sessions, the second of which was held in Lisbon in September. It highlighted the best of the different systems of civil judicial expertise and concluded its work by proposing to merge the various expertise procedures prevailing in both old and more recent EU Member States, particularly where common law and civil law were concerned.

The jury's conclusions are presented here in their general outline. They contain numerous recommendations and ideas, as much for countries where the procedures for recruitment, appointment and quality control of Experts are highly structured as for countries where this is not yet the case.

They offer real avenues for harmonisation between technical experts appointed by judges and expert witnesses appointed by the parties, and this is an unexpected but very valuable contribution to the project.

In addition, although they are limited to civil expertise and geographically limited to the 28 States of the European Union, the recommendations of the Consensus Conference go further than the recommendations adopted less than a year before by the CEPEJ for the 47 Member States of the Council of Europe.

Furthermore, the Guide to Good Practice includes an annex outlining a professional code of ethics for European experts. If every expert were to immediately adopt this, it would mean that the trust inspired in judges, parties, their counsels and EU citizens generally would be substantially increased.

A – THE GUIDE TO GOOD PRACTICE

The Guide to Good Practice essentially advocates creating lists of Experts and introducing Expert status, as well as making provisions for procedure and standardising the presentation of Expert reports. Subject to the availability of fuller statistical studies, it envisages creating a list of European Experts to be gauged in accordance with the known number of cross-border expertise operations, as well as creating an independent European expertise procedure for cases of cross-border dispute or which have cross-border repercussions.

1 – THE CREATION OF LISTS

§ 1 Regional and national lists

Unlike the CEPEJ, the Consensus Conference jury insisted on the need to create lists of Experts even though the judge preserves the power, at any stage of the proceedings, to appoint Experts from outside the list on condition that reasons are given for this.

The creation of these lists, which should of course be based on a standardised catalogue of names and demand similar criteria for registration on them, are seen by the jury to be an essential guarantee, given to those subject to court jurisdiction, of the quality of the Experts appointed by the judges. The jury makes the creation of such lists the focal point of the system of quality assurance that it wishes to see put in place and which aims for regular control of Experts' competence by independent certification and accreditation authorities.

It stresses that these lists, which must be public and easily accessible on the internet for those subject to court jurisdiction, are not simple directories but recognition of the competence and good character of the Experts registered on them; and these Experts, once they are registered, must adhere to the Guide to Good Practice and undertake to observe the professional code of ethics.

The jury also points out that these public lists are an essential tool for helping the judges of a Member State to appoint an Expert working in another State.

Meanwhile, the jury came up against criticism from another Directorate in the Commission which sees these lists as an obstacle to the free establishment of Experts and to free competition between them; whereas in fact, in the very interests of justice, it is necessary to fight against the partitioning caused by discretionary appointments of Experts registered on secret lists held by each court, and which have been drawn up without any checks being made and without any transparency.

§ 2 The European list

With regard to the creation of a European list, which should not be confused with the creation of a directory containing all existing national and regional lists, since this would probably exceed 100,000 names and would therefore be difficult to manage because of its size, the jury

showed great prudence and wished for extra work to be undertaken. This particularly involved statistical research to ensure that the list was useful with regard to the number of cross-border disputes, and to gauge its size according to need.

This prudent position was essentially based on the fear of having to face costs which were too high, and it put a temporary halt to the idea of creating a European list, possibly compiled in an initial stage from voluntary Experts appointed by States which would serve as an example to all Member States and favour the creation of regional and national lists founded on a common basis and similar registration criteria. This waiting game was even more regrettable since the demand for statistics is a very serious obstacle to any advance. This is because in many judicial systems the statistical data concerning cross-border disputes are non-existent and the advantage of a European list is not limited to cases of cross-border disputes.

The jury has nevertheless already specified that registration on the European list, based on voluntary service, would be subject to prior registration on a national list and would not be an obstacle to Expert activity carried out on behalf of an international court (International Penal Tribunal; International Court of Justice, and so on).

2 – THE CREATION OF EXPERT STATUS

The Consensus Conference enumerated rights and obligations incumbent upon the Expert which were very similar to those listed by the CEPEJ. For this reason, only a few particular points will be emphasised here.

Section I – The Expert's Rights

The recognised right for the Expert to accept or refuse his task is reduced: if he is registered on a list, he will have to justify his refusal by giving an objective reason to the person appointing or commissioning him.

Due to possible pressures on Experts, since their opinions are central in helping to resolve a dispute, they should be under specific protection from the Member States, similar to that given to judges or to people with public authority. This protection could go so far as the creation of a specific criminal offence or aggravating circumstance for certain misdemeanours (blackmailing, threats, violence, or attempted bribery) of which Experts may be the victims due to their work.

Section II – The Ethics of the Expert

Identical ethical rules should be applied to the European Judicial Expert regardless of how he has been appointed: he may be an Expert appointed by the court or an Expert appointed and paid for by a party or parties and subject to obligations to the judge since he is authorised to give his opinion before a court.

The ethical rules of the European Expert should cover the major principles on which the Expert's legitimacy and authority is based: competence, probity, objectivity, loyalty, independence and impartiality.

Even when the Expert has been appointed by a party, the Expert should show himself loyal to the court as much as to the parties, since by giving his opinion within the context of a court proceeding, he takes part in establishing the truth and in the implementation of justice. This loyalty to the court should lead the Expert not to conceal, even by omission, any element of evidence that could possibly be detrimental to the party who appointed and is paying him.

The Expert should be able to swear to the following:

“that his overriding duty is to the court, both in preparing reports and in giving oral evidence, and that this duty overrides any obligation to the party from whom he has received instructions and/or by whom he has been paid, and that he has complied and will continue to comply with that duty”.

In the absence of adhesion **to the professional code of ethics and the Guide to Good Practice, and in particular to the declaration of independence, the Expert's opinion will not be acceptable.**

Section III – Quality Assurance

§ 1 General principles

The appointment of a Judicial Expert, whether he is an individual or a legal entity (referred to by the name of “Judicial Expert Service Provider”) should come under a judicial framework which would include a system of quality assurance with standardised and shared rules that involve accreditation and certification.

The quality assurance system should provide a means for returning information from the courts to judicial Experts.

The quality assurance system should arrange for funding to ensure the independence of the bodies set up to implement it.

§ 2 National and/or regional certifying bodies

A judicial Expert should be certified and a legal entity (Judicial Expert Service Provider) should be accredited by one (or some) judicial or administrative body/bodies, even private, funded and structured in such a way that (their) independence is not compromised.

These bodies would oversee the transparency, admission, training and quality of judicial Experts and of judicial expertise. Their particular tasks would be to:

- Promote the quality of evidence in judicial expertise;
- Set basic quality standards applicable to all judicial Experts;
- Set basic standards for certification of individual judicial Experts;
- Set basic standards of accreditation for Judicial Expert Service Providers;
- Set quality standards for specific fields of expertise;
- Hold and maintain a register of certified individual judicial Experts and accredited Judicial Expert Service Providers;
- In addition to general CEN/ISO standards, where possible, set quality standards that include specified best practices and competences that are required for each field of expertise;
- Set the basic curriculum for the judicial training of Judicial Experts;
- Set procedures for the assessment and re-assessment of Judicial Experts and Judicial Expert Service Providers; and
- Set a Code of Conduct which applies to all Judicial Experts.

§ 3 European body for overseeing lists of Experts

An independent consultative committee for EU judicial expertise should be established and funded by the EU in order to:

- Develop the European list of judicial Experts and harmonise the national lists of judicial Experts;
- Promote recognition within the EU of training courses for judicial Experts as well as of refresher and booster courses in general;
- Improve the quality of expertise;

- Develop a statistical tool to gain better knowledge of Expert activity and compare time scales between one judicial system and another.

3 – PROCEDURAL ARRANGEMENTS

10 Reinforcement of the judge's control

Reinforcing the judge's control is necessary when it is the judge who appoints the Expert. He must be able to restrict or extend the Expert's task and give a ruling on any difficulties which may arise during the course of the work of expertise, including difficulties concerning the Expert himself. He must also be able to replace the Expert in the event of failure to perform, lateness or incompetence.

Most importantly, the judge should be able to control the duration of the Expert's work and the observance of time scales and, more generally, support the Expert who, for his part, is able to ask the judge for instructions.

20 Reinforcement of the rule that both parties shall be heard

With regard to this, the jury advises drawing up a pre-report in which the Expert will set out his conclusions. He will then have to submit these to the parties for their observations and possible criticisms, before lodging his final report.

However, the jury proved to be less dogmatic than the working group in the sense that it leaves open the possibility for internal law and the judge to exempt the Expert from writing a pre-report, and this does not only apply to minor disputes. But at the same time, the jury recommends that the Expert's opinion should be discussed by the parties during the course of a meeting to be held prior to the hearing before the judge.

4 – STANDARDISATION OF THE PRESENTATION OF EXPERT REPORTS

Like the CEPEJ, the Consensus Conference recommends that Expert reports be standardised so that quality can be more quickly controlled. It sets out a more detailed list of all the essential information that must be included in an Expert report. This essential information is obligatory for all

Experts, by whatever means they have been appointed. The space occupied by this information in the Guide to Good Practice prevents us listing it here. But its importance is such that it would justify an article being devoted to it in a forthcoming edition.

B – PROFESSIONAL CODE OF CONDUCT FOR EUROPEAN JUDICIAL EXPERTS

(Outline)

The professional code of conduct for European judicial Experts, which is presented in outline as an appendage to the Guide to Good Practice, prescribes the obligations that are incumbent upon any individual or legal entity called upon to give his opinion as a judicial Expert before a court.

This code lists the judicial Expert's obligations to the judge, the parties, the public authorities and other Experts.

It is more restricted than the Guide to Good Practice, which also sets out recommendations intended for judges, legislators of Member States and for the European Union. It repeats, in a different form, the terms of the recommendations for judicial Experts, with the intention of giving them a more compelling character since, by swearing an oath before the judge, the Expert undertakes to respect this code under threat of sanctions (which are left to the discretion of Member States) and the risk of his opinion not being accepted.

The first article of the code defines its field of application and particularly specifies that it applies to Experts appointed by the parties and paid by them. Consequently, these Experts have duties towards the judge that are binding by law or by the oath that they swear, and these duties have priority over those he has towards the party which appointed him.

In the absence of such an oath or of legal provisions giving precedence to the interests of justice over those of the party which appoints the Expert and most often pays him, Experts chosen by the parties are not concerned by the provisions of the text.

However, the code specifies that when these private Experts or party Experts are registered on lists of judicial Experts and have sworn an oath to observe this code with a view to or following their registration on these lists, they are bound by the rules of that code and cannot escape the duty of truth that they owe to the court and to justice. Furthermore, they will have to declare that they have followed its rules in a special statement, before signing the report that they hand over with the prospect of it being produced during the course of debates.

CONCLUSION

Legal expertise at the European level has thus been enriched by a new set of recommendations for good practice. This completes the CEPEJ's recommendations for attaining the goals pursued by the EU in the economic domain and for helping Experts to practise their skills throughout the whole of the European judicial area, while observing a set of professional ethics laid down in a common code.

The experience of the Consensus Conferences on civil expertise, held in France in 2007 and in Belgium in 2010, shows that practitioners are able to capitalise on the recommendations for good practice to improve the way they work at both local and regional level. All European Experts can therefore observe the professional code of ethics which has been outlined, without waiting for the creation of lists and regional, national or European certification and accreditation bodies. They can also, without further ado, implement the recommendations relating to the obligation to provide assurance, the declaration of independence, the harmonisation of expertise reports and the drawing up of a pre-report.

A final decisive step towards harmonising expertise procedures and facilitating the free movement of Experts remains to be taken, and that is the establishment, in accordance with the jury's recommendations, of a European expertise which is similar to the European order to pay. Applicable in its first stage to cross-border procedures or procedures which have cross-border implications, this European expertise procedure could then take the place of national procedures, particularly when collecting evidence prior to any trial, and it could end up taking precedence over national legislations in all scenarios.

This procedure still remains to be written and there is no doubt that the EEEI will very quickly be able to offer a draft text which can form a basis for discussion. In the same way, the EEEI will be fully within its remit in laying the foundations for a harmonised training programme which will enable the quality of all European Experts to be assured.

There is still a long way to go, but there are extremely encouraging signs leading us to think that this distance can be covered very rapidly, since the European Parliament itself has seized upon the problem of judicial expertise and appears to share the Commission's ambition to reach harmonisation within the time scale of its current mandate.

EEEE factsheet

The **European Expertise and Expert Institute (EEEE)** was established in 2006 to contribute to the convergence on core principles of the EU's national systems of judicial expertise, and to guarantee the legal certainty of court rulings across the European judicial area by ensuring the high quality of court-ordered expert examinations.

It brings together from each Member State of the European Union contributors from high courts, bar associations, expert organizations, and universities and other professionals with a stake in these issues. A think-tank at European judicial scale, it is also a cross-professional, cross-border platform for debate and by no means a representative body for experts. The EEEI is completely independent of all public authorities and its work contributes to forming consensual solutions that are to be ultimately transposable to the various European law systems.

In 2010-2012, with the contribution of the Network of the Presidents of the Supreme Courts of the European Union and the financial support of the European Union, the EEEI made a detailed, comparative inventory of existing procedures as regards expert examinations in civil matters. The EUREXPERTISE study was concluded by an International Symposium held in Brussels on 16th and 17th March 2012 on "The Future of Civil Judicial Expertise in the European Union".

Since then, the EEEI has continued its work as a major stakeholder in these issues, and in 2013, was granted Observer status at the GT-QUAL of the CEPEJ.

In 2014, with the continued support of the DG Justice of the European Commission and co-funded by the European Union, the EEEI undertook new research to create a guide to best practice in European civil judicial expertise within a project called **EGLE**, for **European Guide for Legal Expertise**.

Chosen for the **EGLE** project, the method of the **consensus conference** is based on the competence and cooperation of professionals and the sharing of comparative experience. The method appears well-suited to drawing up a common practice directly inspired by the rules of fair trial laid down by European legislation and case law.

This work culminated in the public, plenary conference on May 29th 2015 in the Aula Magna of the Italian Supreme Court in Rome, which by all accounts was a great success. Judges, lawyers, experts and academics, as well as representatives from Supreme Courts and other European and

international institutions, in all, 160 people from 22 countries contributed to the consensus conference.

Based on the preparatory work and on the debates during the plenary conference, a Jury of key European figures met at regular intervals to draw up this Guide to Good Practices.

To date, this Guide has been broadcast to more than 15 000 copies, has been translated into 6 languages. It is now commented and published by Bruylant.

Upcoming projects EEEI will be launched in 2017:

- EurexCrim, inventory and harmonization of proceedings of expertise for criminal justice, as well as the exchange of information between the judicial systems of European countries;
- Find an Expert, the training at European level, of legal experts and of judges and lawyers about “the right use of judicial expertise.”

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