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**EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE  
(CEPEJ)**

**Guidelines on the role of court-appointed experts  
in judicial proceedings  
of Council of Europe's Member States**

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### **Introduction**

1. The purpose of this document is to provide a reference framework for the legislator, the judge and all parties to a lawsuit as regards the role of a technical expert (hereinafter called "expert"), in cases where the expert is instructed by the court, during the judicial decision

process. The definition of a court-appointed expert used in this document is the one provided in the CEPEJ report on European judicial systems<sup>1</sup>, according to which technical experts “place at the disposal of courts their scientific and technical knowledge on matters of fact”. It is meant to communicate the basic principles concerning the role of the experts in the judicial systems of Council of Europe member states. Furthermore it identifies principles which clarify the legal interpretation and application of the law concerning the work of those experts during judicial proceedings. Those principles apply to all pre-judicial and judicial proceedings in all areas of law; not only in civil, but also in criminal and administrative, lawsuits.

2. The role of experts in the trial or lawsuit is different in some of the member states of the Council of Europe. However, there are also similarities. Usually the experts help the judges and other decision-makers in the judicial system with the decision-making. They support the fact-finding, which is an essential basis for every judicial decision. Sometimes they only support the judge; sometimes they even do their own fact-finding.

3. Objective, correct fact-finding is the basis for a fair and just judicial decision. The experts are either appointed by the court itself or by the party or parties to produce an expert opinion. In some cases they have the task of ascertaining facts. They can also (only) assist the parties in bringing forward evidence. Thus experts either complement the judge’s deficient technical knowledge or help with the fact-finding, as long as one party is legally obligated with the reasoning/ giving of evidence.

4. The work of the experts ends where the appraisal of the facts begins, which is the task of the judge alone. This prevails even in those cases where the expert is allowed to direct or conduct the giving of evidence.

5. The work of the expert and his expert opinion are highly important during the lawsuit because of his specialist knowledge of the matter in question, irrespective of the different levels of conclusiveness of the expert opinion. Nevertheless the judge is under no obligation to follow the suggestion of the expert opinion, but the court has to give reasons for an opinion which dissents from the expert’s suggestion. Usually the principle of free assessment of evidence prevails.

6. The work of an expert not only requires an extremely high standard of expertise – his/her level of qualification being in accordance to the complexity of the question under examination – but also the expert’s independence and impartiality.

7. To meet those high standards and ensure a correct fact-finding process, it is necessary to develop, substantiate and apply rules that not only ensure the instruction of the experts by the court and/ or by the parties, but also guarantee the work of the expert according to constitutional principles.

8. These guidelines set a minimum standard of practice that should be maintained by all experts. Also considered is the fact that there are different legal systems and many different jurisdictions in Europe, which may impose additional duties and responsibilities on the expert.

9. The expert is not allowed to let him or herself be influenced by other interests than giving evidence. All rules concerning the rights of the expert and his/her role in the lawsuit/ court procedure have to follow and comply with this general principle.

10. This is why it is crucially important that there are rules at national level (in the different legal systems) guaranteeing the independence, impartiality and integrity of the expert.

11. At the same time there is need for rules that support the focused conduct of judicial process so that a decision may even be reached in a short and appropriate period of time. Over-long legal procedures are meant to be avoided, because these especially often require a complex fact-finding process. Furthermore, a straightforward framework concerning the financial impact of the preparation of the expert opinions ought to be provided.

12. The following guidelines are intended to serve and outline these purposes.

13. The aim of these guidelines is not to answer the question whether and under which circumstances the appointment of an expert is necessary in general according to statutes and the principles of procedural law, but to provide criteria for the correct selection and appointment of the expert and for the preparation of his expert opinion and the introduction thereof into the court proceedings.

14. Other public or private expert opinions that have already been produced outside the lawsuit do not enter into the following guidelines – even if they would qualify as a piece of evidence in the lawsuit. The guidelines refer only to the surveying work of the expert – regardless of the concrete description in the particular national legal system. Therefore they are not applicable to cases in which an expert appears as a witness or a professional witness.

15. This document has been drafted by the Working group on the quality of justice (CEPEJ-GT-QUAL) based on a working document by Anke Eilers (member of the Group, Germany) and a study by Gar Yein Ng (scientific expert, Norway) on the role of experts in judicial systems.

## **1. SUBJECT-MATTER OF THE EXPERT OPINION – TASK OF THE EXPERT**

16. The expert is required to find and present the court with those facts that can only be obtained by specialists who conduct specialist objective observation. He/she conveys the scientific and/or technical knowledge to the judge which then enables the judge to conduct an objective and clear investigation and evaluation of the facts. The expert is neither able, nor is it by any means his/her task, to take over the judge's responsibility for the appraisal and evaluation of the facts which is the basis for the judgment of the court.

17. The expert is part of judicial decision-making concerning the communication of special knowledge to the court. This special knowledge refers to the investigation, the assessment and sometimes the evaluation of facts<sup>2</sup>. Consequently, the expert is simply an assistant or consultant of the judge, nothing more. The expert's role is therefore different from that of the judge, who is the one deciding on questions of law. The expert provides the court with facts according to his special knowledge, education and experience from which the judge can then draw his conclusions.

18. Even if the expert may play a more prominent part in the legal decision-making in other jurisdictions, he/she should remain obliged to help only with the fact-finding and not with the application and interpretation of the law.

19. Subjects of expert opinions are therefore complete description and explanation of conditions relating to persons and things, description and explanation of events, and also declaration of the (different) causes of a damage-causing event.

20. In some exceptional cases, foreign law may be the subject of the expert's evaluation. At all events it is not permitted that the expert him- or herself ends up applying the law.

21. In criminal trials, the main focuses of the evaluation are questions about the legal culpability and criminal responsibility of the defendant, the personal and economic circumstances of the victim and ascertaining causation issues. In civil or administrative procedures, the evaluation of people, things and the course of events prevails.

22. Because of that, medical, psychological, constructional and economic expert opinions and also those concerning road accidents are highly important.

23. Since the judicial decision often depends on substantive evaluation of the facts, the results of these expert opinions become more and more important for the outcome of every procedure. This also means that it is of extremely high relevance to select the best qualified and most suitable expert.

## **2. THE PERSON ACTING AS EXPERT**

### **2.1 Natural person or body of persons**

24. Normally only a natural person can be an expert. The principle is individual and personal preparation of an expert opinion. The reason for that is that the expert in person has to assume responsibility for the expert opinion as regards its content. It is possible for a corporation or institution to be selected initially. Insofar as a corporate body is appointed as an expert, it should nonetheless be ensured that a natural person within such a body takes over responsibility for the content of the expert opinion, signs it or gives a verbal report in court.

## **2.2 Staff / employees**

25. It is possible for the expert to make use of employees during the preparation of the expert opinion. They can not only do preparatory work, but can also draft the expert opinion under the instructions of the expert. They have to be properly supervised. However, the employees do not become experts when undertaking certain tasks concerning the preparation and drafting of the expert opinion. Only the person responsible for the expert opinion – the one who signs the opinion – is the appointed and instructed expert. It has to be made clear in the expert opinion – by quoting name, address and contact details of the expert – who this person shall be. The employees are only responsible for their work in relation to the expert. They do not have any rights or duties in vis-à-vis the court. It has to be indicated in the expert opinion how much work was done by employees or assistants during the preparation of the opinion, as long as the work of assistants was not just minor.

## **2.3 Several different experts / replacement of an expert**

26. It is possible for the court or the parties to appoint several experts. This depends on the matter under examination. It may also be possible that the expert deems it necessary to obtain a second expert opinion concerning details outside his area of expertise. In this case the court (or the parties) will have to appoint someone for such an expert opinion, or empower the expert to obtain such special knowledge by appointing an expert him- or herself.

27. If several different experts are appointed for one concrete question, they should deliver a uniform expert opinion to the court. Where it is not possible for the experts to provide a uniform expert opinion, they should record precisely those issues in which they are on disagreement.

28. To avoid problems with clarity and simplicity, the number of experts appointed should remain manageable and not become too large. It should be limited to a certain number that depends on the complexity and expediency of the question under examination. This number should be defined by the court or by law. In the event that there are many different experts preparing expert opinions, it has to be clearly and unequivocally visible which expert is responsible for which parts of the expert opinion. Nevertheless the expert opinion has to be signed by each single expert. If one of the experts assumes some of the other expert's tasks, he/she should indicate this clearly.

29. If the expert who has been appointed by the court is not able to conduct the preparation of the expert opinion (e.g. because of illness, insolvency, time capacity or refusal for other reasons), the court can replace the expert with another after having sought the opinion of the parties in the matter.

## **3. SELECTION OF THE EXPERT / SELECTION CRITERIA**

### **3.1 Requirements stated by the parties / appointment by the parties**

30. The court instructs an expert. It can also ask the parties to make a proposal concerning the person intended to be the expert. If both parties together suggest the same expert, the court should accept this as the main selection criterion, but not be bound by the parties' suggestion.

31. There is no duty on the parties to propose an expert; they only have the right to do so if they so wish. In some exceptional cases, it may be possible to empower the court to refuse both parties' proposal of one expert if this one person is known by the court to be absolutely unqualified.

## **3.2 Appointment by the court**

32. Usually the court must appoint the expert without the parties because there is no concurrent proposal for a qualified expert by both parties. Here the court in any case has to appoint the expert according to specific selection criteria. The general principle of the selection should be the qualification of the expert.

### **3.2.1 Selection criteria**

33. The court – either the deciding judge or the administrative body of the court – has to appoint an expert according to the following selection criteria. The compilation of lists of experts (to be checked and updated on a regular basis by the court) meeting these criteria may be very helpful in the selection process; the court should be free, however, to appoint experts not on the list if the circumstances of the case so require.

#### ***Determination of expert knowledge***

34. The expert must possess a suitable qualification and/or the necessary experience or skills. The qualification depends on the area of expertise and on the specific task. Experts from the area of science and research normally have a broad expertise. The expertise can also be gained through practical experience, though. The requirements regarding the qualification of the expert therefore vary according to the different job profiles and the assignment of tasks.

#### ***Factual independence and personal impartiality***

35. The expert has to remain independent concerning the matter under examination and must be impartial concerning the relationship with both parties. He/she should not be allowed to have been appointed by one party to prepare a private expert opinion during the pre-procedural stage. It should also be prohibited for him/her to stand in a close personal relationship with one party so as to suggest a conflict of interests. He/she has to guarantee that his/her opinion is given objectively and not according to potential personal interests.

36. The expert's advocacy of a certain scientific position is generally no reason against his/her appointment. However, in this case it must be possible to introduce the opposite scientific position in the proceedings.

#### ***Time and technical capacity / personal ability***

37. The expert must have the time and the technical devices to conduct the assessment within the case management timetable and in a correct way. He/she also has to be personally able to conduct the assessment and be available for the trial.

#### ***Predictable costs***

38. The lowest hourly rate must not be a selection criterion, because the danger of not appointing an independent and competent expert could easily arise. However, experts' costs should be borne in mind when selecting an expert and be dependent on the amount in dispute. Because of this, it may be necessary to appoint a potentially local expert to minimise the expenses. Moreover, the estimated costs of the expert appraisal should be brought to the parties' attention at the earliest possible stage.

39. If there is no legally prescribed system for the remuneration of court-appointed experts, the average cost of an expert should be taken as a valid selection criterion.

#### ***Forensic experience / occupational expert***

40. The selection of the expert cannot be made dependent on whether the expert has already had experience with judicial assessments. If the court already knows the expert and he/she has proven his capability to the court, it militates in favour of this expert's appointment. On the other hand, it is also important to consider that an expert who is always appointed for the same kind of questions runs the risk of lacking factual independence.

41. Judicial occupational experts can, but need not, be selected.

#### ***Predictability of the outcome of the assessment***

42. Predictability of the outcome of the assessment cannot be a selection criterion. Predictability sometimes cannot be eliminated if the expert upholds a certain scientific opinion. However, it is not permitted knowingly to appoint an expert supporting a certain scientific view in order to influence the outcome of the assessment. In any case, experts should indicate clearly whether they align themselves to a prevailing scientific view and, if not, why they have decided not to do so.

43. Rather, there should always be an effort to appoint an independent expert or a panel of experts who can present all different scientific views and who can then decide for one of them, explaining the reasons to the court and the parties.

#### ***Comprehensibility of the language / nationality***

44. The expert should be able to present his expert opinion in clear and comprehensible language and, where necessary, also in the required official language used in court. He/she should also choose a style of presentation which enables the addressees of the expert opinion – the court and the parties – to understand the statements not only linguistically but also substantively, and enables the addressees to undertake an assessment of evidence.

45. The nationality of the expert, and especially that of the country of the court, is unimportant and therefore not a selection criterion.

#### ***Decisiveness and reference to results***

46. The expert should be decisive concerning the questions that he/she receives and should try to answer the questions and not to leave anything open. It can be assumed that this is usually the case with forensically experienced experts.

#### ***Consideration of all criteria / overview***

47. The selection criteria have to be considered in an overview. The general principle must be the competent, independent and impartial expert who can prepare an expert opinion with regard to a well-regulated court proceeding. Only thus can it be guaranteed that the fact-finding is correct and helpful for the court procedure.

### **3.2.2 Selection procedure / guarantee of quality standard**

48. The court has to determine whether the expert has the needed competence and quality standard, thus a general education and a specialised education related to the field of his work so that he/she can determine and find out the facts in question. The expert has to prove his/her competence. In the course of such a selection procedure the following rules should be obeyed:

#### ***Judicial selector / Appointer of the expert***

49. The person appointing the expert can either be the judge who deals with the lawsuit or an administrative body of the court. The expert can either be selected during the core procedure of the lawsuit or in a special, separate procedure. The general principle of the selection procedure has to be guaranteeing a certain standard quality, hence the aim of finding a competent and independent expert with no conflicts of interest.

#### ***Free selection or binding requirements***

50. During the judicial selection process there is the possibility of allowing a single selector a free choice according to the listed selection criteria. Also, it is possible to require that the selection of the expert be directed at pre-selected experts recorded in certain lists.

#### ***Agreed experts***

51. The court – either the deciding judge or the administrative body of the court – can decide to waive the proof of expertise by the expert if it appoints an agreed expert whose general competence was proven to responsible bodies. The selection procedure is thereby facilitated. Scrutiny of the expertise is then no longer necessary.

52. To ensure that this expertise is maintained, there should be regular monitoring of the status of agreed expert. Also, such status should be temporally restricted and a possibility of extension should be provided.

### ***Experts from the professional chambers***

53. Professional chambers and organisations sometimes have a catalogue of experts. It is possible to refer to those catalogues for the selection and appointment of an expert. Sometimes one can ask these chambers and organisations to make one or more suggestions for experts to the court. This is especially interesting if there are questions concerning unusual and rarely investigated areas of expertise. However, there is no binding effect to those suggestions.

### ***Other lists***

54. It is possible that experts may be appointed from trade associations created for the purpose of proposing experts. These organisations may improve the possibility of selecting the most appropriate expert, yet due regard should be paid to the guarantees of independence of the expertise they can provide.

### ***Duty of the court to hear the expert in court before appointment***

55. The expert selected and appointed must always have the possibility to be heard in court after selection and before receiving instructions. He/she must have the opportunity to decline the appointment.

### ***Duration of the expert's appointment***

56. The expert is only appointed for a given lawsuit and the specific fact-finding in that case. For new questions or a new procedure, there is always the need for a new appointment.

### **3.2.3 Duty of the parties to hear the expert and right to decline him/her**

57. After the selection of the expert in the judicial procedure, the parties should have the opportunity to deliver an opinion concerning the nomination. In this connection the parties can disclose further information concerning the personal relationship of the expert with the parties and concerning the estimation of the expert's expertise and his ability to prepare the expert opinion. Parties who invoke one special reason for refusal have to explain it in detail. The court should be able to decline or change an expert if the reason for refusal is considered well-founded.

58. Valid reasons for refusing an expert can be reasons that imply violation of the principle of factual independence or personal impartiality, e.g. one-sided partisanship, bias or prejudice, a close relationship with one of the parties, conflicts with one party, personal interest in the outcome of the lawsuit or definite lack of competence.

### **3.2.4 Instruction of the expert by judicial appointment**

59. The expert is instructed to become an expert by judicial appointment.

### **3.2.5 Legal remedies against the appointment for the parties**

60. The parties may have the possibility to appeal against the appointment of a certain expert. Thus it can be guaranteed that the principles of independence and impartiality are preserved.



### **3.2.6 The court's means of control after the appointment and during the selection procedure**

61. The court or the relevant administrative body should be able to cancel the appointment of the expert during the procedure by discharging him/her. This is important in cases where the ineptitude of the expert was proven later, for example because of personal circumstances that have changed during the procedure such as illnesses, insolvency or lack of factual expertise in the expert's own estimation. Certain countries have found it useful to appoint judges who are specifically in charge of expertise-related matters, including matters relating to the selection of the experts, the failure of the experts to deliver an expert opinion meeting good quality standards, etc.

## **4. REQUIREMENTS FOR THE PREPARATION OF THE EXPERT OPINION (ASSESSMENT) / FORM OF THE EXPERT OPINION**

62. The purpose of expert opinions is to be used as evidence in the lawsuit. Therefore it is important concerning the practical handling and the necessary cogency of the expert opinion that there be general rules for the form of expert opinions. This is the purpose of the following rules.

### **4.1 Appraisal order**

63. The expert has to state exactly the instructions of the court. It seems to be reasonable that this should emerge from the expert opinion itself if the expert correctly and explicitly refers to the instruction of the court.

### **4.2 Addressee of the expert opinion**

64. The expert has to prepare his expert opinion having regard to his (potential) addressee. Concerning the layout and language of the expert opinion, it is essential to know who the recipient is.

65. The addressee is the appointing and instructing party, ie the court or the judicial administrative body, sometimes also the parties themselves. Irrespective of the parties' knowledge, the expert opinion has to be understandable, comprehensible and connected with the consideration of evidence usable for the court.

### **4.3 Fact-finding by experts themselves**

66. As far as is necessary for the assessment of the questions put to experts, they have to do their own fact-finding, examine the object or person in question, conduct tests or simulate chains of events.

### **4.4 Preparation by local on-site inspection or examinations**

67. Regarding these examinations, the expert has to prepare and organise his own on-site visits and must inform the parties and the court about them in advance. He/she also has to leave open the possibility for participation. The procedure has to be transparent for all participants and cannot be biased or one-sided. The general principle of the right to be heard (in court) has to be respected at all times.

### **4.5 Obtaining additional and supplementary reports or assessments**

68. The expert must inform the court and the parties about lack of personal expertise and obtaining other additional and supplementary reports or expert opinions concerning sub-questions. The expert opinion must explicitly refer to such additional reports or assessments and indicate their contents.

### **4.6 Requirements concerning the content of the expert opinion**

69. The expert opinion should be coherent, well-arranged, well-structured, scientifically founded and comprehensible. Furthermore it should be consistent and, depending on the definite rules of the area of expertise, new and recent in its assessment.

70. The expert opinion must depict the facts of the case, on which the results of the experts are based, as clearly and correctly as possible. The reasoning followed by the expert should be displayed as appropriate. If the expert has worked with facts established or assumed by himself, he/she has to indicate this.

71. In addition, the expert opinion should include a summary of the conclusions and a precise answer to the questions posed by the court.

#### **4.7 Verbal or written expert opinion / form of the expert opinion**

72. In general the expert opinion is written or electronically produced. According to the court's instruction, it can also be reported verbally. If the expert produces the expert opinion electronically, he/she carries the responsibility for the counterfeit safety of the written form. The court and the parties must be provided with the written or electronically produced expert opinions.

73. The written contents can focus on the following issues as appropriate:

- assignment of tasks
- reference to the judicial appointment (show order for evidence); notifications of examinations, on-site visits, investigation order, participants in the on-site visits and examinations;
- information about employees of other experts;
- scientific proof (literature) or other sources (e.g. technical rules);
- notifications showing which facts or circumstances were examined, established or simply assumed;
- if necessary it should be explained which methods or examinations were applied and, as the case may be, which other methods and theories exist;
- scientific disputes and information about the different results;
- explanation of the conclusions reached by the expert;
- degree of probability and limitations of possibilities for certain assertions.

#### **4.8 Interim report or final report**

74. The expert may prepare interim reports depending on the extent of the assessment. He/she provides at least the court with a final report. Belated additions to the expert opinion have to be possible for the expert within the periods intended for this.

#### **4.9 Production of the expert opinion within a reasonable time**

75. The expert should produce the expert opinion within a reasonable period of time. If the court sets any deadlines for the production of the expert's opinion, he has to meet them.

#### **4.10 Instructions of the court and of the parties**

76. Specific instructions given by the court concerning the production of the expert opinion, that include instructions concerning the content, the procedure and the report of the expert, have to be obeyed. Parties may ask questions on the report for clarification before the matter comes to trial.

77. The court or the administrative body of the court that appointed the expert must have the opportunity to give instructions concerning the specific production of the expert opinion (of the assessment/report).

78. The parties to the lawsuit or trial need to be extensively informed about the instructions of the court that are given to the expert. The general principle of the right to be heard must be adhered to.

79. The court may also ask the expert to draw up a preliminary report, to be submitted to the parties prior to the submission of his/her final report. This practice lessens the risks of omissions or mistakes during the expert appraisal and clarifies the expert's position on a given matter, thereby also decreasing the risk of subsequent litigation over the expert opinion.

## **5. THE EXPERT'S DUTIES**

80. The expert has duties that refer to his person (personal duties) and duties that concern the procedure of the assessment itself.

### **5.1 Personal duties**

#### **5.1.1 Assessment in person**

81. The expert has to produce and report the expert opinion in person. He/she must take full personal responsibility and cannot delegate this responsibility to third persons. This is also and especially the case if he/she uses the services of employees during the assessment.

#### **5.1.2 Independence and impartiality**

82. The expert has to be not only personally independent but also independent of the outcome of the lawsuit and also of the interests of the parties. The general principles of independence and impartiality must be obeyed and followed. To be able to achieve those general principles, there are specific general professional principles and rules the expert should comply with.

83. These rules include the following for the expert:

- The expert has to follow his instructions having regard to the current standards of science, technology and experience and with due diligence. He/she must diligently determine the actual background of his professional/technical assessment and explain the results of his assessment in a comprehensible way
- While doing his/her job and his/her assessments, the expert must always beware of the danger of bias and prejudice. When preparing and producing the expert opinion he must maintain strict neutrality and answer the questions objectively and without bias (impartiality).
- An expert who has been instructed or appointed in contentious proceedings is not allowed to enter into agreements that could endanger his impartiality, or to make his payment dependent on the outcome of the lawsuit. Also it is prohibited for him to accept other benefits except his fees and expenses.
- An expert should declare at the beginning of judicial proceedings that he/she does not have a common interest with one of the parties, and should not accept instructions in any matter where an actual or potential conflict of interests could exist. Notwithstanding this rule, an expert may accept an instruction in appropriate cases if full disclosure is made to the judge or to those appointing him/her and if these persons explicitly accept the instruction in this situation. If an actual or potential conflict of interests occurs after the instruction of the expert, he/she must immediately notify all interested parties and may have to withdraw from his appointment in relevant cases.
- The expert must report all circumstances that may lead to doubts concerning his independence and his impartiality in this specific expert instruction, e.g. his own bankruptcy or becoming a defendant in criminal proceedings.

84. Courts should also be vigilant as regards situations of monopoly of the expertise. The rotation of experts could be considered as a suitable means to avoid reciprocal dependence and improve experts' independence vis-à-vis the court.

#### **5.1.3 Expert's duty of confidentiality**

85. The expert has to safeguard all information concerning the circumstances that he/she determined during his fact-finding and assessment. It is prohibited for him/her to inform unauthorised third persons about the knowledge he/she obtained during his/her assessment work as an expert or to exploit this knowledge for the use of others. The expert has to oblige his/her employees to respect the duty to remain confidential. Also, the duty of confidentiality continues even if the judicial appointment has ended.

#### **5.1.4 Duty of administration of oath**

86. To affirm his independence the expert must give a public guarantee. This usually happens through the administration of the oath concerning his duties. In case the expert is agreed, he/she may swear impartiality only once.

#### **5.1.5 Duty to regularly update his knowledge**

87. The expert should possess and maintain a high level of technical and professional knowledge and/or practical experience in his professional field. He/she should keep up his knowledge not only concerning his expertise but also the principles guiding the expert's activity. He/she should undertake professional training and educational qualifications on a regular basis on these issues. In certain countries, experts also have the duty to undertake training on the rules of procedure concerning the expertise and the role of the expert, as well as on conditions of the expert's participation in hearings and presentation of his/her expert opinion.

### **5.2 Procedural duties**

#### **5.2.1 Duty to render an expert opinion per se**

88. From the moment of his appointment, the expert is obliged to render an expert opinion. He/she can only be freed from this duty if he/she is excused from producing the expert opinion. He/she has to limit him- or herself strictly to conducting the production of the expert opinion and not deliver legal advice to the parties or undertake legal evaluation vis-à-vis the court.

#### **5.2.2 Correct procedure**

89. The expert should conduct the assessment under a proper and correct procedure. He/she is bound by the instructions received. He also has to inform all those involved – the parties and the court – about his examinations and planned actions. Furthermore he/she has to give them the opportunity to participate when appropriate. The general principle of the right to be heard has to be obeyed. The expert has the duty to keep and treat the files diligently, to deliver them in time and to document his assessment.

#### **5.2.3 Preparation of expert opinion in reasonable time**

90. The expert also has the duty to conduct the assessment and prepare the expert opinion in a reasonable amount of time, at least by the specified deadline. He/she is obliged to inform the court of reasons for an expert opinion not being delivered on the date due. He/she must then also tell the court how long the preparation of the expert opinion will eventually take.

#### **5.2.4 Foreseeable costs of the expert opinion**

91. The expert has to let the court and the parties know, before appointment, the foreseeable amount of the costs of the expert opinion. The expert should also inform the parties and the court during the assessment process if the original estimate of costs changes and the costs increase because the assessment becomes more complex and costly than expected.

92. It may be advisable to make the parties aware of the estimated costs of the expert opinion beforehand.

#### **5.2.5 Duty to appear in court**

93. The expert has the duty to appear in court and to explain his report verbally if required.

### **5.2.6 Communication and documentation / notification duty**

94. The expert must inform the parties and the court about all steps of his assessment (dates of examinations, obtaining knowledge from others, additional, supplementary expert opinions). In some cases it might also be necessary to obtain the court's and/or the parties' approval regarding the expenditure.

95. The expert carries the duty to store the expert opinion and to report the steps of the assessment. To fulfil this duty he may need to describe requirements of examinations, take pictures etc. One can set a time limit on the duty to store and preserve the files.

### **5.2.7 Duty to take out insurance**

96. The expert should (unless the court otherwise directs) take out appropriate insurance with a reliable insurance company that provides an adequate insurance coverage. The expert should maintain this insurance during his period of investigation.

## **6. THE EXPERT'S RIGHTS**

97. The expert has both rights in respect of his person and rights that concern the procedure of producing the actual expert opinion.

### **6.1 Personal rights**

#### **6.1.1 No right of appointment**

98. The expert has no right vis-à-vis the court and/or the parties to be appointed.

#### **6.1.2 Personal right to refuse appointment if biased or unqualified**

99. The expert has a right to refuse his appointment if he/she is not able to carry out assignment impartially and independently or is not sufficiently qualified.

#### **6.1.3 Right to payment**

100. When appointed by the court, the expert has a right to be paid for his work. This payment has to cover the expenses incurred and the cost of labour. The payment has to be foreseeable regarding the amount, must correspond to general standards, cannot be individually negotiated and has to be adjusted to the quality and complexity of the assessment and the expenditure of time and effort for the specific amount. The work of the expert has to be reasonably and adequately rewarded to avoid the risk that the expert is tempted to violate his independence. However, there should be no legal requirement as to the level of payment for the assessment. A scale of fees is to be recommended if the court appoints the expert. Also, if the parties appoint the expert to produce an expert opinion during a lawsuit, payment of the expert should meet the general principles of proportionality, reasonableness and predictability.

101. The payment of an expert appointed by the court may be measured by hourly rates. The payment does not depend on the results of the assessment. It should be also independent of the sum in dispute. The general principles of neutrality and objectivity of the expert can only be adhered to by this way.

102. Apart from that, the hourly rates of the expert depend on the area of expertise and also take account of the expert's qualification. Under some circumstances it may also be permissible to differentiate regarding the complexity and the degree of difficulty of the assessment.

103. Legal aid schemes should include the costs of expert opinions among the same rules as for lawyers when required by the matter at issue.

#### **6.1.4 Right to payment in advance**

104. The expert who has been appointed by the court should have a right to payment in advance depending on the extent and importance of the assessment. In a civil case the parties are usually obligated to allow payment in advance according to the principles of general procedural law.

105. As soon as the expert has given a complete and proper expert opinion, he/she has the right to full payment<sup>3</sup>.

#### **6.1.5 Reimbursement of expenses**

106. Court-appointed experts' rights include payment of a claim for refund. However, this claim only refers to the necessary costs, for example travel expenses, costs for copying and telephoning, as well as costs for computer software, examinations or other costs for special equipment and costs for employees.

#### **6.1.6 Accounting**

107. The expert also has the right to balance accounts with his/her client after he/she has finished his work as an expert. If the court appointed the expert, he/she has to request determination of his/her fees and expenses by accounting.

108. The client (the party) has to refund the fee and must reimburse the expenses. If the expert has been appointed by court, the treasury must pay. In civil law proceedings, these costs normally become costs of the lawsuit that have to be paid by the parties according to the general law of costs.

### **6.2 Procedural rights**

#### **6.2.1 Right to receive directions from the court or the client**

109. The expert has a right to receive directions as to how he/she should deliver the expert opinion. In addition, he/she has a right to be informed about and advised of his/her personal duties and procedural duties. The judge can and should assist when necessary and when the expert asks for support.

#### **6.2.2 Right of access and right to information**

110. To be able to conduct a proper and correct assessment, the expert must have the right of access to all objects, persons and events that are being examined and evaluated. A copy of the original of the evidence order or the examination should be sent to the expert. If the expert is refused an opportunity to examine this, it could prevent him/her from fulfilling the duty to produce an expert opinion.

111. It is recommended that the court send the expert for feedback a copy of the decision in the case in which the expert provided assistance.

### **7. POSSIBILITIES FOR FOLLOW-UP TO THE EXPERTISE AND SANCTION IN CASES OF BREACHES OF DUTY**

112. The duties of the expert are of high importance for the complete lawsuit, especially the duty to produce the expert opinion within a reasonable time. It is known that the cause of excessive length of proceedings is often lengthy taking of evidence, especially obtaining expert opinions. For this reason, it is of the utmost importance that the judge and/or the court registry follow up the assessment process and intervene in case of delays in delivering the expert's report.

113. Also, unpredictability of the costs arising from the appointment of the expert is a reason for the court and the parties to exert pressure on the legal proceedings.

114. Breach of the expert's duty to produce a factually correct expert opinion that meets the actual circumstances ultimately carries the danger of a wrong judicial decision.

115. Furthermore, it is important that the expert abide by his general personal and procedural duties.

116. Therefore possibilities of sanction that support compliance with duties must exist. One has to differentiate between the possibilities of sanction for the court and for the instructing administrative body and the parties.

117. A potential means of sanction could be forfeiture of payment, release from the assessment, disqualification as an agreed expert, an administrative fine or an arrest, criminal proceedings, disciplinary consequences or damage claims.

118. As mentioned earlier under chapter IV f), certain countries have found it useful to appoint judges who are specifically in charge of expertise-related matters, including selection of the experts, breach of a duty by the expert, etc.

## **7.1 Possible court sanctions**

### **7.1.1 Possible sanctions for breach of personal or procedural duty**

119. Depending on the breach of duty, criminal proceedings or regulative legal consequences can arise. If experts violate the obligation of confidentiality or do not appear in court to report results and present the expert opinion, they are in breach of the duty to inform the court or the parties. An administrative or disciplinary fine may be incurred for making false declarations about personal qualities. In more severe cases. There may even be the possibility of criminal proceedings.

120. Under certain circumstances, depending on the breach of duty, a the expert's final exemption from the assessment in this single case might be possible. However, there are no effects on the probative value if the expert remains under instructions to produce the expert opinion.

### **7.1.2 Possible sanctions in cases of incorrect / unqualified assessment**

121. In several cases, the court or the parties must have the opportunity to ask the expert questions and insist upon the completion of the expert opinion. This is especially the case if the expert prepares an expert opinion which is incomplete, unclear, ambiguous and objectively incorrect, not up to date, without any scientific evidence, or if he or she fails to fulfil the instructions to produce an expert opinion or proves not to be competent. In case of gross negligence, the expert may incur liability.

122. If it is proven during the judicial legal proceedings or later that the expert has completed his expert opinion in a way which is not objectively correct, the court has no claim for damages.

123. If an expert is discovered to be permanently unqualified because of lacking expertise, the status of agreed expert as expert may be refused or can also be revoked.

### **7.1.3 Possible sanctions for expert opinions not completed in time**

124. If the expert does not complete his expert opinion within the stipulated time, it should be possible to impose a fine on him/her. In very severe cases of breach of duty, it should be possible to withdraw the expert from the appointment.

125. However, there are no effects on the probative value of the assessment if the expert hands it in behind schedule but remains to be appointed for the production of the expert opinion.

126. Also, it must be possible for the court to reduce the payment in very severe cases where the expert is to blame for the delay.

127. In all eventualities the court should have control over the deadlines that were given to the expert.

## **7.2 Possibilities for the parties to impose sanctions**

### **7.2.1 Right to refuse the expert**

128. If the expert breaches his/her duty to remain independent, it has to be possible for the parties to request the judge to decline him/her because of bias. In the context of the discussion whether to refuse the expert, the parties have to justify the expert's lack of independence for whatever reasons.

### **7.2.2 Right to a new expert, a second expert opinion**

129. Beyond that, the parties must have the procedural right to deliver an opinion concerning the expert opinion, to question the expert and to substantiate their own reasoning/giving of evidence with a private expert opinion or with a principal judicial expert's opinion. Only the court - and not the parties themselves - has the right to communicate directly with the expert

### **7.2.3 Damage claims in cases of culpably incorrect factual assessment**

130. In some specific cases in which the expert has culpably failed to conduct a proper and correct assessment, the parties may have damage claims against the expert.

131. In these cases it will usually be necessary that the expert has prepared his expert opinion wrongly with intent or wilful negligence. For the degree of fault, the assessment itself will count.

132. The damage claims against the expert can be settled in a separate procedure. Notwithstanding that, the parties can also bring normal legal proceedings against the expert.

### **7.2.4 The expert's duty to insure against damage caused**

133. To be able to enforce possible damage claims of the parties, it might make sense to place a duty on the expert to be insured for any case of liability (liability insurance).

## **1. EFFECTS OF THE EXPERT OPINION IN THE LAWSUIT OR TRIAL**

### **8.1 Binding effect of the expert opinion**

134. The expert opinion is not binding on the court or on the parties. The court evaluates it freely. The court must verify and determine whether the expert opinion is objectively convincing. In so doing, the court has to consider all objections that have been made against the expert opinion by the parties.

135. The expert opinion is introduced into the judicial proceedings by written submission or by verbal explanation during the lawsuit. The parties and the court must have the right to ask the expert questions. The expert is obligated to give his opinion in the matter and may have to report an additional expert opinion. Discussion of the content of the expert opinion with the expert can be actuated by introducing and opposing it to private expert opinions already available or still to be obtained.

136. However, the way to question the expert is different from a real cross-examination that can only be conducted with witnesses. The right to question the expert solely refers to an understanding in terms of content and to the control of scientific correctness of the expert's statements.

### **8.2 Probative value**



137. Basically the expert opinion should have the same probative value as other evidence. If the expert opinion is not meant to function as a piece of evidence in the lawsuit but the statements are only meant to help the actual understanding of the judge, the expert's statements have no mandatory binding effect. The judge has the possibility to diverge from the expert's presented position and understanding if he/she has reasonable reasons to do so.

## **2. PERSPECTIVE**

138. According to the principles developed herein, every member state of the Council of Europe should either introduce legal regulations concerning the rights and responsibilities of experts in judicial process or control, or review whether the existing guidelines in the matter meet the prescribed minimum standards of the rules of conduct for experts.

<sup>1</sup> CEPEJ report on European judicial systems (2012 data), chapter 15.

<sup>2</sup> In some Council of Europe member states, foreign law may be considered as a fact. Consultants may be appointed by the judge (very often from the academic environment) to help clarify certain issues related to the interpretation and application of foreign law and assist the judge with the decision-making process.

<sup>3</sup> Payment of the final costs of the expert appraisal by the parties depends on the legal solutions identified in each member state