

EGLE – EUROPEAN GUIDE FOR LEGAL EXPERTISE

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Abstract

The Propose of the European Guide for Legal Expertise is to be an extremely useful tool in building a consensus on the heterogeneous realities of judicial expertise and judicial experts. It made it possible to bring together in a participatory process the various practices and experience from very different systems, from common law and civil law, and to draw out the best of these practices in order to propose a common foundation to improve judicial expertise.

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In October 2015 the European Expertise and Expert Institute have published the Guide to Good Practice in Civil Judicial Expertise in the European Union (European Expertise and Expert Institute, 2015). The Guide was the result of work led by European professionals whose main aim is to improve and harmonize very different practices from various systems, in order to propose a common foundation to the civil judicial expertise.

The conclusions contain many recommendations and ideas, as much for the countries where the recruitment, appointment and monitoring of the quality of experts are very organized as for the countries where this is not yet the case. They also offer actual points of convergence between different categories of technical experts appointed by judges for a fair trial.

Most of the recommendations can be immediately implemented, but others may require the creation of ad hoc bodies or the adaptation of civil procedure rules. We want to see the differences between the Guide and our expert and expertise legislation.

In the Chapter I: Definitions and limits, it says that the principles should be applied to three categories of Experts, whose existence has been noted by European Commission for the Efficiency of Justice: Technical Experts, Expert Witnesses and Legal Experts.

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The Legal Expert - who can be consulted by the judge on specific issues regarding the rules, practice and rights applicable in foreign law, and more particularly on the law of a non-EU Member State - is a new institution for our specified legislation (the New Civil Procedure Code - NCPC, and the Government Ordinance no.2/2000 actualized).

The other provisions of this chapter of the Guide are similar or can be easily converted in our legislation. For example, the Judicial Expert (Technical or Witnesses) from the Guide is appropriate to the Technical Judicial Expert in our legislation, and the Private Expert from the Guide is the Technical Extrajudicial Expert.

In the Chapter II: Conditions regulating when one should resort to judicial expertise, we have complaints provisions with our legislation, except the opinions on questions of law, where only Legal Experts can advise the Court, when allowed by the law of a Member State.

The Chapter III: Appointment of the Expert introduces new institutions in:

Section I – Eligibility criteria to be appointed Expert

§ 1 Registration on a National or *Regional list*, and/or on a *list of European Experts*

For efficiency of justice and transparency in a unified European judicial space as well as for the quality of expert opinions would be well-served by the creation by all Member States of lists of Judicial Experts, that would be easily accessible to citizens over the internet, as well as of a list of European Experts, mainly for cross-border disputes, that would allow judges in the member states of the European Union to easily find the most appropriate Expert for a given case. These lists should be established based on harmonized nomenclature of the fields of competence and identical criteria.

These lists, which would comprise experts who are already registered on a national list, should include the Expert's past experience and his working language or the mention of the countries where has had additional experience (in some cases knowledge of the cultural idiosyncrasies may be useful for a qualified opinion).

It is also possible to set up a European directory of all Experts by bringing together existing national lists under certain conditions of harmonization. This could form a database of about 85.000 to 120.000 name of Experts. The body in charge of registrations (for a maximum and renewable period of five years) and re-registrations on the list of European Experts could be invested with the power of supervising the correct application of the registration criteria in the Member States. It must also ensure that the Expert has taken out sufficient civil

liability insurance (sourced from a credit-worthy insurance company) to cover, without any territorial limits, his main activity.

The court can nevertheless proceed to verify the Expert's knowledge and skills by referring to the following points in particular:

- university degrees
- professional experience listed on his CV
- professional reputation membership of professional associations
- references
- the Expert's professional qualifications, with initial and continuous training
- relevant publications, prizes obtained
- courses and teaching experience
- the legal knowledge for the exercise of his main activity in a fair trial, his obligations and rights.

§ 2 *Oath* and endorsement of the Guide to Good Practices

The Expert should be held to the swearing of an oath before the competent judicial authority at the time of his registration on the national list and/or on the list of European Experts. By taking this oath the Expert would be swearing to put his skills at the service of the law with probity, objectivity, loyalty, independence and impartiality, and to respect the recommendations of this Guide to Good Practices and appended Code of Ethics.

Section II – Appointment Procedure

Before appointing an expert, the judge or party should be able to call or write to him in order to verify that he has the necessary competence to carry out the instructions for which he is approached, that he is available, and that there is no conflict of interest, or where one potentially exists, that it has been declared.

As for the Expert, before accepting the assignment, he must disclose any information that could preclude or be considered as a conflict of interest, and more generally, must ensure that his appointment does not place him in a conflict of interest. To this end, he should spontaneously provide the court with a statement of independence and disclose any relation he has or has had with one or more parties in the litigations that could cast suspicion on his impartiality.

If a conflict of interest appears during the expertise operations, for example if the expertise operations are extended to another party than the ones present when the Expert was appointed, he will again need to inform the appointing judge or party.

They can decide either to disqualify the Expert or allow him to carry on with the expertise after having received the agreement of the judge having heard all the parties involved. Finally, the Expert will have to show proof of specific insurance to cover his work as an Expert.

Section III - Challenging the Experts' appointment

When a request for a challenge is brought before the court, the judge should decide within a reasonable time after having heard the Expert. In all cases, the decisions taken following the challenge and replacement of an Expert's appointment should be substantiated and appealable.

The other provisions of this chapter of the Guide are similar or can be easily converted in our Romanian legislation (NCPC, art. 332-334).

The Chapter IV: The expertise procedure presents four sections.

Section I - Guidelines of the proceedings and the judge's office

§ 1 The adversarial principle

The evidence submitted to the Expert will be shared with all the parties, unless the judge decides otherwise, or the parties have agreed on the fact that there is enough reason for the evidence to remain confidential. In this last case the judge should determine the conditions in which the Expert will be able to carry out his instructions in a non-adversarial manner.

Prior to the hearing before the judge, the Expert will share a pre-report with the parties. If no pre-report has been made available, the parties should nonetheless still be able to send to the Expert their technical questions and observations on his findings before being heard by the judge.

§ 2 The Judicial supervision of the Expert appointed by the judge

The independence of the Expert does not exclude the judicial supervision of the progress of the proceedings to ensure swiftness and efficiency. As for the Expert, provided he keeps the parties informed, he should have the right to seek written directions from the court on any procedure matters that may assist him out his instructions.

The judge should ensure (unless local law or particular conditions make him to decide against) that the Expert draws up a pre-report which will be shared either with all the parties in litigation to phrase their observation before the final report is drafted.

The judge must be able to supervise and ensure a fair trial during the expertise.

Section II - Progression of the proceedings

§ 1 Definition and duration of the Expert's instructions

In no case should the Expert's instructions include the negotiation of a settlement between the parties, nor should they include the possibility to negotiate with anyone and much less with the other party's expert when each litigation party has appointed one.

Where a legal entity is appointed as an Expert, it must have integral management of the case, but if one individual person working as an Expert within the organization, must take personal responsibility for any written or oral evidence collected and for the conclusions.

§ 2 Extension of the Mission

The judge has the power to extend or restrict the timeline and the scope of the mission. The provisions of this paragraph are similar or can be easily converted in our Romanian legislation (NCPC art. 337).

§ 3 Experts' meetings and supplemental reports

The judge will encourage the Expert to limit the number of the meetings with the parties to what is strictly required, and when necessary, all the participants in a trial should use all available resources provided by new technologies (videoconference, emailing of documentary evidence and report).

Moreover, in instances where there is more than one expert appointed to the case, the judge may order a meeting of experts, where the experts will identify the areas where they agree and those on which they disagree in a "without prejudice" discussion.

The next provisions of this paragraph - the Supplemental Report, are similar or can be easily converted in our legislation (NCPC art. 338).

§ 4 Return and conservation of documentary evidence that the Expert has held throughout the proceedings. There are similar provisions in the New Civil Procedure Code (art. 341-344).

Section III - Oral Hearing

The provisions of this section are similar with the art. 334 of the NCPC, but the oral hearing may be held as a videoconference in accordance with domestic legal provisions.

Section IV - Simplified Proceedings

In small cases and claims or during an "installation meeting" the judge may ask or the Expert may suggest a simplified procedure, aimed, with the parties' agreement, at limiting or eliminating adversarial meetings.

Chapter V: Expert report

Section I - Preliminary report

Where a pre-report is submitted, the final report should have the same structure and show changes from the pre-report. An oral pre-report must have the same structure as the written pre-report.

Section II - Structure of the Report

The report has similar subsections in our Romanian legislation: introduction, the body of the report (investigation, discussion and Expert's analysis) and the conclusions.

The signature of the Expert must be preceded by a "Statement of Truth".

Any documents that were not in the evidence provided by the parties but has been used by the Expert, or are referred to in the Report, are mentioned in the Annexes.

The Report must be deposited at the court, at least 10 days before the term of judgment (NCPC, art. 336). The judge may make exceptions to this rule under urgent circumstances.

Section III – Effect

The judge shall always decide freely whether or not he will take the Expert's opinion into the final judgment (NCPC, art. 264).

Chapter VI: Remuneration of the Expert

The provisions of this chapter are similar or can be easily converted in our Romanian legislation (NCPC art. 330, 331 and 339). In the Romanian legislation are also used the terms of remuneration, respectively indemnity as the equivalent of remuneration (Ros, 2017).

The Expert must inform the judge and the parties about the calculation method of his fees and communicate the closest possible estimate of the costs.

Chapter VII: Status of Experts

Section I – The rights of the Expert

Due to possible pressures on Experts, since their opinions are helping to resolve a dispute, they should be under specific protection similar to that given to judges or to people with public authority.

The other provisions of this section of the chapter are similar or can be easily converted in our legislation (NCPC: art. 331, 332, 334 and OG 2/2000: art. 17-23).

Section II – The expert's ethics

Identical ethical rules should be applied to the European Judicial Expert, since he is authorized to give his opinion before a court. The Expert should show himself loyal to the court as much as to the parties, and his legitimacy and authority is based on competence, probity, objectivity, loyalty, independence and impartiality.

Even when the Expert has been appointed by a party who is paying him, he must be honest and not to conceal anything, even by omission, of any evidence.

The Expert should be able to swear an oath or a declaration of independence, in relation to any possible links with the parties that could cast doubt on his objectivity. The oath can be amended for any national requirements as long as it does not diminish the guarantees provided. The European Expert's ethical rules should be identified in a Code of Ethics and the Expert should be required to respect it.

The applicable sanctions if ethical rules are not respected should be adapted by each country depending on judicial traditions and rules of proceedings, as long as the disciplinary decision is handed over to a jurisdiction or an independent body, and as long as it respects the adversarial principle. Assessments and reviews are essential, their practical implementation depend on the national legislation.

Section III – Quality Assurance

§ 1 General principles

A quality assurance system should be based on shared and uniform rules including both: accreditation and certification. The four criteria that the Expert must provide for the quality assurance system are:

- a) knowledge and competence in the field of expertise (theoretical)
- b) practical knowledge and competence,
- c) ethics and professional attitude
- d) efficiency (time and agreed budget).

§ 2 National Certification Bodies

The provisions of this paragraph of this section are similar or can be easily converted in our legislation – including the CEN/ISO standards required for each field of expertise, (OG 2/2000: cap. V - VII).

§ 3 List of European Experts and European body in charge of managing this list

The national authorities of the EU members should develop an accreditation method for the legal entities recognized as Experts. The body created and funded by the European Union to manage the list of European Experts shall be responsible for:

- developing the list and harmonizing the national registers
- improving the quality of expert opinions
- developing a statistical tool to gain better knowledge of the activity and to compare timeframes from one judicial system to another.

The other provisions of this section of the chapter are similar or can be easily converted in our legislation.

Conclusions

This Guide of Good Practices is intended to evolve with future social, economic and legal developments, in particular the ongoing progress of legal harmonization.

In the long term, the creation in each Member State of independent national or regional certification and accreditation bodies in charge of establishing public lists of Judicial Experts, after verifying the competence and morality of the candidates, most certainly be a quality assurance system.

Our legislation is close to the Guide recommendations. Most of the recommendations can be immediately implemented, but few others may require the adaptation of civil procedure rules.

We think that a common code of ethics would substantially contribute to improve legal processes and would help courts issue high quality rulings in all cross-border litigations.

Bibliography

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