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Jeanne BRIAND – Matthias MONTCHOVET – Yannick PORTE

Tutor: Sophie LADOUES-DRUET

THE HARMONISATION OF CIVIL JUDICIAL EXPERTISE IN THE EUROPEAN UNION: MOVING MOUNTAINS?

INTRODUCTION

"*I know human life has no price, but such a difference within a few meters is scandalous*"[1] -
Matteo ROSSI, lawyer for the families of Italian victims of the Mont Blanc Tunnel fire.

Built at the height of the European integration process in the 1960s and once celebrated as a source of pride and ties between France and Italy, the Mont Blanc Tunnel was often seen as a symbol of what European cooperation could effectively mean: transcending cultural differences and natural barriers to economic growth, technical achievement and above all free movement in a strategic cross-border zone in Central Europe. As the then President of the Italian Republic Giuseppe SARAGAT said at the opening ceremony, it showed how "*the strength of the common will of the peoples [of Europe] could move mountains*[2]."

This shared vision lasted until twenty years ago when a fire killed 39 people in March 1999 due to a truck catching on fire on the French side, aggravated by a failure in the ventilation system on the Italian side. This tragic event triggered a so-called "battle of experts" in both countries to seek the liability of all parties involved. Unfortunately, it revealed how deep the gap was between French and Italian experts: not only were the investigations particularly difficult to conduct on a common basis, but there was also a difference on a scale of one to ten in the damage assessment carried out by each country. This sole fact prompted Matteo ROSSI, a lawyer from Milan defending the families of the Italian victims, to call for "*urgent harmonisation at European level* [3]".

One may wonder how such a contradictory situation could arise in modern Europe, proving the 17th century French philosopher, Blaise PASCAL, right when he said "*truth on this side of the Pyrénées [mountains], error on the other*". Historically the term "expert" derives from the Latin *expertus*, which means "*the one who has experience*" or "*the one who is skilful*". Every judicial system in the world admits the intervention of a "*man of art*" capable of assisting the court in the understanding of evidence in a case, requiring special skills that the judges or litigants do not master. Even if an expert's opinion is eventually discarded by the court, his/her conclusions are often followed, making him/her a trusted "*auxiliary of justice*"[4] with a "*special status due to his/her decisive role in the resolution of disputes*"[5]. Thus, scholars widely consider the expert as "*the hidden author of*

[1] Marcel LEGENDRE, "Tunnel du Mont-Blanc : harmoniser les indemnisations", *Le Progrès*, 28 September 2000.
[2] "Deux cent lauréats sont reçus au Conseil de l'Europe", *Le Monde*, 24 July 1965.
[3] Marcel LEGENDRE, *ibid*.
[4] According to the French *Conseil d'État*, case 77459, *Ministre de l'Intérieur c/ Sieur Aragon* (1971), the expert is "*part of the public service of justice*".
[5] Belgian Constitutional Court, case 31/2009 (2009), B.7.3.

court decisions"[6]. Nowadays there is an estimated number of 120,000 qualified court experts throughout Europe[7].

Although there is no prevalent definition of what a court expert is, there is consensus in qualifying expertise itself as "*an investigative measure assigned to a technician by, or with the approval of, a court or a prosecuting or adjudicatory authority, in order to contribute to the judicial settlement of present or future litigation by adducing technical or factual evidence*.[8]" Thus, expert opinion is one way of administrating evidence for both parties and judges. Besides its weight in court decisions, such opinion has consequences on the duration and costs of judicial proceedings. For instance, in France more than 54,000 civil expert reports were carried out in 2009, mainly regarding construction and health cases, and usually completed after 15 to 20 months at an average cost of 2,200 euros[9].

European judicial cooperation in civil matters has achieved tremendous success these past twenty years, affecting family law, civil procedure, property, succession and even small claims. It is based on the principle of mutual recognition, which is the core or the cornerstone of the area of freedom, security and justice, and while there is recognition and enforcement of judgments and decisions in the European Union (hereinafter "the EU") this principle does not yet apply to judicial expertise: the main European texts are silent on the topic. As a result, an expert report provided in one EU Member State is virtually worthless in another because it is closely linked to the system of legal evidence adopted in a particular country. Besides, the free provision of services by court experts seems to be hindered in the European market. However, some margins still exist to tackle the issue: common grounds may be found regardless of the judicial system and could be systematised under specific rules or methods.

Therefore, this paper will examine the reasons behind the lack of harmonisation in civil judicial expertise in the EU (I) before demonstrating how the principle of mutual trust could realistically be transposed to this area in the coming years (II).

I. The lack of harmonisation in rules governing civil judicial expertise in the EU

Judicial expertise provisions reflect the distinctive features of civil procedure in the EU, which has been marked historically by converging but mostly diverging factors. Firstly, these differences will

[6] Éric LOQUIN, "Les experts : auxiliaires ou concurrents du juge ?", *Centre de droit comparé*, vol. 1, 2009.
[7] Katharina BLEUTGE in *Good practice in civil judicial expertise in the European Union: towards a European expertise*, Larcier, 2016, p.36.
[8] European Commission for the Efficiency of Justice (CEPEJ), *Report on European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice* (2014), chapter 15.
[9] Delphine DUMÉNY, Emmanuel VERSINI, *L'essentiel de l'expertise judiciaire,* Gualino, 2014, p.55.

be assessed (A), and then their lasting impact on the way civil expertise is exercised in Europe will be discussed (B).

A) An assessment of the divergence in European systems of civil judicial expertise

First of all, it should be noted that there are three main legal traditions in the EU: "continental" or "civil law" (continental Europe), "common law" (United Kingdom – England, Northern Ireland, Wales, and the Republic of Ireland) and "mixed" systems (Cyprus, Scotland).

In a nutshell, continental law systems are primarily based on the rule of structured law in codes and pre-established evidence, whereas common law systems focus on the importance of court decisions and parties documenting evidence. In this framework, two types of court experts prevail[10]: technical experts who are at the disposal of the court, and expert witnesses supporting the arguments of the parties in technical fields[11]. The former may frequently be encountered in continental law systems while the latter are a characteristic of common law systems with some exceptions[12].

Bearing this in mind, civil judicial expertise differs significantly in the EU from common law to continental law countries, and even between continental countries themselves, as regards the status and responsibility of the expert on the one hand *(1)*, and proceedings on the other *(2)*.

1. *Differences regarding the status and responsibility of the expert*

a) Common law and mixed systems

In common law countries, court experts do not have to be qualified under a specific procedure or approved by governing bodies in order to help the court in civil cases. The expert-witness system means that parties have the freedom to propose whoever is able to support the burden of proof. However, this does not imply that ethical rules are not respected: for instance, in the UK, the expert has to state in his/her report that he/she "*understands and has complied with [his/her] duty to the court*"[13] and that expert evidence is "*restricted to that which is reasonably required to resolve the proceedings*"[14]. Otherwise, the court has the power to intervene when a mission generates disproportionate costs or may report the expert to the Academy of Experts for disciplinary measures. Nonetheless, two EU Member States provide immunity for experts (Cyprus and Ireland): their liability cannot be sought because it is believed that potential claims could prevent them from

[10] A third category exists: "legal" or "law experts" who are consulted by judges on issues related to practices and rights applicable in foreign law but mainly concerning non-EU Member States.

[11] Expert witnesses must not be confounded with "private experts" who provide technical help to the parties but do not have obligations towards the court or the judges, in particular no oath taken and/or no legal provisions that ensure the interests of justice over private interests. See Béatrice DESHAYES, Philippe JACQUEMIN, *Good Practice in Civil Judicial Expertise in the European Union*, Larcier, 2016, chapter I.

[12] For example Spain since the Law of Civil Procedure (7 January 2000).

[13] Civil Procedure Rules, rule 35.10.2.

[14] Civil Procedure Rules, rule 35.1.

giving an independent and unbiased opinion. In the UK, this rule, which had been in effect for more than four centuries, was recently overturned when it was deemed to be no longer justified, in particular with reference to the principle "*no wrong should be without a remedy*[15]". Altogether, expert witnesses are subject to criminal liability in cases of perjury, contempt, falsification of reports or oral presentations and acceptance of direct payment by one party to the case when knowing this is forbidden.

b) Continental law systems

In continental law, the choice of experts is restricted in a majority of countries. Experts must often demonstrate qualifications determined by law (as in Austria, Croatia, Hungary, Malta and Slovakia) or be certified by committees (Austria and Lithuania). The criteria may even be laid down by the experts' professional body itself (Spain). Most of the time, the nationality of the expert is irrelevant but two countries require the expert to be a national (Czech Republic and Latvia). About 70 per cent of EU Member States have established a status for experts governed by civil procedure codes (Bulgaria, Denmark, France, Greece, Poland, Spain and Sweden) or professional codes of ethics (Austria and Germany). Consequently, experts can face disciplinary action if they do not comply with their obligations towards the court or the parties involved. The range of administrative sanctions is wide: they can be fined (Germany), replaced (Luxembourg), have their fees reduced at the end of their mission (France or the Netherlands) or be struck off the lists (Lithuania).

Experts are also responsible for the damages caused by their acts, even if this is limited to civil liability (France, Germany, Lithuania, Netherlands, Portugal, Slovakia and Slovenia) or criminal liability only (e.g. Estonia and Romania). Civil liability complies with the same conditions as those of ordinary law, that is to say demonstrating a sufficient link between the misconduct of the expert and the damage done. Strangely, insurance to cover this professional risk is not mandatory in most Member States. Criminal liability can refer to offences for breach of confidentiality or professional secrecy (Austria) and specific infringements, as in Bulgaria (false report before the court), France (bribery and forgery of expert opinion), Italy (fraud, serious negligence during mission, false opinion or interpretation of facts) and Poland (voluntary violation of the rule of sincerity).

2. *Differences regarding expert proceedings*

a) Common law and mixed systems

As a result of the adversarial procedure used in civil matters, common law countries leave the initiative of requesting an expert report to the parties. Exceptions include Cyprus and Scotland, where experts can also be called by the judge if their opinion is deemed necessary in the case,

[15] United Kingdom Supreme Court, case UKSC 13, *Jones v Kaney* (2011).

Ireland, if compensation for personal injury is at stake, and the UK when a single joint-expert opinion appears compulsory. The choice of expert lies with the parties but must be approved by the court (Cyprus and UK). There are no official registers of experts available, albeit lists can be provided by professional bodies (UK). Usually, the judge cannot interfere or supervise the expert's mission, except with regards a preventive role in limiting the conflicts likely to arise. Furthermore, a contradictory procedure is not obligatory. Even though they are considered as "technical counsel" to the parties and are allowed to express their opinion in their report, expert witnesses are expected to be impartial (UK and Ireland). As a matter of fact, they must not accept a mission if there is a potential conflict of interests. Their fees are negotiated and directly paid by the parties soliciting the report and can eventually be borne by the losing party at the end of the proceedings.

b) Continental law systems

As for continental law countries, the courts and the parties generally take the shared initiative of requesting a report. Only a handful of EU Member States make it an exclusive prerogative of the parties (Denmark, Finland, Latvia and Romania) or the judge (Czech Republic, Hungary, Italy, Slovakia and Sweden). Recourse can be mandatory in some special fields determined by the law, such as child custody (Denmark), confiscation (Netherlands) and guardianship (Germany and Poland).

In all cases, the judge is responsible for the appointment of the expert, except when arbitrators are involved (Malta). Apart from three countries (Belgium, Finland and Sweden), the expert must be chosen from a list or register established by professional, jurisdictional or institutional bodies on a national or regional basis. Half of continental law countries let the judge choose the expert alone, almost always with possible input from the parties (save Italy). Conversely, the other half lets the parties make the choice but with subsidiary intervention by the judge if they cannot agree on the expert. In this situation, the choice may depend on a random draw from a register (Romania). The expert can refuse or withdraw from his/her mission, sometimes for legitimate reasons only (Italy and Slovenia), and be recused by the parties.

The expert's tasks are assigned by the judge who must take into account the proposals or questions from the parties (Bulgaria, France, Germany, Latvia and Lithuania). The expert's mission is predominantly monitored by the judge, even by one that may be specialised in the particular activity (France).

One of the major distinguishing factors in continental law countries is that the whole procedure is not necessarily contradictory, notably in Eastern and Northern Europe (Austria, Bulgaria, Estonia, Finland, Germany and Latvia). Indeed, while some Member States like Germany and Austria deem that the adversarial principle is sufficiently safeguarded by the opportunity for the parties to cross-

examine the expert during the court hearing after completion of the report[16], others believe it is essential to allow a debate at all stages of the proceedings, as for instance in France and Belgium, due to their legal traditions[17]. Mandatory preliminary reports are, however, relatively rare among EU countries (Belgium, Italy, the Netherlands and Slovenia).

Finally, the expert's fees are covered by the losing party and priced at rates set out by law in several EU Member States (Croatia, Estonia, Germany, Latvia and Poland). Fees are secured by an advanced payment from the party requesting the report, which is often the one supporting the burden of proof, or from the State, if court-ordered.

B) The lasting negative impact of the divergence of European systems of civil judicial expertise

The diversity of European expertise traditions is not, in itself, a drawback. Differences in the status of the expert and proceedings do not necessarily have to result in excessive difficulties, either for the European citizen eager to see the conclusions of an expert report recognised across the continent, or for experts appointed to or wishing to operate outside their home country.

Indeed, existing European rules contain many general provisions applicable to transnational judicial expertise. Such is the case of Regulation n°1206/2001 on cooperation between the courts of EU countries in the taking of evidence in civil and commercial matters (hereinafter "*the Evidence Regulation*") and European regulations concerning jurisdiction or the free movement of people and services. Moreover, existing regulations have seen their scope and effect widened by case law: the harmonising influence of the European Court of Justice (hereinafter "ECJ") is clearly perceptible in its *Penarroja Fa* and *ProRail* rulings *(1)*.

However, this group of interlinked regulations and rulings is unable to sufficiently coordinate national particularities in all cases, creating possibilities for overlapping expert proceedings and impeding the perfect circulation of experts and expert reports *(2)*.

1. *The existence of counter-measures for a negative impact of the diversity of European systems of civil judicial expertise*

Since the Rome Convention of 1980, the EU has been engaged in a gradual process of mutual recognition of judgments and harmonisation of sections of its civil law. Thus, a complete lack of common rules directly or indirectly applicable to expertise recognition or proceedings would be unthinkable. At first glance, various European regulations and related case law could be seen as

[16] European Parliament, Directorate General for Internal Policies, *Civil-law expert reports in cross-border litigation in the European Union: a comparative analysis of the situation in France and Germany* (2015).
[17] E.g. article 160 of the French Code of Civil Procedure, article 974 of the Belgian Judicial Code.

having set a common European reference framework regarding both expertise procedures and mutual expert recognition.

For expert reports to be recognised and expert proceedings to take place on a transnational level, there first needs to be European consensus on a court having jurisdiction to appoint an expert in a given case. European regulations and case law seem to provide satisfying rules in this regard.

Jurisdiction of Member State courts in civil disputes is determined by a succession of EU regulations[18]. It was long uncertain whether a court having jurisdiction under these rules also had sole jurisdiction to appoint an expert. Although the courts of several Member States adopted this point of view[19], the ECJ first seemed to limit the scope of jurisdiction regulations in favour of the *Evidence Regulation*[20], which led certain authors to conclude that the appointment of experts did not fall within the scope of EU regulations on jurisdiction[21]. However, in its recent case law, the ECJ has dissipated these doubts, ruling that its previous case law is only applicable to cases where the applicant seeks the appointment of an expert to analyse evidence within the jurisdiction of a court that does not have jurisdiction on the merits[22].

Thus, it seems clear that the general principles outlined by EU legislation on jurisdiction apply to the determination of a court having jurisdiction to appoint an expert in a given transnational case. According to said rules, jurisdiction to appoint an expert lies with the court able to settle the case.[23] This rule is as simple as it appears satisfying: which court, if not the one supposed to decide on the merits of the case, would need the assistance of an expert to reach an enlightened conclusion? Regarding cases where the courts of several Member States have jurisdiction to appoint an expert, the court before which the case is first brought will have sole jurisdiction for such an appointment following the *lis pendens* doctrine[24].

Once clear identification of the court having jurisdiction to appoint an expert in a given case has been established, the ability for said expert to perform all necessary operations across EU territory is the logical consequence of the principle of mutual trust, cornerstone of European civil procedure. In this regard, European rules also appear satisfying.

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[18] Most notably Regulation n°1215/2012 on jurisdiction and the enforcement of judgements in civil and commercial matters (hereinafter "*Brussels I recast*"), Regulation n°2201/2003 on jurisdiction in matrimonial matters and matters of parental responsibility and Regulation n°650/2012 on succession.

[19] European Parliament, Directorate General for Internal Policies, *Civil judiciary expertise in the EU: Analysis of EU legislation and recommendations* (2015), p.9.E.g. Cass., Civ. 1, case 00-18.547 (2011).

[20] ECJ, case C-104/03, *St Paul Dairy Industries* (2005). For precisions regarding the content of the *Evidence Regulation*, see below.

[21] Gilles CUNIBERTI, *Revue critique de droit international privé*, "L'expertise judiciaire en droit judiciaire européen", Dalloz, 2015.

[22] ECJ, cases C-170/11, *Lippens* (2012) and C-332/11, *Pro Rail* (2013).

[23] European Parliament, Directorate General for Internal Policies, *ibid*, p.10.

[24] Enshrined notably in article 29 of the *Brussels I recast* Regulation.

The only European regulation directly applicable in this matter is the *Evidence Regulation*[25]. It remains influenced by traditional considerations of international private law on the territorial jurisdiction of courts and, consequently, the mission of experts appointed by them. Thus, the *Evidence Regulation* states that a European court wishing to gather evidence in another Member State has two options: either to request the foreign court having territorial jurisdiction to gather said evidence or to send its own representatives to do so after submitting a request to the Member State in question[26].

However, through its case law, the ECJ has made it easily possible to sidestep the *Evidence Regulation*. In 2013, it ruled that the application of the *Evidence Regulation* is not mandatory if the appointing court has jurisdiction[27]. The ECJ established only one exception to this general rule: if the gathering of evidence could "*affect the powers of the state in which it takes place*", it is mandatory to follow the procedure laid down in the *Evidence Regulation*.

It thus seems clear that experts appointed by the court of one Member State can freely fulfil their duties on the territory of another. However, could EU experts be freely appointed by any court of any Member State, regardless of nationality? And could their conclusions be freely produced as evidence before the courts of any Member State? Looking at existing regulations and case law, the answer is that they could.

Court experts carry a fraction of the public authority of the court that appointed them. This could be seen as subjecting their choice and appointment to considerations of national sovereignty: after all, the free movement of European citizens[28] does not prohibit European countries from limiting the recruitment of certain civil servants (among them, magistrates) to their own nationals, as long as said civil servants have the authority to exercise public authority[29].

However, general principles of European law make it clear that the court of one Member State may appoint an expert who habitually works in another. They also seem to be interpreted by the ECJ as prohibiting discrimination in the appointment of experts based on nationality.

Indeed, the provisions of the *Treaty on the Functioning of the European Union* (hereinafter "TFEU") establishing the free movement of people and services were judged by the ECJ as

[25] Applicable to civil judiciary expertise according to its article 17 (3).
[26] During the negotiations prior to the adoption of the Evidence Regulation, a German proposal seeking to eliminate all prior requests for judicial experts was even explicitly rejected: see initiative of the Federal Republic of Germany, OJ 2000, C314, p.1
[27] ECJ, *ProRail, ibid*: a Belgian court could appoint an expert to operate in the Netherlands without prior notification to the Dutch authorities.
[28] Articles 12 and 39 of the TFEU.
[29] Article 51 of the TFEU.

applicable to expert translators in its *Penarroja Fa*[30] ruling. The ECJ ruled that, as long as the expert's mission is not "*to give an opinion on the substance of the case*", he/she is fully protected by European law guaranteeing the freedom of movement and service-providing. Complementing the broad interpretation of the scope of existing EU regulations, the ECJ also extended their reach by ruling that they were applicable to only indirect or factual limits to said freedoms: the litigious French regulations were deemed contrary to European law, although French courts are free to appoint experts who are not registered on regional and national lists.

Although the ECJ expressly limited its decision to expert translators, (a nuance linked to the aforementioned limit of experts giving "*an opinion on the substance of the case*"), its reasoning seems transposable to all court experts. In no European legal system does experts give anything else than a factual opinion, nor is the judge ever bound by the conclusions of experts: he/she can always choose to disregard them after comparison with other evidence[31].

This last fact also seems bound to ensure broad transnational recognition of expert findings. Indeed, as all European legal systems share the low legal authority with which expert conclusions are endowed, there are no direct legal impediments to the circulation of expert conclusions. No national provisions prohibit a given party from adducing a foreign expert report before the court of a Member State, as said expert report would simply be considered another piece of evidence[32].

Following this brief summary of European regulations and case law applicable to judicial expertise, it seems there would be no reason for further unification of rules applicable to civil judicial expertise within the EU. Nevertheless, a closer look reveals there remain legal and practical difficulties caused by the absence of common guiding principles.

2. *The insufficiency of counter-measures for a negative impact of the diversity of European systems of civil judicial expertise*

Both transnational expertise proceedings and the transnational movement of experts and expert reports are hindered by the insufficient harmonisation of the rules applicable to civil judicial expertise in the EU.

Regarding a court having jurisdiction to appoint an expert, the situation sometimes proves insufficiently organised by existing European regulations. Apart from the general flaws of European regulations on jurisdiction, which tolerate parallel proceedings in the case of related actions and can thus lead to several courts appointing different experts with overlapping tasks producing

[30] ECJ, cases C-372/09 and C-373/09, *Josep Penarroja Fa* (2011): a Spanish national had been denied registration on the French national list of recognised expert translators because he had not worked for a French regional court for at least three years, although he had worked for Spanish courts for more than twenty. This was deemed a violation of his freedom to provide services.

[31] European Expert and Expertise Institute, *Eurexpertise Project comparative study* (2012), p.20.

[32] European Parliament, Directorate General for Internal Policies, *ibid.*, p.19.

contradictory reports[33], provisions in all European regulations on jurisdiction can be a source of acute problems regarding judicial expertise proceedings.

All European regulations on jurisdiction contain provisions giving jurisdiction to courts of any Member State to grant provisional or protective measures even if they do not decide on the merits of the case[34]. It is uncertain whether the regulations on provisional and protective measures could apply to judicial expertise. As the ECJ adopts an intentionalist approach to define protective measures (a court-ordered measure is protective if it "*intends to preserve a factual or legal situation*"[35]), some expert proceedings may be considered protective measures, while others may not. This uncertainty could be exploited by parties seeking to circumvent European regulations on jurisdiction in order to appoint an expert more favourable to their cause.

Although the applicable case law of national and European supreme courts seeks to limit the scope in which expertise proceedings can be considered provisional or protective[36], there are several instances of courts being seemingly unaware of said case law, ruling that they may appoint an expert as a provisional and protective measure, as long as the expert only carries out his/her task within the territorial jurisdiction of the appointing court[37].

Diverging assessments of the definition of protective measures, creating difficulties in transnational litigation requiring expert proceedings, mirror diverging national civil procedures impeding the free circulation of experts and expert reports. The significant differences in national expertise procedures appear like a *de facto* limit to the free adducing of foreign expert reports before the courts of Member States, despite a *de jure* freedom to adduce expert reports as evidence.

For instance, the different conceptions of the adversarial principle regarding expertise proceedings in French and German law[38] could lead French courts to refuse to rely on German expert reports, considering that a given party was denied its right to adequately discuss the expert's method and findings during proceedings[39], in contradiction with its right to a fair trial as applicable to expertise according to European Court of Human Rights (hereinafter "ECHR") case law[40].

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[33] E.g. a Franco-German case brought before the French *Cour de cassation*: Cass., Civ. 1, case 08-12.482 (2009).
[34] For example, *Brussels I recast*, article 35.
[35] ECJ, case C-261/90, *Reichert and Kockler* (1992).
[36] In its *Saint Paul Dairy* decision (footnote 20), the ECJ ruled that the hearing of a witness before proceedings on the merits could not be considered a provisional or protective measure. The same restrictive definition was applied, for instance, by the Belgian *Cour de cassation,* Civ. 1, case C.08.0480.N (2009).
[37] European Parliament, Directorate General for Internal Policies, *ibid*., p.12 cites Caen Court of Appeals, case 13/02517 (2014).
[38] See I.A.
[39] Such was the case in the transnational procedure referred to in footnote 33.
[40] ECHR, case 21497/93, *Mantovanelli v. France* (1997), a precedent that the ECJ seems to have taken up in case C-276/01, *Joachim Steffensen* (2003).

The same differences in expertise procedures could prevent the creation of a European market of court experts. Notwithstanding the natural barriers to the creation of such a market (mainly distance and language differences), the courts of a given Member State may have a strong incentive to appoint only experts knowledgeable of the national procedure they must follow. Thus, in a case where Luxemburg private law is applicable before German courts and said courts find specific provisions of Luxemburg law need to be laid out by an expert, they systematically appoint a German professor at the University of Trier, rather than a legal practitioner from Luxemburg, despite the fact that neither distance nor a language barrier exists in this case.[41]

II. The achievement of free circulation of civil judicial expertise through EU action

The first part of this paper illustrated how variations in domestic rules applicable to civil expertise can hamper free circulation of civil expertise in the EU. Therefore, steps should be taken at EU level to foster mutual recognition of civil expertise proceedings among Member States. To assess what type of action is required from the EU in the field of civil expertise (B), the first thing that needs to be determined is the precise goal that the EU should be pursuing through its action (A).

A) The need for mutual trust among Member States in the field of civil judicial expertise

As emphasised above, thanks to ECJ and ECHR case law, there are few if any *legal* obstacles to free circulation of civil expertise within the EU[42]. The impediments to such free circulation are far more *practical* than legal. Member States are reluctant to rely on civil expertise conducted outside their territory or to appoint foreign experts because they face a lack of knowledge about the rules governing civil expertise in other Member States. Thus, this leads to mistrust, rightly or wrongly, and generates the issues that have been underlined[43]. Therefore, the aim of action at EU level would mostly be to achieve mutual trust among Member States when it comes to civil expertise[44].

The best way to achieve such mutual trust would be to implement European standards of civil expertise that would ensure the value of expertise proceedings and the protection of the fundamental procedural rights of litigants in any EU judicial system. These standards should apply to any civil expertise conducted in the EU so that each Member State is convinced that the rules governing civil expertise in another Member State, despite not strictly identical to its own national rules, offer similar guarantees, thus creating the conditions for mutual trust to be achieved.

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[41] European Parliament, Directorate General for Internal Policies, *ibid*., p.24.

[42] Free circulation of civil expertise refers here to free circulation of both experts' reports and experts themselves within the EU, either in order to conduct investigations outside of their territory or to be appointed by another Member State than the one where they qualify as experts.

[43] See I.B.

[44] The principle of mutual trust, if not mentioned in the Treaties, has been ruled a fundamental principle of EU law by the ECJ. This principle requires each Member State to consider all other Member States as complying with the fundamental rights recognised by EU law, with no further control. See ECJ, Opinion 2/13 (2014).

The European Expertise and Expert Institute (hereinafter "the EEEI") has been advocating for the establishment of these minimal standards through its European Guide for Legal Expertise project (hereinafter "the EGLE project") co-funded by the Civil justice programme of the EU. They came up with several recommendations based on the best practices observed in Europe, with the hope that because they are in line with the core values shared by all Member States, they can be acceptable in every judicial system of the EU despite their variety[45]. For the sake of brevity, this paper will focus on some key points where approximation appears fundamental to the achievement of mutual trust and of a genuine European area of civil justice in the field of civil expertise.

1. Harmonisation of eligibility criteria to be appointed as an expert

The cornerstone of mutual trust appears to be the harmonisation of eligibility criteria to be appointed as an expert. As discussed above[46], great diversity among Member States may be observed when it comes to the question of how an expert is qualified as such. As a result, Member States might be reluctant to appoint foreign experts since they have no guarantee of their competence. It seems therefore highly necessary to establish common standards about the ways in which expert competence is evaluated in the EU. Thus, the system of certification on national lists should be sustained in every Member State, with uniform certification criteria among them. It would indeed offer a guarantee that expert evaluation is consistent, both nationally and at EU level. In its work, the EEEI suggests that the following requirements should necessarily be satisfied by an expert who applies for certification: knowledge and competence in the field of expertise, sufficient knowledge in the field of the law concerned, familiarity with the directing principles of a fair trial, and adherence to a code of ethics that guarantees, *inter alia*, independence and impartiality. Moreover, fulfilment of these requirements by registered experts should be reassessed periodically, especially to ensure that expert knowledge and skills are up to date[47].

2. Harmonisation of expert status

While courts are not legally bound by expert opinions in all Member States, it may be observed that in practice, the expert's opinion is more often than not decisive in a ruling. Therefore, it is essential that identical obligations guaranteeing expert legitimacy apply in the EU. Among them, the duties of independence and impartiality should figure, as they are fundamental to the quality and fairness of expert proceedings and to the overall confidence of EU citizens in their justice systems. While they are found in most, if not all national laws governing civil expertise, it would still be useful to recall them and to define more precisely how these notions should be construed when applied to

[45] EEEI, Plenary Conference hosted in Rome on 29 May 2015, *Final Report Data Study Group*.
[46] See I.A.
[47] EGLE Plenary Conference, *ibid*, *Report of the working group n°3: « Qualifications, Competence and the evaluation of experts »,* p.16.

civil expertise. The implementation of a common code of ethics with which every expert should comply could be discussed.

3. Harmonisation of the scope of the adversarial principle

As of right now, respect of the adversarial principle during expertise is protected by the jurisprudence of the ECHR[48], since every Member State is a party to the European Convention on Human Rights. However, significant variations may be observed among Member States with regards the significance of the adversarial principle when applied to civil expertise. This different understanding of the way fundamental procedural rights of the parties should apply in the context of civil expertise is one of the few *legal* impediments to free circulation of expert reports in the EU[49]. Therefore, it would be necessary to overcome these differences by developing a common understanding of the parties' rights during expert proceedings under the adversarial principle and the right to a fair trial. The parties' right to have access to the expert's opinion prior to the hearing and to every piece of evidence upon which the expert drew his/her conclusions appears quite consensual. However, no consensus arises about whether the parties should have the right to participate in the expert's investigations. While the narrower understanding of the parties' rights under the adversarial principle is sustained, a judicial system that grants broader protection to the parties under its domestic rules should be compelled to admit an expert report produced in foreign proceedings complying with European standards.

4. Standardisation of expert reports and fields of expertise

Finally, standardisation of expert reports and fields of expertise would be necessary to achieve efficient free circulation of experts and expert reports in the EU. Indeed, even when courts are ensured that experts registered on a list from another Member State satisfy similar requirements to experts registered on their own national list, the fact that expertise fields do not match from one Member State to another can be an impediment to the appointment of a foreign expert. Likewise, standardising the structure of expert opinions by creating a framework for report-writing would facilitate the free circulation of expert reports.

These few elements do not cover all the questions that would have to be addressed at EU level. The remuneration of the expert, the definition of its mission, or the extent of the court's powers when it comes to monitoring the schedule of the assignment are a few of the other areas where European standards could be implemented to foster mutual trust. However, it appears that without some form

[48] ECHR, *Mantovanelli v. France*, *ibid.*; ECHR, case 8562/79, *Feldbrugge v. Netherlands* (1986).

[49] Cass., Civ. 1, n°08-12.482 (2009), *ibid*. The French *Cour de cassation* refused to consider a German expert's report based on the fact that German expert proceedings did not comply with the procedural rights of certain parties.

of harmonisation in these fundamental axes, Member States will necessarily remain suspicious of expertise conducted outside their territory and of experts certified in another state.

B) The ways to achieve mutual trust among Member States in the field of civil expertise

The legal feasibility of action from the Union implementing European standards of civil expertise will first be considered (*1*), before contemplating its practical feasibility (*2*).

1. *Legal feasibility*

The first question that needs to be addressed is whether the EU is competent to pass a law that would tend to harmonise rules of civil expertise in the EU. Under the principle of conferral laid down in article 5 of the TFEU, the EU can only act within the limits of the competence that has been conferred upon it by the EU treaties. EU action must therefore be allowed by a legal basis found in primary law.

Article 81 of the TFEU, found in title V devoted to the Area of Freedom, Security and Justice, provides for the adoption of measures in the area of judicial cooperation in civil matters having cross-border implications[50]. Article 81§2(f) of the TFEU especially rules that measures aimed at eliminating obstacles to the proper functioning of civil proceedings should be adopted when necessary for the proper functioning of the internal market[51].

It is thus clear that the EU would be competent to pass legislation that would approximate the rules of civil expertise in cross-border litigation. It is more uncertain however, whether such approximation of the rules of civil expertise could apply to purely domestic cases. The notion of cross-border *implications* can be construed as broader than cross-border *litigation* but it usually implies that the case presents connecting factors involving at least two different Member States. Therefore, to say that the Treaties grant the Union competence to approximate the rules of civil expertise even for purely domestic cases would be a very broad understanding of its competence.

In order to avoid the coexistence of two sets of rules for civil expertise, which would undoubtedly lead to more complexity, it would therefore be required that Member States extend the scope of application of the proposed common European standards to purely domestic cases.

[50] Article 81 of the TFEU provides *"The Union shall develop judicial cooperation in civil matters having cross-border implications […]. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States."*

[51] §2(f) of Article 81 of the TFEU provides *"The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring […] the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States*."

2. Practical feasibility

Ideally, approximation should be pursued through a binding EU act (a). However, it is probably more realistic to seek approximation through a non-binding instrument (b).

a) Approximation through binding instruments

Two types of EU legislative acts could be considered to implement European standards for civil expertise: either a regulation, defined as a legislative act that applies automatically and uniformly to all EU countries as soon as it enters into force, or a directive, defined as a legislative act that sets out a goal that all EU countries must achieve, but leaves the Member States the freedom to then devise their own laws on how to reach these goals.

As underlined above, a thorough uniformisation of the rules of civil expertise is neither realistic nor necessary to achieve mutual trust in the European Judicial Area. It is not realistic because legal traditions are too heterogeneous to obtain a consensus on every single rule that governs civil expertise. Moreover, under the principles of proportionality found in article 5 of the TEU, the content and form of EU action must be in keeping with the aim pursued. Therefore, a regulation, which would substitute national rules of civil expertise in their entirety with no room left for national specificities, might actually be in violation of the principle laid down in article 5 of the Treaty on the European Union (hereinafter "the TEU"), since some variations in the rules of law from one state to another do not prevent mutual trust.

Rather, a directive could especially be adapted in order to define experts' rights and obligations, establish common accreditation criteria for all countries in the EU, and to approximate expert report structure and fields of expertise. To avoid a fragmentary growth of European civil procedural law, this could be achieved through a larger approximation of the rules of civil procedure in the EU. Indeed, the European Parliament adopted a resolution on 4 July 2017 with recommendations to the Commission on a directive aimed at establishing common minimum standards of civil procedure in the EU[52]. The text of the proposal submitted to the Commission does include an article 11 "court experts", but it would need to be completed.

Apart from the approximation of domestic rules of civil expertise through a directive, some suggest that a specific European expertise procedure should be created, based on the model of the European payment injunction procedure[53]. Such European expertise would be governed by rules similar to the common standards discussed above[54], but would have a narrower scope as it would only apply in

[52] European Parliament, Resolution of 4 July 2017 with recommendations to the Commission on common minimum standards of civil procedure in the European Union.
[53] *Final Report Data Study Group, ibid.*
[54] See I.A.

the context of cross-border litigation or expertise that has cross-border consequences. This would imply the creation of a list of European experts qualified to be appointed in such cases. Any expert reports established in the context of this procedure should automatically be deemed admissible evidence in front of the courts of any Member State and given the same weight as a report established under the domestic rules governing civil expertise in that state. As for the European payment injunction procedure, such European expertise would have to be implemented through a regulation, since its very purpose would be to have one single procedure for expertise proceedings in every Member State in the context of cross-border litigations.

However, assuming the approximation of national rules for civil expertise were to be successful, the need for a specific European expertise procedure for cross-border litigation is questionable. Indeed, the very purpose of approximating national rules for civil expertise is to allow better circulation of foreign reports and to make it more likely that judges will appoint a foreign expert if needed, either in the context of cases with cross-border implications or purely domestic cases.

Nevertheless, whether approximation of rules for civil expertise takes place through a directive or a regulation creating a European expertise procedure, one might wonder if it is likely to ever see the light of day. In the best-case scenario, it would take years for these instruments to be enacted through the ordinary legislative procedure and actually come into force. Until then, mutual trust and rules of civil expertise that guarantee European citizens' procedural rights should be fostered through alternative ways.

b) Approximation through soft law instruments

Several projects have already been undertaken in that direction, both at EU level and at the Council of Europe level.

At Union level, the European Expert and Expertise Institute has launched several projects, with the support of the European Commission, aimed, on the one hand, at addressing the lack of knowledge about the regime of civil expertise in other Member States that hinders mutual trust, and, on the other hand, fostering the emergence of common standards of civil expertise in the EU.

The EGLE project in particular led to the publication in November 2015 of the *Guide to good practices in civil judicial expertise in the European Union* that contains best practice recommendations in the field of civil expertise, and to which is annexed a Code of ethics of European judicial experts[55]. The idea is that experts and Members States can voluntarily decide to follow the recommendations contained in this Guide. For example, a Member State could decide to implement the Guide's recommendations for experts' certification and appointment in its domestic

[55] EEEI's EGLE project, *Guide to good practices in civil judicial expertise in the European Union* (2015).

body of laws. Then, any court of another Member State would be convinced that experts certified in that state presents sufficient guarantees of knowledge and competence, and would be more inclined to appoint them in cases where their skills were relevant. In the same way, any expert could voluntarily commit to comply with these guidelines and adhere to the Code of ethics annexed. Thus, courts would be assured that foreign expert proceedings conducted by these experts were fair and acceptable, and would trust their results to the same extent that they would trust expert proceedings that followed their domestic rules.

The project "Find an expert" on the other hand, also carried out by the EEEI and co-funded by the European Commission, is designed to provide an instrument through which one can access information on the rules of civil expertise that exist in a given Member State and the national register of experts listed in that state. When the project reaches fruition, this information will be accessible on the European e-justice portal run by the European Commission. The hope is that with better knowledge of the rules governing expert proceedings in other EU Member States, courts will be less reluctant to rely on foreign expert opinions or to appoint foreign experts.

One possible improvement to this project would be to publish a centralised list of national experts on the Europe e-justice portal who (1) committed to follow the EGLE guidelines and (2) were certified nationally through a process that complies with the EGLE recommendations. Indeed, this would be a very convenient instrument for identification of competent experts based in other Member States. However, the first version of the EEEI project, very similar to this, was declined by the European Commission.

At the Council of Europe level, the European Commission for the efficiency of justice adopted its *Guidelines on the role of court-appointed experts in judicial proceedings of Council of Europe's Member States*[56] on 12 December 2014, aimed at setting minimum standards that should be maintained in all Member States of the Council of Europe in order to ensure the quality of expert proceedings, and especially the parties' fundamental procedural rights under the ECHR during these proceedings.

Finally, certain issues could be addressed through judicial dialogue[57]. For example, it has been underlined that under EU legislation on jurisdiction, if in principle the court deciding on the merits has jurisdiction to appoint an expert, the court of the place where the expert is to carry out his task may have jurisdiction too if the expert's appointment fall within the category of provisional

[56] 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* (2014).

[57] Example could be taken on the ECHR that holds yearly a seminar called « dialogue between judges » that provides a forum for discussion between judges from the ECHR and from various other courts on various topics related to human rights.

measures under article 35 of *Brussels I recast*[58]. In order to reduce the risk of interference with the proceedings on the merits, a common understanding of conditions under which the appointment of an expert can be construed as a provisional measure under article 35 of *Brussels I recast* should be fostered through judicial dialogue among EU courts.

It appears that while soft law instruments foster mutual trust and contribute to developing minimum quality standards of civil expertise in the EU, they also quickly show their limits. Firstly, the multiplication of soft law instruments leads to a lack of intelligibility, even contradictions among them. More problematic still, obviously and inherently, is the lack of normativity in these instruments. Both the *Guide to good practices* and the *Guidelines on the role of court-appointed experts* provide a model of rules for civil expertise for reform in domestic law, but the final call is left to Member States. To reach genuine mutual trust, it is necessary that each and every Member State adheres to these minimum standards. Until then, practical impediments to free circulation of civil expertise will live on and slow down the advent of the European area of freedom, security and justice called upon by Title V of the TFEU.

CONCLUSION

Civil court-ordered expertise is representative of the current state of national legislations barring European harmonisation: extremely diverse laws and practices, which are symbols of an ancient continental heritage but sometimes contradictory and seemingly irreconcilable. Although there appears to be neither an urgent need nor a possibility for complete top-down unification, convergence and adoption of mutual good practices are desirable in order for the EU to continue to foster mutual trust between the judicial systems of its Member States and the freedom of every European citizen to live and work within the whole territory of the Union.

Given the instability of the current political and judicial environment in Europe, the European legislator may have other priorities. Thus, in this field as in others, case law and soft law play an increasingly important role in advancing European unity, trying to foster "enlightenment", as Guy CANIVET, former President of the French *Cour de cassation*, described the harmonisation of expert procedures seventeen years ago[59].

[58] See I.B.

[59] Guy CANIVET in François PICHON, *L'expertise judiciaire en Europe : études des systèmes allemand, anglais, espagnol, français et italien en matière de procédure civile*, éditions d'Organisation, 2002, p.XXVI.

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