REGULATIONS
GOVERNING EXPERT EVIDENCE COMMISSIONED BY A COURT OR PARTY IN THE ITALIAN CRIMINAL PROCESS

Contents

EXPERT EVIDENCE COMMISSIONED BY A COURT

EXPERT EVIDENCE COMMISSIONED BY A PARTY

EXPERT EVIDENCE COMMISSIONED BY A COURT

1. SCOPE OF EXPERT EVIDENCE COMMISSIONED BY A COURT

The **purpose** of expert evidence is regulated by Article 220, subsection 1 of the Italian Code of Criminal Procedure (C.Cr.P.), which establishes that expert evidence is admitted when "it is necessary to conduct investigations or acquire data or assessments which require specific **technical, scientific or artistic expertise**".

Going beyond the generic reference to the notion of investigation provided for under Article 314 of the 1930 Code of Criminal Procedure, the provisions of the current Code refer to investigations and assessments, denoting the performance of analyses and the formulation of opinions, distinct moments occurring individually or simultaneously.

In specific terms, the report of the Court-appointed expert witness may tend towards a search for evidentiary data which can only be obtained through specific technical expertise. It may also be of use to admit data to the proceedings which, although known, nevertheless requires expert intervention to render it comprehensible. Finally, there are circumstances in which there is a need to interpret data already entered in the proceedings, but which can only be assessed if explained and illustrated with the support of technical expertise.

Some of the **matters** concerning which expert investigations can be carried out in the criminal proceeding are listed, without restriction, in the provisions arising from the Code's Implementing Provisions:

- Article 67 of the Implementing Provisions of the Code of Criminal Procedure stipulates that the professional register of experts held at each ordinary Court must include experts in the following categories: forensic medicine, psychiatry, accounting, engineering, road safety and accident analysis, ballistics, chemicals, handwriting analysis and comparison;
- according to Article 74 of the Implementing Provisions of the C.Cr.P., in proceedings concerning the forgery of banknotes or metallic coinage, a specialist from the head office of the Bank of Italy or directorate general of the Treasury will be appointed;

- Article 72 C.Cr.P. provides for periodic assessments of the state of mind of the defendant, adhering to forms and guarantees applicable to the expert appraisal;
- Article 16 of Law 66 of 15 February 1996 stipulates that, with reference to the offences stipulated in Articles 609 bis, 609 ter, 609 quater and 609 octies of the Penal Code (sexual assault offences), the defendant will, in accordance with the forms applicable to the expert appraisal, be subject to investigations with a view to the identification of sexually transmissible diseases where the factual circumstances give rise to a risk of the transmission of such diseases.

In relation to the overall admissibility of an expert testimony with reference to matters not absolutely predetermined at regulative level, there is a prohibition on criminological and psychological expert evidence, i.e. an investigation whose purpose is to establish the habitual or professional nature of an offence, the propinquity to offend, the character and personality of the defendant or, in general, psychological qualities independent of pathological causes.

Factors on which this prohibition is based range from doubts surrounding the scientific quality of this typology of expert testimony to issues concerning the defence of civil rights and possible negative effects on the judgement ascertaining criminal liability.

There have been fears that investigations concerning the defendant's personality may, especially with regard to ascertainment of the motives for the crime, jeopardise the actual presumption of innocence.

Increasingly frequent criticisms directed at the ban on psychological evidence are sparked by significant progress in the various fields of the psychological sciences and draw attention to the fact that it is possible to circumvent the ban by relying on the provisions of Article 236, subsection 1 C.Cr.P., where it allows the entry, for the purposes of arriving at an opinion on the defendant's personality, of documentation held by the surveillance authorities. Given in fact that, during the stage of enforcement of the sentence, the ban is inoperative in accordance with an explicit provision to this effect in Article 220, subsection 2 C.Cr.P., it becomes possible to admit to the proceeding knowledge of criminological opinions, possibly acquired during the enforcement stage in the interests of assessments of the defendant’s bio/psychosocial profile. One of the end results of this would be a disparity of treatment among defendants who have been subject

to criminological and psychological assessments in the past in the context of the enforcement of previous convictions and defendants who have not undergone such assessments.

2. PROCEDURAL STAGE AND CRITERIA FOR ADMISSION OF EXPERT EVIDENCE

Expert evidence can be provided at all **stages** of the proceeding, from the pre-trial investigation to the appeal proceeding. Only a judgement on the legality of the case before the Court of Cassation is excluded.

During the pre-trial investigations and pre-trial hearing, expert evidence can be acquired in the context of a need to take evidence at the pre-trial stage, a procedure through which, for reasons of urgency, the acquisition of evidence according to the forms of a trial is brought forward. Cases in which the taking of evidence under examination can be "brought forward" in advance of proceedings of first instance relate to circumstances in which there is a risk of inevitable change or loss of persons, items or places relating to the evidence (Article 392, subsection 1, para. f) C.Cr.P.) and where the expert evidence is of such complexity that it would, if commissioned in the course of a trial, necessitate a stay of the proceeding for a period exceeding sixty days (Article 392, subsection 2, C.Cr.P.).

Under urgent circumstances, the trial judge may proceed with the entry of expert evidence during the phase preceding the proceedings of first instance.

With regard to **admissibility**, Article 220, subsection 1 C.Cr.P. lays down a specific criterion in accordance with which "expert evidence shall be admitted where it is necessary to undertake investigations or acquire data or assessments calling for specific technical, scientific or artistic expertise".

According to prevailing legal theory, a judge, having once verified the fulfilment of the above-mentioned conditions, would be under an obligation to admit the expert evidence. However, some sources go as far as to maintain that the need for specific knowledge, resulting from probative evidence acquired at the initiative of the parties, makes it incumbent on a judge to admit the expert evidence and deprives him of further

discretionary powers concerning the utility or suitability of such evidence. If this were not the case, we would fall into the inquisitorial pitfall of *iudex peritus peritorum* [the judge as expert for the experts] and the judge would be enabled arbitrarily to tackle questions on which specialist input is required, depriving the parties of elements of appraisal essential to a correct reconstruction of the facts. Indeed, under the current judicial system, the expert witness can no longer be viewed as a mere servant of the judge, but must be seen as a source of knowledge with the function of enabling litigants to exercise their right to full argument on both sides.

In case law and practice however, there is a tendency to consider the admission of expert evidence to be subject to the discretionary power of the judiciary, in respect of whom the parties merely have a right to request the admission of such evidence, even if they themselves have produced technical opinions. In particular, in accordance with the principles of the free evaluation of evidence and the right of the judge to follow his deep-seated conviction, it is asserted that the judge has the power to evaluate whether he is in a position to exclude the entry of an expert opinion where it is possible to achieve comparable results through any other means of evidence or notions derived from common experience.[1] However, the judge is not entitled to repudiate expert evidence in order to draw on his own technical expertise.[2]

The grounds for decisions ruling out the commissioning of expert evidence by a Court are different; there must be adequate and logical grounds to support the absence of a need for such evidence in cases where expert witnesses commissioned by a party have been examined who, as witnesses, have provided evidence and opinions:[3] in accordance with the adversarial principle, the parties also have the power and means to secure the admission of their technical/scientific input to the proceeding, which can therefore no longer be regarded as purely the prerogative of the judge and his appointed expert witness.

[1] Court of Cassation, 7 April 1994, Silvestro, C.E.D. 201195.
[2] Court of Cassation, 15 June 1999, Larini, in *Criminal Justice*, 2000, III, page 605.
[3] Court of Cassation, 1 December 2000, Sibio, in *Guida dir.*, 2001, section 14, page 91.

3. SELECTION OF AN EXPERT WITNESS, GROUNDS FOR INCAPACITY OR INCOMPATIBILITY, RIGHT OF ABSTENTION OR OBJECTION

Under the previous criminal judicial system, in which Article 341, subsection 4 of the 1930 C.Cr.P. vested the judge with the discretionary power of free selection of the expert witness, Articles 221 C.Cr.P. and 67 of the Implementing Provisions of the C.Cr.P. require an expert to be selected from persons listed in professional registers held at the Ordinary Court or persons endowed with expertise in a specific field. The intention was, through priority **selection from professional registers,** to guarantee the competency of the expert witness, having reference to an objective predetermined criterion, as opposed to the discretion of the judge.

However, the judge may make a choice from persons not listed in such professional registers, but, under these circumstances he must give preference, in the first instance, to persons professionally employed by a public body (Article 67, subsection 3 of Implementing Provisions of C.Cr.P.) and, most importantly, indicate the specific reasons for his choice in the appointment ruling (Article 67, subsection 3 of Implementing Provisions of C.Cr.P.).

Case law has it that an appointment ruling is not appealable. There is therefore no scope for the exercise of control over errors in evaluation or arbitrary decisions on the part of the judge, which makes it possible to circumvent the criteria laid down in law and, in particular, risks running counter to the priority accorded to inclusion in the professional registers as a prerequisite for appointment.

However, the legislative decision to allow a judge a margin for discretion in selection of the expert witness is justified by the need to reconcile the aim of ensuring minimum standards of professionalism and avoiding selection criteria based on preference or actual patronage, with the aim of identifying persons with special skills who, while not included in the professional registers, are nevertheless fit to handle matters of particular difficulty beyond the range of persons included in the registers.

Inclusion in a professional register allows control to be exercised regarding the specific competency or professionalism of members, at the admission phase and thereafter, given that, over and above the assessment of fulfilment of the requirements for

access, the Committee with responsibility for preparing the register conducts a review every two years with a view to the removal of members who have ceased to fulfil any of the requirements laid down in Article 69 of the Implementing Provisions of the C.Cr.P. or have become subject to an impediment preventing them from holding office as an expert witness (Article 68 of Implementing Provisions of C.Cr.P.).

The Committee provided for under Article 68, subsection 1 of the Implementing Provisions of the C.Cr.P. is chaired by the Presiding Judge of the Ordinary Court, who has responsibility for maintaining the register, and includes the Public Prosecutor at the Ordinary Court, Chairman of the Professional Judicial Council and Chairman of the association or panel to which the category of experts in question belongs, or representatives of the latter.

The evaluation conducted by the Committee for the purposes of admission of the interested parties is essentially based on the production of certificates and documents attesting to the specific expertise of the applicant and does not provide for the performance of examinations or other tests, although the Committee has the power to gather information at its discretion.[4]

Persons included in the professional register are subject to the disciplinary power of the body in question, defined under Article 70 of the Implementing Provisions of the C.Cr.P. in relation to persons "who have failed to discharge the obligations arising from vesting of the mandate".[5] Sanctions which can be imposed range from a simple warning to a maximum period of suspension of one year and removal from the register.

It is possible to commission **several people** to provide expert evidence in the event that the investigations and assessments required are of significant complexity or require different branches of knowledge in diverse fields (Article 221, subsection 2 of C.Cr.P.).

---

[4] In addition to establishing, in subsection 1, with reference to inclusion in the register, the requirement of "particular expertise in the matter", Article 69, subsection 3 of the Implementing Provisions of the C.CR.P. identifies the following factors impedimental to inclusion:

a) a past conviction with a final judgment imposing a penalty of imprisonment for a premeditated crime, unless rehabilitation has taken place;
b) the presence of any of the situations of incapacity provided for under Article 222, subsection 1, paras. a), b) and c);
c) removal or striking off from the respective professional register as a result of a definitive disciplinary action.

[5] A typical example would be failure to comply with the time limit in answering questions.

The person or persons appointed has/have an obligation, under pain of criminal sanctions pursuant to Article 366 of the Penal Code (refusal to hold office where legally required to do so), to accept the mandate, the sole exception for which provision is explicitly made being the existence of one of the grounds for abstention laid down in Article 36 C.Cr.P. or factors imposing an obligation of abstention on the judge.

Article 222 C.Cr.P. also stipulates the grounds for incapacity and incompatibility of the expert witness, which must be regarded as mandatory to guarantee the reliability of the source, and hence the evidentiary findings.

Incapacity is defined as the effect of non-fulfilment of the subjective requirements laid down in law in relation to the status of expert witness, being excluded in the case of minority age groups, debarment, disqualification, unsoundness of mind, subjection to personal security or prevention measures.

Incompatibility is on the other hand ascribable to situations where the person is involved in the proceeding in another capacity, is entitled to observe secrecy or required to assume a status in the proceeding irreconcilable with that of an expert witness. Examples are:

a) presentation as a witness or interpreter in the same proceeding;
b) the existence of personal circumstances impedimental to or restrictive of the obligation to testify (Articles 197 and 199 C.Cr.P.).
c) previous assumption of the status of expert witness in the same or a related proceeding.[6]

A person called upon to act as an expert witness is under an obligation to declare the existence of a ground for incompatibility, a fundamental obligation if one considers that, if the position is held by an incompatible person, the expert evidence will be null and void (relative nullity curable under Article 181 C.Cr.P. and open to objection under Article 182 C.Cr.P.).

[6] In relation to the latter hypothesis, it is necessary to clarify that the judicial precedent of the Court of Cassation has excluded that Article 222 C.Cr.P. can give rise to a prohibition on assuming the status of an expert witness affecting a person who, having previously been appointed to this position in the same proceeding, is then reappointed to the post by a different judge.

The grounds for **abstention** and **objection** on the part of the expert witness are the same as those applicable to a judge, as provided for under Article 36 C.Cr.P., with the sole exception of serious reasons of expediency (Article 36, subsection 1, para. h) C.Cr.P.), which justify a declaration of abstention, but not a declaration of objection.

The scenarios outlined in the Code are as follows:

1) if the expert witness has an interest in the proceeding or any of the private parties or a defence counsel is a creditor or creditor of himself, his spouse or children (Article 36, para. a) C.Cr.P.). It has been decided that the term "interest" must also be understood in an indirect sense, as the relationship, founded on objective data, between the activities of the expert witness in the proceeding and the prospective pecuniary or non-pecuniary loss or gain he may derive therefrom;
2) if the expert witness is the guardian, executor, attorney or employer of any of the private parties or if the defence counsel, attorney or executor of one of the said parties is a close relative of himself or his spouse (Article 36, para. b) C.Cr.P.). This hypothesis presents no problems of interpretation, subject to the clarification that the concept of "close relative" must be deduced from Article 307, subsection 4 of the Penal Code;
3) if the expert witness has given advice or expressed an opinion on the subject of the proceeding (Article 36, para. b) C.Cr.P.). The fact of having given advice is commonly identified with having suggested to one of the parties the procedural line of conduct to be followed. With regard to the expression of an opinion, the situation examined in case law concerned the compatibility between a therapeutic intervention to which the defendant was subject and intervention as an expert witness: a therapeutic intervention is still more

   influential than expressing an opinion on the subject of the proceeding and undoubtedly constitutes a ground for abstention/objection;
4) if there is serious animosity between himself or his close relative or any of the private parties (Article 36, para. d) C.Cr.P.). The grounds for abstention or objection are restricted to animosity arising from interpersonal relations of a private nature, unrelated to the proceeding, and the feeling must be reciprocal. It

has been clarified that it is insufficient for accusations or complaints to have been lodged against the expert witness;

5) if any close relative of himself or his spouse has been injured or damaged by the offence or a private party (Article 36, para. e) C.Cr.P.);
6) if any close relative of himself or his spouse performs or has performed the duties of Public Prosecutor (Article 36, para. f) C.Cr.P.);
7) if he finds himself in any of the situations of incompatibility provided for under Articles 35 and 35 [sic] of the Judicial Ruling (abrogated by Article 30 of Legislative Decree 51 of 19th February 1998 relating to the appointment of a single judge).

Given the existence of any of these grounds, the expert witness is under an obligation to declare it. A declaration of abstention or objection may be submitted prior to completion of the formalities of vesting of the mandate or, with reference to grounds arising or discovered subsequently, before the expert witness has expressed his opinion.

The decision is assigned to a judge who has commissioned the expert evidence who, if accepting the declaration, must then arrange for replacement of the expert witness and stipulate whether any acts performed by him to date remain valid, and, if so, which acts.

4. FUNCTIONS OF THE EXPERT WITNESS

Having sworn an oath and accepted the mandate, the expert witness will proceed autonomously with the operations necessary to respond to the question posed (Article 228, subsection 1 C.Cr.P.). The expert witness will enjoy absolute autonomy on technical matters and may freely select the scientific criteria and methods to be adopted. However, on procedural matters, the expert witness will be subject to the judge's direction. The functions of the judge will in particular include the issue of authorisation to inspect case documents and be party to the taking of evidence (examinations of the parties, depositions, *et seq*) and the settlement of questions relating to the definition of powers vested in the expert witness and his terms of reference.

With reference to evidentiary material accessible to the expert witness, Article 228, subsection 1 C.Cr.P. stipulates that the expert witness may be authorised to inspect instruments, documents and items exhibited by the parties which the law stipulates may be entered as evidence in the trial papers (Article 431 C.Cr.P.).

The clear purpose of this provision is to define the limits of the procedural knowledge of the expert witness, to the exclusion of material whose cognizance is denied to the Judge (with particular reference to documentation accessible to the Public Prosecutor) in line with the principle of separation of the different phases in a proceeding. Were it otherwise, the judge would, via the expert witness, be able to take into consideration findings denied to him, circumventing one of the cardinal principles of the trial and jeopardising the adversarial principle in the construction of evidence.

The wording of this legislation has been accorded a broad interpretation, allowing authorisation of the inspection not only of documents already entered as evidence in the trial, but also documents liable to be entered at a later date. In the case of expert evidence commissioned in the context of the gathering of evidence at the pre-trial stage of the criminal proceeding prior to preparation of the trial documents (which postdates the decision arrived at in response to the request for an indictment), the right of inspection will extend to material evidence, items pertaining to the crime, documents and items exhibited by the parties together with the request for the taking of evidence at the pre-trial stage or the pleadings provided for under Article 369 C.Cr.P.[7]

The risk of circumventing the ban on the cognizance of documents which cannot be entered as evidence in the trial arises from the loose construction placed on Article 228, subsection 3 C.Cr.P., which stipulates that the expert witness may seek information from the defendant, injured party or other persons. This right has in fact been interpreted as the power to inspect documents prepared by the Public Prosecutor or criminal police, with the sole proviso that the information is used solely for the purposes of the

[7] With reference to documentation accessible to the expert witness, it must be remembered that, under Article 76 of the Implementing Provisions of the C.Cr.P., the Judge may, at his own discretion, authorise original documents or other items on the issue to the expert witness, subject to the preparation of a record to this effect by the Clerk of the Court.

investigations of the expert witness.[8] There would be no procedural consequence under such circumstances nor, in particular, would the expert evidence be declared unusable.[9]

However this assumption would make it possible for the judge to have cognizance of information acquired by the expert witness, distilled into his report or included in the records of operations completed. Finally, it would enable the judge, through the medium of the documents prepared by the expert witness, to circumvent the explicit prohibition provided for under Article 526 C.Cr.P. and hence, for the purposes of the ruling, make use of data not directly entered as evidence in the trial. Furthermore, any statements made to the expert witness could lawfully influence the technical opinion formulated by the latter, but could not be assessed autonomously by the judge nor used by the parties to lodge objections in the course of the trial examination.

There has therefore been a proposal to exclude data acquired for the purposes of Article 228, subsection 3 C.Cr.P. from the trial papers to prevent the judiciary from gaining cognizance of it. Conversely, a solution has been suggested according to which it would be sufficient to allow a dialectic comparison of the information both during the acquisition phase (by means of participation in the proceedings of the expert witness) and during the trial itself.

At all events, with the consent of all parties in the proceedings, the authorisation to inspect can be extended to instruments and documents which would not, of themselves, be included in the list contained in Article 431 C.Cr.P.

The second part of subsection 2, Article 228 C.Cr.P. resolves the thorny problem of whether the expert witness can, with or without authorisation, call upon other specialists, by stipulating that any recourse to assistants will be subject to the judge's authorisation.

The approach according to which the mandate of the expert witness must be strictly personal is essentially confirmed and it is absolutely prohibited to delegate the performance of this mandate, directly or indirectly, to third parties. It is therefore precluded to involve a party unrelated to the proceeding, not bound by the formal commitment of satisfactory performance of the office, not bound by the obligation to

[8] Court of Cassation, 13 December 1994, Mustaka, in *Giust. Pen.*, 1996, III, page 190.
[9] Court of Cassation, 17 October 2000, Cordone, in *Dir. Pen. Proc.*, 2002, page 304.

secrecy and not open to objection. According to case law, violation of this provision would give rise to relative nullity,[10] although there have been judgments which exclude any form of invalidity attaching to the expert evidence.[11]

It is nevertheless difficult to find an easy solution to the problem of the distinction between activities involving no appraisal or assessment and interventions of a technical nature which, autonomous of the subject of the investigation, call for the appointment of an ad hoc expert. The first category would include input which is purely material and devoid of critical content, provided as a purely manual function for reasons of enforcement and service.[12]

5. ADVERSARIAL PRINCIPLE IN PROCEEDINGS OF THE EXPERT WITNESS

The provisions of Article 229 C.Cr.P. regulate, in the event of non-concomitant replies, the system of communication to the parties, which must guarantee adherence to the **adversarial principle** from the outset of the proceedings undertaken by the expert witness.

Disclosure by the expert witness, under the terms of Article 229, subsection 1 C.Cr.P., of the date, time and place at which the proceedings will commence constitutes an incontrovertible guarantee. Therefore, in the event of changes in these particulars, the expert witness will be under an obligation to notify the defence counsel to this effect; in the absence of a notification to this effect, it would be impossible to invoke the mechanism contained in subsection 2 of the said provision which, in providing for a simple communication without formal procedure to the parties present, relates exclusively to a possible "continuation" of the proceedings of the expert witness already

[10] Court of Cassation, 29 December 1993, Cimai, in *Cass. Pen*., 1995, page 3013.

[11] Court of Cassation, 23 July 1992, Valensise, *Arch. Nuova proc. pen*, 1993, page 333. The Supreme Court affirmed that the anomaly resulting from the unauthorised delegation by the expert witness to a third party of the mandate assigned to him by the pre-trial investigation judge to establish the identity of certain blood reports should have been pleaded prior to the indictment, pursuant to Article 181, subsection 2 C.Cr.P., given that this is a matter of relative nullity in relation to the pre-trial investigation stage.

[12] Examples of an activity involving no appraisal or assessment would be mathematical calculations to be used for the purposes of a ballistics report: Court of Cassation, 15 December 2003, Scattone, C.E.D. 228975. Further examples would be laboratory analysis or the reading of an electrocardiographic trace in the context of a medical/forensic report.

under way and cannot therefore be applied in the event of a change decided on by the expert witness prior to commencement of his proceedings.

The **notice** given to the defence counsel of the instigation or continuation of the proceedings of the expert witness satisfies the requirements of protection of the defendant's right to assistance pursuant to Article 178, subsection 1, para. c) C.Cr.P.: consequently, failure to issue an analogous communication to the expert witness commissioned by a party will not lead to nullity in any form. However, in the event that a defence counsel who has requested to be a party to the proceedings of the expert witness has been excluded, this would lead to a case of general nullity due to impairment of the defendant's right to technical assistance; this would apply irrespective of the presence or absence of the expert witness acting for the party.

6. METHODS OF ENTRY OF THE OPINION OF THE EXPERT WITNESS AND THE PROBLEM OF ITS EVALUATION

Article 227 C.Cr.P. stipulates that, as a general rule, the opinion of the expert witness must be expressed in **verbal** form, with statements recorded in the transcript, and only exceptionally by means of the filing of a written report.

While, in practice, the second method of disclosure of the findings of the expert witness constitutes the rule, the filing of a written report remains subsidiary to the verbal exposition of the opinion by the expert witness, which is clearly essential. It follows that, in a trial, failure on the part of the expert witness to make a verbal exposition of the responses to questions posed by the judge will give rise to intermediate nullity as a result of violation of the right to a fair trial, under the terms of Articles 178, para. c) and 180 C.Cr.P., by preventing the defence from posing questions.[13]

It must also be stressed that, according to the explicit provisions of Article 508, subsection 3 C.Cr.P., a verbal exposition of the report of the expert witness must precede examination of the expert witness by the parties and the judge under the terms of Article 501 C.Cr.P., an examination which is purely contingent. Again, in adherence to the principle of orality and immediacy in the construction of evidence, a reading of the report

[13] Court of Cassation, 22 April 1999, Pilati, in *Riv. pen.*, 2000, page 277.

of the expert witness with a view to its entry in evidence can only be ordered after examination of the expert witness (Article 511, subsection 3 C.Cr.P.).

In the case of a written report, the procedure for construction of the evidence of the expert witness will vary depending on whether an examination does or does not take place: 1) if an examination does take place, the report will be of use to the parties for the purposes of posing questions and lodging objections and will become evidence only on completion of the examination; 2) however if the examination has not been requested, it will be possible to proceed directly to a reading of the report with a view to its entry as evidence.

There is therefore no obligation incumbent on the judge to provide for a reading of the written report unless, after examination, the judge decides this is necessary or if requested by any of the parties.

In case of expert evidence commissioned in the context of the pre-trial investigation however, there has been discussion as to whether the verbal exposition of the report, previously filed in writing, and the examination of expert witness must necessarily take place before the judge dealing with the taking of evidence in the pre-trial investigation or whether, conversely, as affirmed in the case law of the Court of Cassation, the response to the questions, provided when
the written report is filed, should be separate from the examination of the expert witness, to be conducted at a later date during the trial phase.[14]

The issue of the relationship between the oral and written form in the construction of the evidence of an expert witness arises again in cases where it is desired to transfer the findings of an investigation to a criminal action other than the action in which the expert evidence was commissioned and gathered.

This relates to a problem in the interpretation of Article 238, subsections 1 and 2bis C.Cr.P., the wording of which appears to allow the entry of expert evidence gathered in a different criminal action even in the absence of an examination of the expert witness

[14] Article 468, subsection 5 C.Cr.P. appears to mitigate in favour of the lack of necessity for an examination when evidence is taken in the context of the pre-trial hearing, where it requires the ex officio summons, at all events, of an expert witness appointed in the context of the taking of evidence in a pre-trial hearing: cfr. Court of Cassation, 15 December 1998, Anastassiedes, in *Cass. pen.*, 2001, page 594.

in the presence of all parties.[15] However, this opinion conflicts with Article 111, subsections 4 and 5 of the Constitution, given that the end result would be the admission of a departure from the adversarial principle in the construction of evidence, not compatible with the scenarios provided for under the Constitutional provision.[16]

The response of the expert witness is **open to free evaluation**, which means that it is not binding in nature. The judge is required to verify: a) the scientific correctness of the principles and methods employed; b) the accuracy of the application of the principles to the case in point, scrutinising the adequacy and consequentiality of the nuances and lines of argument employed in the report of the expert witness.

However, in the face of complex investigations and the pressing pace of scientific development, the difficulty in which the judge finds himself in exercising effective control and avoiding the ever-increasing risk of passive alignment with the findings of the expert witness, has been significantly increased. The more complex the scientific investigation, the greater the tendency of the judge, albeit not bound by the findings of the expert witness, to endorse them.

However the judge's pursuit of his deep-seated conviction must be justified so that it may be subjected to review by a judge acting at subsequent levels of the proceeding.

When, in the performance of this function, the expert employs methods of investigation which are new or experimental, not fully accepted into the body of knowledge of the scientific community, the grounds adduced must be more rigorous.

---

[15] Article 238, subsection 2bis C.Cr.P. provides for the usability of evidence deriving from a different criminal action with sole reference to a defendant whose defence counsel has been a party to the acquisition of such evidence, but relates this condition exclusively to declaratory evidence, a category in which expert evidence is not included.

[16] The exegetic option less conducive to the "defence of civil rights" has in the past been preferred by the Supreme Court, for whom expert evidence gathered in a different criminal action, read out at a trial, can be used even where the expert witness has not been examined, given that this obligation is not provided for under Article 511bis C.Cr.P., with reference to the reading of the report of evidence deriving from other actions; at all events, the absence of a preliminary examination of the expert witness could not constitute a ground for nullity, given that there is no specific sanction in this sense and it cannot be included in any of the categories of general nullity provided for under Article 178 C.Cr.P.. Conversely, it would not even be possible to invoke a scenario of evidence unlawfully acquired under the terms of Articles 191 and 526 C.Cr.P., given that these provisions make reference purely to the concept of "acquisition", i.e. an activity which, being previous, is distinguished logically and chronologically from a reading of or reference to documents included in the trial papers: Court of Cassation, 24 May 1996, in *Cass. pen.*, 1997, page 2141, which relate however to the regulative structure existing prior to the amendments to Article 111 of the Constitution and Article 238 C.Cr.P.

By analogy, scrupulous justification will be required in the case of conflicting expert opinions (conflicts between the reports of two different Court-appointed experts or between the report of a Court-appointed expert and that of an expert appointed by a party): the judge will be required to choose, providing grounds for the solution adopted on the basis of specific technical, scientific or factual reasons.

If the judge fails to accept the findings of the expert witness, he should, according to some sources, be required to appoint a different expert witness, whereas, in accordance with a viewpoint endorsed even in case law, he should demonstrate in the grounds adduced that he has given special consideration to the line of argument not endorsed.

In practice, there may be a risk that the opinion of an expert witness appointed by the judge is, from the outset, accorded greater credibility than that accorded to expert evidence commissioned by a party and, specifically, the private party. This enhanced scientific credibility could moreover be accorded to expert evidence commissioned by the Public Prosecutor, especially considering the persistent mindset which views the prosecution edifice as an impartial organ, indifferent to the outcome of the proceeding and concerned purely with the pursuit of a "just" decision.

However, case law repudiates preconceptions of this kind, requiring expert evidence to be commissioned by the Court in the event that the contributions of experts acting for the parties have generated a conflict, not so much between these findings, but in terms of the analysis of the data and investigatory methods employed.[17]

Full implementation of the dialectic method at all stages of the evidentiary proceeding and the opportunity for all litigants to avail themselves of the support of experts to support their position certainly remains a fundamental necessity, as an instrument for avoiding the creation of privileged positions in the evaluation of scientific evidence.

However, a significant contribution could be provided, according to some sources, by the creation of a criminal statute for the expert witness, centred around the clear provision of an obligation to truth in relation to his contribution to the proceeding, an essential prerequisite for the eradication of the current uncertainty surrounding this figure, currently spanning the alternative roles of the expert witness, bound by oath, and

[17] Court of Cassation, 4 April 1995, C.E.D. 201496.

that of a technical defence counsel, free to introduce into the proceeding a scientific "truth" functional to the specific interests of the party for whom he acts.

EXPERT EVIDENCE COMMISIONED BY A PARTY

1. ROLE OF EXPERT WITNESS ACTING FOR A PARTY UNDER 1988 CODE OF CRIMINAL PROCEDURE

In the Italian judicial system, the feature which primarily distinguishes the report of an expert witness acting for a party from that of a Court-appointed expert witness is the **subject** entitled to avail themselves of one of the other. Both consist of investigations, assessments and evaluations of a technical nature which require, as clarified under Article 220 C.Cr.P., "specific technical, scientific or artistic expertise"; however, whereas the Court-appointed witness is appointed by the judge, the party-appointed expert witness is a "technical/scientific auxiliary instrument" exclusive to the **parties**.[18] As stipulated by the Court of Cassation, the parties assign to such a witness the task "not only of the performance of material activities requiring a greater or lesser degree of technical capacity, but also and primarily the reasoned formulation of a critical evaluation of the findings of that activity, in the light of the knowledge of which the witness, being a specialist in a specific matter, must be in possession".[19]

Given that this figure is strictly linked to the parties, the party-appointed expert witness has also benefited indirectly from the **extended scope of action** ascribed to him under the **1988 code of criminal procedure,** adversarial in origin. According the parties a key role in construction of the evidence, current regulations governing the criminal process are indirectly more favourable to the performance of the functions of the party-appointed expert witness than those laid down in the 1930 Rocco Code.

The **legislator of 1930** considered the investigation carried out by the judge to be the most effective method of establishing the truth and deemed the adversarial principle and the intervention of the parties "obstacles" to the achievement of that objective. Given that the expert witness appointed by the judge was regarded as the only expert capable of providing reliable scientific replies, powers vested in expert witnesses commissioned by a

[18] KOSTORIS, *Expert witnesses commissioned by a party in the criminal process,* Milan, 1993, page 1.
[19] Court of Cassation, 14 May 1992, Marotta, in GUARINIELLO, *Criminal process in the case law of the Court of Cassation,* Turin, 1994, page 71.

party - even after the 1955 reform[20] - were limited and lacked teeth: their contributions, consisting primarily in written observations filed at Court, were given scant attention by the judge, being accorded a low level of reliability and authenticity. They were treated with a diffidence comparable to that accorded to the pleadings of the defence counsel. Moreover, in the 1930 Code, the figures of expert witnesses appointed by a party and the legal counsels tended to overlap: party-appointed expert witnesses were regarded merely as "technical defence counsels acting for the parties", to the extent that their absence at a trial – unlike in the case of a Court-appointed expert witness - did not result in a stay of proceedings or adjournment. Defence counsels were in fact viewed as capable of acting as adequate substitutes for the latter. In summary, the Rocco Code regarded the intervention of an expert witness acting for a party in the proceeding as an unnecessary *quid pluris* [additional thing], "tolerated" out a formal respect for the right of defence. It was moreover precisely on the right of defence affirmed in Article 24, subsections 1 and of the Constitution that the attempts of the Constitutional Court to vest the parties with a specific "entitlement to appoint an expert witness", i.e. the right of the parties to be assisted by experts who would guarantee them an effective technical/scientific defence, were founded.[21] These guidelines, coupled with references in international conventions[22] and examples from foreign judicial systems,[23] induced the 1988 legislator to implement "a **mini-revolution**",[24] enhancing the value of the technical/scientific contributions provided by a party and ascribing to the report of an expert witness commissioned by that party the status of a right and guarantee to be accorded to the accused. The key changes introduced on this matter by the 1988 Code are as follows: the status of effective impartiality accorded to the Court-appointed expert witness, the right accorded to the Public Prosecutor to call upon his own expert witnesses, the tendential symmetry

[20] We refer to Presidential Decree 666 of 8 August 1955.
[21] Cfr. Constitutional Court, 8 June 1983, no. 149, *Giur. cost.*, 1983, I, page 869.
[22] Cfr. Article 8, section 2 of the American Human Rights Convention of 22 November 1969 (which accords the accused the right to *"examine witnesses present in the Court and obtain the appearance, as witnesses or experts, of other persons who may throw light on the facts"*).
[23] Cfr. The provision in the American Criminal Justice Act of 1964 according the right to a person accused of a federal crime to consult an expert witness free of charge to support him in formulating a defence strategy before trial when questions of a technical/scientific nature are involved.
[24] AMODIO, *Reports of the Court-appointed expert witness and the witness acting for a party in the evidential framework of the new criminal process,* in *Cass. pen.*, 1989, page 171.

between the latter and witnesses acting for other private parties (especially the defendant)", "the multiplicity of instruments in place conducive to the admission of specialist knowledge to the process", beginning with the **report submitted by an expert witness acting for a party in the absence of that prepared by a Court-appointed expert witness.** Article 233 C.Cr.P.[25] allows each party, even in the event that no expert witness has been appointed by the Court, to "appoint a maximum of two[26] expert witnesses to act for him", entitled to present the judge with their opinion, through pleadings or otherwise. According to legal theory and case law, the function of this provision is no longer purely to stimulate the judge to commission his own expert witness by drawing attention to the expediency of doing so (as emerged from the proceedings preparatory to the Code), but the provision actually represents a means of evidence which is "autonomous, alternative to the report of a Court-appointed expert witness and to which each party may have recourse with a view to the direct entry in the proceedings of his technical/scientific contribution".[27] This therefore constitutes a vehicle for transfer to the trial, by disclosure to the judge in the course of cross-examination, of the findings of technical investigations commissioned by the parties with the aim of establishing the solidity of the prosecution case or defence response.

In fact therefore one should not, in the Italian criminal legal system, allude any longer simply to expert evidence commissioned by a party, but to the various different forms of such evidence, differentiated according to structure, purpose, the phase in which it is provided, the persons entitled to avail themselves of it, the codified regulations relating to which are highly fragmented, and hence difficult for an interpreter to encapsulate.[28]

---

[25] KOSTORIS, *Expert witnesses appointed by a party,* cit. page 28.

[26] The numerical limit of two consultants per party laid down under Article 233, subsection 1 C.Cr.P. responds to the need to satisfy the requirements of speed and prevention of an uncontrolled proliferation of expert witnesses in the proceeding for obstructionist ends. However, this solution may seem inopportune when the party needs to call upon experts endowed with expertise in more than two specialist areas. Under such circumstances, the witnesses appointed should undertake to provide a verbal report on the findings of experts in disciplines beyond the scope of their own knowledge. It would appear less problematic to reproduce these findings in a written report.

[27] KOSTORIS, *Expert witnesses commissioned by a party,* cit. page 100.

[28] APRILE, *Technical/scientific investigations: judicial issues surrounding the construction of criminal evidence,* in *Cass. pen.*, 2003, page 4034.

2. POWERS OF AN EXPERT WITNESS ACTING FOR THE PUBLIC PROSECUTOR

In the course of pre-trial hearings, where it is necessary to undertake activities requiring specific extrajudicial knowledge, investigatory bodies may be assisted by "specialist assistants".

In more specific terms, under the terms of Article 348, subsection 4 C.Cr.P., "when, of their own volition or if commissioned to do so by the Public Prosecutor", the **criminal police** "perform acts or procedures requiring specific technical expertise, they may call upon the services of suitable persons, who shall not be entitled to refuse the commission". It was seen as "entirely correct, even indispensable" to enable investigators to access specialist technical support, given "the existence of an infinite number of situations requiring the immediate intervention of persons who (…) are in a position to provide advice or undertake interventions regarded as useful and necessary to the identification of and securing of evidentiary sources":[29] in fields such as narcotics, pollution, food adulteration, crimes against the person, the search for materials of use for identification purposes, establishment of a blood group or DNA, the precise relationship between investigators and professionally skilled experts represents an effective tool for obviating "errors in formulation of the approach to the investigations"[30].

However, the first explicit reference to the figure of the expert witness appears in Article 359 C.Cr.P. which allows the **Public Prosecutor**, "when undertaking investigations or analyses for the purposes of identification, description or photographic evidence or any other technical procedure for which specific expertise is necessary", to "appoint and avail himself of experts, who shall not be entitled to refuse this commission" and who may be authorised by the Public Prosecutor "to assist in individual investigatory acts".

The Public Prosecutor may appoint as his expert witness "**as a general rule** a **person entered in the professional register of experts"**: as required under Article 73 of the Implementing Provisions of the C.Cr.P., to ensure that the prosecuting authority

[29] BIELLI, *Court-appointed and party-appointed expert witnesses in the new criminal process,* in *Giust. Pen*., 1991, III, page 66.
[30] BIELLI, *Court-appointed and party-appointed expert witnesses,* cit., page 66.

avails itself of experts endowed with adequate professional capacity[31]. It has moreover been observed that, by analogy with the criminal police[32], in concrete terms the Public Prosecutor enjoys a wide margin of **discretion in his decision[33]:** although this is "a fundamental question (the greater the incidence of the technical/professional component in the performance of the investigation, the more material, if not decisive, the reliance the Public Prosecutor must place in the person to whom the investigation is assigned), there is no provision in the Code or other legislation which provides specific guidelines as to the criteria for identification of the expert": the judicial reality "requires such an appointment to be regarded as the outcome of a fiduciary relationship". In practice, in general terms, a criterion of "essential significance in identification of the expert" is identified as the "pre-existing effective completion of mandates"; where it is necessary "to tackle issues of infrequent or unusual occurrence on which the personal experience of the Public Prosecutor throws no light whatsoever", an approach to "institutional bodies (chairmen of professional bodies, rectors of university faculties" may constitute a guarantee of reliability in terms of the suitability of the choice and the tangible relevance of the information to be gained".[34]

However, the **context** and **aims** in relation to which the Public Prosecutor may seek the collaboration of expert witnesses differ, bringing "to the proceeding specialist knowledge particularly suited to the establishment of the objective truth".[35] The important thing is that the Public Prosecutor must never transform "his witness into a - albeit highly qualified - officer of the criminal police, to whom he delegates the performance of the initial and (and not only initial) investigations".[36]

---

[31] Court of Cassation, 5 December 1995, Tauizilli, in *Cass. pen.*, 1997, page.724. The appointment of an expert not entered in the professional register of expert witnesses does not give rise to nullity in the appointment nor, still less, impact on the reliability of the evaluations expressed (Court of Cassation, 23 November 2005, Pellegri, C.E.D. 233192).

[32] Cfr. Court of Cassation, 27 January 1998, Cerreti, in *Riv. Pen.* 1998, page 810. However, it has been emphasised in legal theory that the decision must adhere to criteria of professionalism and moral suitability.

[33] Given that, among other things, there are no conditions specifying derogations, the Public Prosecutor appears to enjoy a greater level of discretion than the judge in selecting the expert witness.

[34] PARODI, *Nature, function and role of an expert witness acting for the Public Prosecutor*, accessed at http://appinter.csm.it/incontri/relaz/14202.pdf.

[35] CARLI, *Pre-trial investigations in the criminal system*, Milan, 2005, page 370.

[36] MEZZINA, *The evidence of expert witnesses in the criminal proceeding,* accessed at www.no.archiworld.it.

The Public Prosecutor must pose to his witness questions formulated in precise terms, placing "these experts in a situation where they answer the questions on exclusively technical premises". It is also regarded as possible that the witness may be asked to refer to and interpret technical provisions, or at the most judicial provisions of a primarily technical content. On the other hand however, witnesses should limit themselves to the performance of advisory services culminating in a critical evaluation, and not, as is sometimes the case in practice, suggest "specifically judicial solutions, indicating the provisions to be applied in the case handled".[37]

Whereas the "suitable persons" of which the criminal police may avail themselves under the terms of Article 348, subsection 3 C.Cr.P. are required to have specialist technical capabilities, the expertise characterising expert witnesses commissioned by the Public Prosecutor may also be scientific or artistic.[38] Furthermore, unlike Article 348 C.Cr.P., which refers to "acts or procedures designed to secure evidentiary sources", in referring to **"investigations, descriptive or photographic analyses and any other technical procedure** for which specific expertise is required", Article 359 C.Cr.P. appears to include acquisition and evaluation procedures:[39] this means the witness could be required to observe, identify and acquire material data using specialist operating techniques ("analyses"), evaluate data previously acquired on the basis of technical/scientific principles and, finally, perform complex procedures involving the acquisition and evaluation of evidence (the "investigations").[40] In drawing up a list of procedures assigned to expert witnesses acting for the Public Prosecutor, Article 359 C.Cr.P. applies a "decreasing level of technical/scientific complexity of investigatory activities, in which the procedures in question would constitute the final level".[41]

The instrument provided for under Article 359 C.Cr.P. is certainly flexible from a procedural viewpoint, being devoid of formal definitions.

---

[37] MEZZINA, *The evidence of expert witnesses*, cit.
[38] KOSTORIS, *Expert witnesses*, cit., page 138.
[39] The criminal police authorities and hence the "suitable persons" appointed by them may only undertake investigations and analyses of the condition of places, things or persons where there is a risk of tampering, dispersal or alteration of evidence, items pertaining to the crime or the condition of places and the prompt intervention of the Public Prosecutor pursuant to Article 354 C.Cr.P. is not possible.
[40] On the distinction, see Court of Cassation 20 November 2000, D'Anna, in *Guida dir*., 2001, page 105.
[41] KOSTORIS, *Expert witnesses*, cit., page 144.

The witnesses provided for under Article 359 C.Cr.P. have a predominantly **internal role in the investigations**: they undertake procedures which are, by their nature, repeatable in the context of the trial, usable for the purpose of continuation of the investigations, supporting the implementation of a precautionary remedy, pronouncing a dismissal order or a conclusive order in the pre-trial hearing. The records of such persons can only be used for the purposes of a decision on the merits of the case in the event of a summary procedure or plea bargain or where repetition would be impossible pursuant to Article 512 C.Cr.P. Precisely because the activities undertaken by expert witnesses under the terms of Article 359 C.Cr.P. generally exhaust their significance during the phase of the actual proceeding[42] - not representing any moment in the construction of actual evidence - the Code makes no provision for their appointment to be disclosed to the interested parties.[43]

The regulations laid down in Article 360 C.Cr.P. in relation to **unrepeatable technical investigations**, i.e. investigations relating to "persons, property or places whose condition is liable to change" (e.g. a number of routine acts in forensic medicine, such as post-mortems): the Public Prosecutor is required "without delay" **to inform** "the person under investigation, the injured party in the offence and the defence counsels of the date, time and place fixed for the performance of the mandate and the right to appoint expert witnesses". A comparable obligation is extended to the Public Prosecutor under the terms of Article 117 of the Implementing Provisions of the C.Cr.P., in the event that a technical investigation which the Public Prosecutor is required to perform in order to decide whether to instigate a criminal action "**gives rise to changes** in items, places or persons, rendering the act unrepeatable".

The purpose is to facilitate effective exercise of the right of defence, understood as the right to "participate in the vesting of the mandate and investigations and formulate observations and reservations", countering those of the prosecution. The expert witness with responsibility for unrepeatable technical investigations under the terms of Article 360 C.Cr.P. although categorised among the witnesses for the prosecution, in actual fact

[42] The activities of the expert witness under the terms of Article 359 C.Cr.P. "can only be freely appraised by the judge following examination of the expert witness in the trial under the terms of Article 501 C.Cr.P.". (Court of Cassation, 14 April 1995, Ucci, in *Dir. Pen. Proc.*, 1995, page 937).

[43] On the compatibility of Article 359 C.Cr.P. with Article 111 of the Constitution, cfr. Court of Cassation, 8 August 2000, Brunello, in *Arch. Nuova proc. pen.*, 2001, page 210.

surrenders the role of an investigatory organ ascribed to the expert under the terms of Article 359 C.Cr.P. and assumes that of a person responsible for **formulating evidence in advance** which can be used in the proceedings pursuant to Articles 431, subsection 1, para. c) and 511, subsection 1 C.Cr.P. (to the point where an investigation conducted in accordance with Article 360 C.Cr.P. has been defined as "an expert testimonial produced by the Public Prosecutor"[44]).

In **practice**, there has been a recorded tendency to extend the scope of application of Article 360 C.Cr.P. to cases where the technical investigation to be performed is not in actual fact unrepeatable, relying implicitly on the acquiescence of the defence, who frequently waive their right to appoint their own witness. The objective of the Public Prosecutor is to introduce the findings of expert witnesses appointed in the course of the pre-trial investigations directly into the proceedings.

3. POWERS OF THE EXPERT WITNESS ACTING FOR THE DEFENCE

As regards the defence, the current Article 327bis C.Cr.P., introduced by Law 397 of 2000 - which regulates defence investigations fully and in detail - allows the defence counsel (acting for a suspect, defendant, person civilly liable, person civilly liable for a fine, civil claimant or injured party in an offence) to commission expert witnesses to conduct investigations designed to search out and identify probative evidence favourable to their client “where **specific expertise** is necessary". This clarification is probably superfluous, introduced for the sole purpose of "drawing attention to the exceptional nature of the investigatory activities of expert witnesses".[45]

Under the terms of Article 327bis C.Cr.P., the latter are not authorised to perform investigatory acts on their own initiative: they must first be vested with a **mandate** from the defence counsel who, in the event that he chooses to avail himself of the collaboration of an expert in accordance with the "**Rules of conduct for the criminal lawyer in defence investigations"** (Article 4, section 5) drawn up by the Union of Criminal Divisions, is required to vest an assistant with a written mandate, requiring the latter to:

[44] NOBILI, *The new criminal procedure*, Bologna, 1989, page 240.
[45] BRICCHETTI-RANDAZZO, *Investigations conducted by the defence*, after Law 397 of 7 December 2000, Milan, 2001, page 37 *et seq.*

- comply with statutory provisions, with particular reference to those governing defence investigations and data protection;

- communicate details and findings of the investigations and deliver any documentation relating thereto exclusively to the defence counsel who has vested the mandate or a representative of the latter;

- except where specifically authorised in writing by the defence counsel, refuse any further mandate relating to or associated with the case to which the vested mandate refers.

The defence counsel shall furthermore be under an obligation to issue the expert witness with "any directives he may consider necessary" (cfr. Article 4 of rules of conduct for the criminal lawyer) and - it is considered - at the very least, exercise control over the correctness and authenticity of data and findings provided by the expert: "if the expert witness offers the defence counsel a document which fails to meet the criteria of correctness and authenticity, the defence counsel cannot make use of the report in the proceedings"[46] (Article 14, section 1 of Code of Ethics).

Unlike the expert witness commissioned by the Public Prosecutor, a witness acting for private parties is not required to be entered in a professional register or hold certificates attesting to his professional competency. It is in the interest of the defence to appoint witnesses who are truly competent and qualified in the relevant disciplines (forensic medicine, toxicology, forensic genetics, ballistics, graphology, etc...), capable of representing "a guide for the defence in the acquisition of material technical data and providing technical evaluations favourable to the defence position".[47] The method of construction of evidence sanctioned by Article 111, subsection 4 of the Constitution also requires expert witnesses to have "a strong and rigorous professionalism": the parties have "more than ever a need to have access to highly skilled expert witnesses (...), to withstand the adversarial system in relation to evidence provided".[48]

In the past, effective recourse of private parties to the figure of the expert witness was for some time negatively conditioned by Article 4, Law 217 of 1990, which

[46] TADDEUCCI SASSOLINI, *Technical/scientific defence investigations*, accessed at http://appinter.csm.it.
[47] TADDEUCCI SASSOLINI, *Defence investigations*, cit.
[48] FRIGO, *The expert witness for the defence in the new criminal process*, in *Cass. pen*., 1988, page 2187.

established a **system of legal aid** for people of limited means, restricting the Government's obligation to the coverage of expenses incurred in respect of an expert witness commissioned by the Court. In fact, only those in possession of the economic resources required to meet the costs involved were allowed to appoint an expert witness. This solution was open to considerable doubt concerning its constitutional legality, in the light of the right of defence and the principle of equality, given that the Public Prosecutor could always avail himself of his own expert witnesses. As a result of the judgment pronounced by the Constitutional Court, no. 33 of 1999, the legislator reworded this regulation: Article 102 of the Consolidated Act on Legislative and Regulatory Provisions governing Legal Costs, approved in **Presidential Decree 15 of 30 May 2002**, allows a person admitted to legal aid to appoint an expert witness resident in the district of the Appeal Court in which the process is pending or, subsequent to the amendment introduced by **Law 25 of 24 February 2005**, in a different district, excluding travel expenses and allowances. Article 106, subsection 2 of the Consolidated Act specified however that expenses incurred in respect of expert witnesses commissioned by a party, regarded as superfluous or immaterial for evidentiary purposes at the moment of vesting of the mandate, could not be met. The fact that it was the judge who decided on the level of materiality and utility of the evidence to be adduced when the mandate was vested gave rise to objections: it is frequently only as result of such expert evidence that it is possible to infer the degree of utility of evidentiary material in a reconstruction of the facts.

With reference to the **powers** which can be exercised by expert witnesses acting for a party, Article 391bis C.Cr.P. accords the latter, the defence counsel, a representative of the latter or an authorised private investigator, the right to "confer with persons in a position to report on circumstances of use for the purposes of the investigative activity", through a **non-documented interview,** designed to establish the knowledge in the possession of that person and the utility for the defence, the findings of which cannot be directly used at procedural level. However, before this interview takes place, the expert must provide the other party in the interview with an account of his status and the purpose of the interview.

Article 391sexies C.Cr.P. furthermore explicitly authorises expert witnesses employed by the defence to effect "**access** with a view to inspection of the condition of the **premises** and **property** or undertake a description of the latter or **technical, graphic, structural, photographic or audiovisual analyses**". Under these circumstances, the witness may draw up a record stipulating the date and place of the access, his own particulars and those of any other persons involved, the description of the condition of the premises and property, details of any analyses conducted, which will form part of the main document and be appended to it. In the case of "**private premises** or premises not open to the public", where the consent of a person with disposal of the latter is lacking, access of the defence counsel and - self-evidently - his assistants, including the expert witness, must be "authorised by the judge, in a reasoned Court order laying down concrete terms and conditions" pursuant to Article 391septies C.Cr.P. Conditions governing access to "**residential** premises and fixtures" are more restrictive: under these circumstances, access is subject to the consent of the private individual and, where this is lacking, authorisation from the judge and a need to "investigate the evidence and other material effects of the crime".

In order to perform, when accessing premises, analyses not likely to change the condition of the premises or things, the defence counsel will not be required to issue notification to the Public Prosecutor to this effect. A record of the procedure may be used in Court for the purposes listed for expert evidence commissioned by the Public Prosecutor under the terms of Article 359 C.Cr.P. With reference to **unrepeatable analyses** (i.e. preventive, non-deferrable, remedies), the Public Prosecutor, in person or through the medium of the criminal police commissioned by himself, shall be entitled to be present at this act. If the Public Prosecutor decides to be a party to the act, through delegation of the criminal police or otherwise, the defence will be under obligation to file with the Public Prosecutor a record of the activities performed, to be included in the file of the Public Prosecutor and of the defence counsel and subsequently brought together in the trial papers, with evidentiary value. The same evidentiary value will characterise documentation relating to unrepeatable acts performed in the course of access to premises when "submitted in the course of pre-trial investigations or at the pre-trial hearing": under

these circumstances, the documentation must be included directly in the papers provided for under Article 431 C.Cr.P..

Article 391decies, subsection 4 C.Cr.P. regulates the option of the defence counsel to perform, by availing himself of an expert commissioned at his own discretion, **unrepeatable technical investigations**. Law 397 of 2000 has thus extended to private parties an instrument previously reserved for the Public Prosecutor, enabling them to construct advance unilateral evidence: the report on unrepeatable technical investigations performed by the defence is in fact intended, on completion of the pre-trial hearing, to be brought together in the trial papers in accordance with the reference to Article 431, subsection 1, para. c). The defence counsel will be required to "give notice to this effect without delay to the Public Prosecutor with a view to the exercise of the rights laid down, in as far as compatible, under Article 360": the latter will in fact enjoy the same rights as can be exercised by defence counsels acting for private parties in the event that the Public Prosecutor (see above) commissions an unrepeatable technical investigation. Article 15 of the "Rules of conduct for the criminal lawyer in defence investigations" extends the notice obligation incumbent on the defence counsel to all persons vis-à-vis whom the act may take effect and of whom knowledge exists.

It is however uncertain whether, in addition to the defence counsel, the expert witness himself is entitled, at his own expense, to request and obtain copies of documents in possession of the **Government authority**". Article 391quater C.Cr.P. specifically restricts this right to the defence counsel. However, it has been asserted that this right is also extended to the expert witness given that, in accordance with the general rule laid down in Article 327bis, subsection 3 C.Cr.P., all investigations regulated by Section VI bis, Book V of the Code of Criminal Procedure can "be completed indiscriminately by the defence counsel or, where specific technical expertise is required, by expert witnesses".[49]

In accordance with prevailing theory, expert witnesses acting for the defence, as provided for under Article 327bis C.Cr.P. shall also be vested with the **rights** listed in **Article 233, subsection 1bis C.Cr.P.**: having obtained authorisation from the judge - or, in the course of the pre-trial investigations, the Public Prosecutor himself - experts

[49] FOCARDI, *Non-Court-appointed expert evidence*, Padua, 2001, page 116.

appointed by private parties may **examine items seized in situ, be party to inspections or examine the subject of inspections at which they have not been present.**

Under these circumstances, in accordance with Article 233, subsection 1ter C.Cr.P., "the Court will lay down **requirements to be adhered to in order to preserve the original condition of property and places and ensure respect for persons".**

With regard to the examination of items seized, the interpretation of the term "**examine"** is controversial: according to an initial interpretation, the expert witness would be able to observe from the outside, describe and gather material data pertaining to the crime, but not perform invasive interventions; according to other sources however, in addition to taking photographs or measurements of the assets seized, the expert would be entitled to handle the object, providing that this does not alter its condition. Finally, according to the most permissive interpretation, the expert would be allowed to perform all technical procedures necessary for the investigations.

The right of **attendance at inspections** accorded to the expert witness under Article 233, subsection 1bis C.Cr.P. extends and adds to the right of defence, enabling a defence counsel to ask the Court to be assisted or replaced by an expert witness in the exercise of the right of presence at inspections accorded to him under Article 364, subsection 4 C.Cr.P. Referring explicitly to "inspections", Article 233, subsection 1bis relates to inspections of premises, things or persons, regulated respectively by Articles 245 and 246 C.Cr.P. In the latter circumstances, the purpose of the Court's authorisation will be, given the invasive nature of the act, to facilitate a selection of persons authorised to be present.

The third right accorded under Article 233, subsection 1bis C.Cr.P. to an authorised expert witness consists in the option of the **autonomous examination of things, places or persons which have been the subject of a previous inspection,** in the event that the expert witness has not attended an inspection performed by the judicial authority.

The person entitled to request **authorisation** to ensure that the expert witness is able to perform the activities described under Article 233, subsection 1bis C.Cr.P. will be the legal practitioner who has taken on the capacity of defence counsel. Given however that subsections 1 and 1bis make reference to the "party", the expert witness in favour of

whom this request may be put forward is purely an expert witness appointed directly by the private party concerned, not the expert appointed by the defence counsel for performance of the investigatory acts regulated by Articles 391bis *et seq.*

The decision to stipulate that an expert witness should be in possession of authorisation in order to be able to exercise the rights listed under Article 233, subsection 1bis C.Cr.P. has aroused concern: to make the exercise of the right of defence in a technical/scientific context contingent on a discretionary measure of the judicial authority would be in conflict with Articles 3, 24 and 111 of the Constitution. A conflict which would be significantly lessened, according to other sources, if it were considered that "the judicial authority must make the utmost effort to facilitate access to the seized material or attendance at the inspection"[50] and that it should only be denied where it is considered that, not even by application of the requirements laid down under Article 233, subsection 1ter C.Cr.P. would it be possible "to ensure that the original condition of the items or places seized is preserved or respect for the person subject to inspection safeguarded".[51]

Where authorisation is denied, the defence counsel is entitled to lodge an **appeal** before the judge, who will consider it in private session pursuant to Article 127 C.Cr.P. According to an initial line of argument, this instrument of control relates purely to a refusal expressed by the Public Prosecutor: it would be anomalous to conceive of an objection lodged before the judge against a remedy pronounced by a different jurisdictional organ at the same level and it would at any rate prove difficult to identify which judge had jurisdiction. Other sources prefer to rely on a literal interpretation: the appeal is drawn up as a provision in itself, which appears to relate both to a decision arrived at by the judge and a decision arrived at by the Public Prosecutor.

The procedures and conditions in accordance with which the expert witness acting for a party may convey to the judge the knowledge acquired on the basis of the investigatory activity and data gathered by him relate to different provisions: Article 501 and Article 233, subsection 1 C.Cr.P..

Article 501 C.Cr.P. provides that the evidentiary acquisition of the opinions of expert witnesses appointed by a party or by the Court must take place by **oral**

[50] FOCARDI, *Non-Court-appointed expert evidence*, cit, page 103.
[51] LOCATELLI-SARNO, Investigatory acts on the part of the defence in the criminal proceeding, Padua, 2006, cit., page 267.

examination at the trial, subject to "provisions governing the examination witnesses, in as far as applicable". From the technical opinions submitted, the judge "will be under an obligation to select the opinions he considers most reliable on completion of the direct examination and cross-examination".[52] In accordance with the adversarial principle with reference to the construction of evidence, each of the parties will seek, in the cross-examination, to undermine the credibility of the expert appointed by the opposing party and, in the direct examination of his own witness, convince the judge of the validity of the line of argument adopted by the latter.

However, the only persons entitled to put questions to the expert witness will be the Public Prosecutor and defence counsel; this right is not however accorded to the experts, notwithstanding the fact that they are persons technically more qualified.

On the other hand, Article 233, subsection 1 C.Cr.P. provides that expert witnesses appointed by the parties in the absence of a Court-appointed assessment may "present the judge with their opinion, in the form of **pleadings** or otherwise, pursuant to Article 121 C.Cr.P.", without however clarifying whether the witness is entitled to exhibit the opinion in written form over and above, or even independently of, the oral examination.

A number of pronouncements in case law have admitted the possibility of the production of an opinion drawn up by the expert witness at the trial pursuant to Article 495 C.Cr.P., as a "document" (debatably, given that the material is not external and does not predate the proceeding and given that, where it permits the entry, ex officio or otherwise, of "documents,

written reports and publications" consulted in the course of examination of the expert witness, Article 501, subsection 2 C.Cr.P. presupposes the oral contribution of the witness).

Prevailing case law considers however that the examination of the expert witness at a trial is a necessity, to safeguard the requirements of the adversarial principle. The report can be entered as evidence for the sole and specific purpose of supplementing the deposition rendered at the trial, subject to two conditions: firstly, that the expert witness has made reference to its contents during examination and, secondly, that the examination

[52] FOCARDI, *Non-Court-appointed expert evidence*, cit, page 230.

has proved deficient in relation to a number of significant aspects tackled by the parties in their questions.[53]

However, some sources consider that the written technical/professional opinion can be entered in the proceedings even in the absence of an oral examination of the expert witness, with the proviso that this would not have the value of conclusive evidence of factual data, being merely effective at the level of argumentation.

Relying on the prevailing line of argument, where Article 501, subsection 2 C.Cr.P. provides that the examination of the expert witness should be covered by the regulations applicable to the examination of ordinary witnesses, the intention is to refer exclusively to the method employed in taking evidence, **cross-examination**, and not to allow the application to the examination of the expert witness of the entire range of provisions laid down in respect of the ordinary witness (see the expression "in as far as applicable"), starting from Article 497, subsection 2 C.Cr.P., which places an obligation of truth on the witness: "in the context of the examination, the expert witness at any rate remains a separate person, who restricts himself to putting forward and supporting arguments favourable to the party he represents".[54] For precisely this reason, it is "essential to make the utmost effort to ensure that the expert is examined at the trial in the presence of all parties".[55] Given that the witness would not be bound by an obligation of truth, it is also doubtful whether the prohibition on questions likely to prejudice the honesty of replies would be applicable to him. Nor would it make a great deal of sense, given the technical nature of the examination, to apply the provision forbidding leading questions, i.e. questions which tend to suggest answers, to safeguard the spontaneity of the statements made by the witness.

Given the level of complexity characterising specialist fields, it is also difficult to pose questions to an expert witness "on specific acts", as provided for under Article 499 C.Cr.P.

---

[53] Milan Ordinary Court, 10 January 2000, Giorgetti, in Foro. It, 2002, II, page 302.

[54] KOSTORIS, *Expert witnesses*, cit, page 320. An alternative approach draws a distinction between witnesses depending on the party who has appointed them and assigns to an expert witness appointed by the Public Prosecutor the duties of legality, correctness and identification of the truth proper to the party represented: there would therefore be an obligation to tell the truth. In practice, there has at times been a tendency to "split" the examination of the witness, firstly hearing him as a witness bound by an obligation of truth with reference to historical data in his possession and, secondly, as an expert not bound by an obligation of truth, in relation to the critical evaluations he formulates.

[55] FOCARDI, *Non-Court-appointed expert evidence*, cit, page 261.

At the moment of evaluation of technical evidence, given that the Italian judicial system does not incorporate the principle of "best evidence", any conflict in technical evidence is entirely the responsibility of the judge at the ruling phase. "One cannot claim" - it has been said - that in his judgement "the judge adduces technical/scientific grounds, i.e. chooses to adopt a finding because it is technically more correct".[56] It is seen as sufficient that, in his grounds, the judge demonstrates that he has not ignored the arguments of experts of a contrary opinion. The judge may assert in his grounds that he does not believe the conclusions of an expert because he has failed to answer convincingly under cross-examination or has been unable to demonstrate that the technical procedure followed is correct. On the correct use of technical/scientific notions, the judge is able to exert "the same control as could be exercised by the general public, of whom the judge is both representative and interpreter".[57]

Given that the evidence of a non Court-appointed expert may acquire conclusive evidentiary value - as established by the **Constitutional Court** in **Judgement 33 of 1999** - if the judge considers the conclusions put forward by the expert witnesses acting for a party to be "objectively founded, exhaustive and based on convincing arguments", he is under no obligation to order his own expert appraisal and may lawfully derive "probative evidence from examination of the expert witnesses commissioned by the parties".

In **practice** however, private parties frequently strive, under the eyes of the judge, to undermine evidence in their favour, merely presenting the opinion of their own expert witness: they then prefer to present this evidence in the opinion and at the same time ask the judge to commission an expert appraisal which, being carried out by a third party, will be accorded greater credibility by the judge.

4. POWERS OF THE EXPERT WITNESS APPOINTED BY A PARTY IN THE CONTEXT OF EXPERT EVIDENCE COMMISSIONED BY A COURT

Having examined the powers assigned in the course of pre-trial investigations and in the actual proceeding under the Code of Criminal Procedure to the expert witness

[56] FOCARDI, *Non-Court-appointed expert evidence*, cit, page 264.
[57] DENTI, *Scientific nature of evidence and judge's evaluation*, in *Riv. Dir. Proc.*, 1972, page 414.

acting for the parties in the absence of a Court-appointed appraisal, we now come to the more traditional figure of the technical assistant provided for under the Italian judicial system: the expert witness who, under Article 225 C.Cr.P., may be appointed by the Public Prosecutor or private parties **in the event that** the judge has **instructed an expert appraisal**, whose essential function is one of **control** over the actions of the appointed expert.

The legislator is concerned to define the conditions and forms of this control, providing information primarily on the number of expert witnesses. Allowing each party to appoint expert witnesses "in a number not exceeding the number of Court-appointed expert witnesses", the intention is to ensure that the assistants appointed by the party are in a position to confront the Court-appointed expert witness dialectically *"ad armi pari"* [on an equal footing] and enable expert witnesses acting for the parties to participate in the expert appraisals assigned to several different persons by virtue of complexity of the investigations, when the appraisal operations may at times take place simultaneously in different places. In the past however, the limits imposed on the number of consultants capable of being appointed could in practice compel a single witness (two if there were several parties) to confront an entire team of Court-appointed expert witnesses. Conversely, the decision to ensure **numerical parity** between expert witnesses appointed by the parties and those appointed by the Court, even where the latter are confident in the same field, could slow down procedural timescales: to offset this risk, appointment procedures have been simplified.

The legislator has also imposed a number of **disclosure requirements** to enable the parties to appoint their expert witnesses and enable the expert witnesses to participate in the performance of the expert appraisal. In theory, knowledge of the scope of the expert appraisal represents for the parties an essential prerequisite for the conscious appointment of their own expert witnesses.

In reality however, Article 224 C.Cr.P. merely requires that the order commissioning the expert appraisal contains a summary statement of the scope of the investigations. This gap in information is not offset by the identification of the Court-appointed expert and it is unclear whether his professional status also needs to be mentioned. It is only in certain cases that specific mechanisms regulating the taking of

evidence in the context of pre-trial investigations and at the trial proper provide a remedy for this information deficit, providing adequate knowledge of the subject of the expert appraisal, albeit on the basis of “subsequent approximations”.

A request for the taking of evidence in the context of pre-trial investigations - in which there is a requirement, pursuant to Article 393, subsection 1, paras. a) and c) C.Cr.P., to indicate among other things the "evidence to be taken" and the "facts which constitute the subject of the evidence" - must be notified to the nominal opponents, who will present counter-arguments. The order accepting the request for the taking of evidence during the pre-trial investigations must stipulate in summary form the subject of the evidence pursuant to Article 224, subsection 1 C.Cr.P., but "within the limits of the request and the arguments", both known to the parties.

With reference to an expert appraisal in the context of the trial, the parties present are placed in the position of knowing the subject of the appraisal in terms beyond the summary, although this opportunity is not explicitly recognised in any legal provision. For parties who are not present however, the only means, subject to their own efforts, of acquiring this knowledge remains the Court order in which the judge officially commissions the expert appraisal.

With reference to **details of time and place,** the order in which the judge commissions the expert appraisal is required to stipulate the date, time and place set for the appearance of the expert witness appointed (Article 224, subsection 1 C.Cr.P.); if, on accepting the appointment, the latter decides he is unable to provide an immediate response to the questions posed, he is required to disclose "the date, time and place at which the appraisal operations will commence" (Article 229, subsection 1 C.Cr.P.); this data must be communicated to the parties present (with sole reference therefore to the parties who have made the effort to attend the first phase of the appraisal) in the event that the appraisal operations go ahead. In the past however, case law regarded it as sufficient to advise the defence counsels on an ad hoc basis of the commencement of the appraisal operations; thereafter it was dependent on the latter to make contact with the Court-appointed expert to apprise themselves of any further operations.

In relation to the conditions under which this information must be conveyed, the provisions of the Code are summary, although they regulate key aspects to allow for

performance of the appraisal in accordance with the adversarial principle. Chronological and logistic particulars pertaining to the appearance of the expert appointed by the Court must - it would appear - be disclosed - under the terms of Article 224, subsection 2 C.Cr.P., which requires the judge to take "all measures necessary for the performance of the appraisal operations".

With reference to an appraisal conducted in the context of the **taking of evidence at the stage of the pre-trial investigations**, while it is true that the order acceding to such a request will contain this data, it is also true that Article 398, subsection 3 C.Cr.P. merely provides for the Public Prosecutor, person under investigation, injured party and defence counsels to be provided with a communication/notification of the date, time and place of the hearing. The gap relating to the subject of the evidence, a fundamental perquisite for the appointment of expert witnesses, therefore persists, a situation which it has been proposed could be remedied by citing Article 224, subsection 2 C.Cr.P..

In the event of an appraisal commissioned in respect of the **trial**, the expert witness is "immediately summoned to appear and will be required to present his opinion at the trial" (Article 508, subsection 1 C.Cr.P.); for the parties, apprised of the subject of the appraisal, the problem could be that of immediately appointing their own witnesses, to be in a position to exercise the right vested in them under Article 152 of the Implementing Provisions of the C.Cr.P. It is probable that the judge, availing himself of the right accorded to him under Article 508, subsection 2 C.Cr.P., will adjourn the trial where necessary and fix a date for the new hearing.

Whereas, under the previous system, there was no provision for the participation of the expert witness acting for a party in the vesting of the mandate and formulation of the questions, today the relationship between the expert witness acting for the party and the Court-appointed expert witness evolves from the phase of the preliminary investigations to the actual appraisal. Nowadays the Court-appointed expert witness, expert witnesses appointed by the parties, Public Prosecutor and defence counsels present, who must be heard by the judge, are party to the **formulation of the questions,** governed by Article 226 C.Cr.P. This provision is innovative, not merely owing to the opportunity for interaction accorded to the Court-appointed witness (previously in practice questioned at the outset with a view to the gathering of information on the

findings and methods of the operations requested) but also owing to the contribution of the parties and their "technical" assistants, defence counsels and expert witnesses. The formulation of the questions, the outcome of a dialectic collaboration between the judge, Court-appointed expert witness and parties, thus becomes the key moment in the expert appraisal. This interaction is consistent with the new fundamental choices in the criminal system: under the previous Code, in which the investigating magistrate had powers of investigation and construction of evidence, it was more comprehensible that the wording of the questions was unilateral and took no account of input from the parties; the current approach reflects the absence of investigatory powers vested in the judge and the opportunity for the parties to ask the judge to commission an expert appraisal. In particular, in the event that an expert appraisal is commissioned in the context of the taking of evidence at the pre-trial stage, given that the pre-trial investigation judge is not aware of the investigations conducted by the parties, the interaction with the Court-appointed expert witness, the information contained in the actual request for the taking of evidence at the pre-trial stage and the arguments, if any, put forward by the opposing party are the sole tools of information of which the judge may avail himself in formulating the questions. When however the expert appraisal takes place in the context of the trial, the judge’s overview of the process is already more complete and becomes increasingly solid in pace with developments in the preliminary evidentiary investigation; it is no chance that, at this stage, the tool of the expert appraisal can also be activated by the judge, who is obviously accorded a greater degree of awareness of the ends to be achieved. The contribution of the parties and expert witnesses then has the primary value of safeguarding the parties and their function as sources of information for the judge becomes less prominent.

In regulative terms, the participation of the expert witness appointed by the parties in the formulation of the questions is provided for under Article 230, subsection 1 C.Cr.P., on the basis of which the latter "are able **to be present** at the vesting of the mandate and put **requests, observations and reservations** to the judge", of which mention must be made in the transcript. For the exercise of the rights provided for under Article 230 C.Cr.P., it is essential that the persons in question are present. However, having heard the parties, the judge is not bound by their observations and is under no

obligation to pronounce on the requests pursuant to Article 230, subsection 1 C.Cr.P. Notwithstanding, it is considered that the existence of a dialogue between the persons present, the participation of the Court-appointed expert witness and the consultative value of the questioning should not be allowed to generate attitudes which in fact fail to take account of the arguments of the parties and their expert witnesses.

Article 230, subsection 2 C.Cr.P. stipulates that the expert witnesses acting for the parties may "**participate** in the Court-appointed appraisal **operations**": using the term "participation" - and not "assistance", the term used in the previous subsection to define the role undertaken at the moment of vesting of the mandate in the Court-appointed expert witness - the legislator accords the expert witness acting for the party a more significant and effective role in the performance of the appraisal operations. It is thus intended to remove the "lack of communication" between the Court-appointed expert witness and the expert witnesses acting for the party while the appraisal is still in progress, outlining two intervention routes for the latter: in addition to the opportunity to express observations and reservations, they may propose **"specific investigations"** to the Court-appointed expert witness.

When the latter do not fall within the scope of the questions formulated when the mandate is vested, the proposal of these investigations is equivalent to the introduction of new questions, addressed directly to the Court-appointed expert witness: the scope of the expert appraisal commissioned by the Court is in effect broadened. What are the valuation criteria to which the Court-appointed expert witness should adhere? Legal theory has indicated as a benchmark Article 220, subsection 1 C.Cr.P., which gives the applicant parties the right to request the judge to commission an expert appraisal where there is a need "to perform investigations or acquire data or evaluations requiring specific technical, scientific or artistic expertise", and, Article 190 C.Cr.P., which provides for the exclusion of evidence which is manifestly superfluous and immaterial. Turning to the person called upon to evaluate the proactive requests put forward by the expert witnesses acting for a party, some sources have identified him as the actual Court-appointed expert witness, bound merely to note the requests in his report, and not provide reasons in a specific measure for their reasons for acceptance or refusal. Other sources consider that, in accordance with Article 228, subsection 4 C.Cr.P, the judge may be vested with the

decision in this matter, ascribing to the jurisdictional body a decision on "questions pertaining to the powers of the Court-appointed expert witness and his terms of reference".

The "participation of the expert witness acting for the parties in the Court-appointed appraisal operations" is positioned between the two extremes of the adversarial process and cooperation, coinciding with neither the one nor the other. On the one hand in fact, rather than competing with the Court-appointed expert witness to influence the decision of the judge after the event, the expert witness acting for the party appears to wish to express his opinion to the Court-appointed expert witness, so as to influence the actions of the latter while the Court-appointed appraisal is in progress. On the other hand, it is also not possible to comprehend the relationship between the expert witness appointed by the party and that appointed by the Court as a collaboration given by the expert witness acting for the party to the expert witness acting for the Court with the objective provided for under Article 226, subsection 1 C.Cr.P of establishing the truth. The dialectic confrontation between the two persons will certainly be advantageous in the light of this result, although it is true that it will not be possible to achieve "any form of awareness in the domain of the probable while ignoring the opinions of others";[58] it would however be an exaggeration to assert that the burden of truth is incumbent on the expert witness acting for the party and that the pursuit of the party's interest will give way before the goal of achievement of the interests of justice.

Article 230, subsection 3 C.Cr.P allows expert witnesses acting for parties **appointed after completion of the Court-appointed appraisal operations** to "examine the reports and ask the judge for authorisation to examine the person, thing or place which is the subject of the expert appraisal". The term "reports" presupposes that the outcomes of the appraisal have been expressed in written form: which should be the case under the circumstances regulated by Article 227, subsection 5 C.Cr.P, in which, given that it is "indispensable to illustrate the opinion in written notes, the Court-appointed expert witness may ask the judge for authorisation to present a written report within the time limits laid down in accordance with subsections 3 and 4". Under other

[58] GUILIANI, *The controversy. Contribution to judicial logic*, in *Studies in legal and social sciences*, 1967, page 148.

circumstances, the right provided for under Article 230, subsection 3 is manifested in the examination of the written record of the opinion rendered verbally by the Court-appointed expert witness, pursuant to Article 227, subsection 1 C.Cr.P

Examination of the reports of the Court-appointed expert witness also poses a temporal problem: if the Court-appointed expert witness is able to file his report within the time-limit assigned for the expert appraisal, there is nothing to rule out that he may also do so at the expiry date. Under these circumstances, the practical opportunity accorded to the expert witnesses acting for a party to proceed with an examination of the reports would be jeopardised and the ability of the latter to participate, in accordance with the adversarial principle, at the hearing at which the expert witness appointed by the Court will be required to provide a verbal response to the questions would be undermined. The reports in question could be referred to in the verbal exposition of the opinion and may at any rate contain information, calculations and complex representations which can only be used efficiently if known in advance. Hence the desire expressed in legal theory for the expert witness acting for a party to be notified of the filing of these reports[59] and be accorded a minimum time-limit for consultation, established not at the discretion of the judge, but in general terms under the Code.

For an expert witness acting for a party, appointed on completion of the expert appraisal operations, to examine the reports constitutes a right; to examine "the person, thing or place which is the subject of the expert appraisal ordered by the Court" under the terms of Article 230, subsection 3 C.Cr.P constitutes on the other hand a right dependent on the judge's authorisation. Under the 1930 Code, the opportunity for the expert witness acting for a party to carry out a further examination of the material which is the subject of the Court-appointed appraisal was regarded as an incidental moment, to be conceded by the magistrate with caution on the basis of the requirements of the proceeding. Under the current judicial system, in which expert witnesses acting for a party are figures through which the objective of "safeguard of the parties vis-à-vis the Court-appointed appraisal" is to be achieved, examination of the "person, thing or place which is the subject of the expert appraisal commissioned by the Court" is an important prerequisite for instigation

[59] CORBI, *The commissioning of a Court-appointed appraisal in the context of the taking of evidence in pre-trial investigations: procedural law and interpretive practice*, in *Cass. Pen.*, 1991, page 468.

of the adversarial process; hence, according to the interpretation prevailing in legal theory, the expert witness acting for a party will be endowed with a real "right to authorisation", contingent on two conditions. The judge would have to refuse authorisation to examine the material where it may irremediably compromise the outcomes of a subsequent pronouncement which the judge may be called upon to make; according to a strict interpretation of Article 230, subsection 4 C.Cr.P, under which "the appointment of expert witnesses acting for a party and
the performance of their activities cannot be allowed to delay the performance of the Court-appointed appraisal and the completion of other procedural activities", examination of the material subject to the Court-appointed expert appraisal would be denied, even in the event that, at the trial, the expediency of hearing the Court-appointed expert witness as soon as he has presented his opinion or report emerges.

Applying the inverse assumption – according to which the Court-appointed appraisal is commissioned after the appointment of the expert witness acting for the party - Article 233, subsection 2 C.Cr.P extends the rights provided for under Article 230 C.Cr.P to the expert already appointed. Although the provision refers only to the latter, legal theory tends to invest the expert witness acting for the party with further rights linked to the instigation of the Court-appointed appraisal, such as those laid down under Article 229 C.Cr.P.

The legislator does not make it incumbent on the parties to avail themselves, in the case of a Court-appointed appraisal, of the expert witnesses previously appointed: he merely exempts them from the need to make fresh appointments, without excluding the option of the parties to commission different expert witnesses. It is reasonable to believe that expert witnesses previously appointed will, on the basis of the investigations completed, have accrued knowledge placing them in a position more favourable than that of expert witnesses acting for the other parties and the Court-appointed expert witness. Therefore – the prediction is - their contribution at the moment of formulation of the questions and any reservations and observations they express will have a different value, acquire a superior materiality, liable to have a substantial influence on the performance of the operations.

The reference to Article 233, subsection 2 C.Cr.P and Article 225, subsection 1 C.Cr.P makes it possible to **adjust the number** of expert witnesses acting for each party in line with the number of Court-appointed expert witnesses, where the number of the latter is greater. More problematic is the scenario in which there is only one Court-appointed expert witness; under these circumstances, the party who has appointed several expert witnesses outside the scope of a Court-appointed appraisal will probably be required to waive the contribution of one of these witnesses.

Pursuant to Article 223, subsections 1 and 2 of the Implementing Provisions of the C.Cr.P, the powers provided for under Article 230 C.Cr.P belong also to the expert witness acting for a party who assists the interested party during the "**analysis of samples** in relation to which there is no provision for review" taken "in the course of procedures of inspection or supervision" or in the course of review of an analysis of samples previously taken: the records of these acts are, providing that the guarantees according to the interested party have been respected, intended to have evidentiary value, by analogy with unrepeatable technical investigations.

REFERENCE BIBLIOGRAPHY

KOSTORIS, *The expert witness in the criminal process*, Milan, 1993

FOCARDI, *Expert evidence commissioned by private parties rather than the Court*, Padua, 2003

CONTE-LOFORTI, *Technical investigations in the criminal process*, Milan, 2006

GUALTIERI, *Investigations of the defence counsel*, Padua, 2002

TRIGGIANI, *Defence investigations*, Milan, 2002

LOCATELLI-SARNO, *Investigatory acts of the defence in the criminal proceeding*, Padua, 2006

CARLI, *Pre-trial investigations in the criminal procedural system. Prosecution and defence in the search for and construction of criminal evidence*, Milan, 2005

AMODIO, *Expert evidence commissioned by the Court and the parties in the evidentiary framework of the new criminal process*, in *Cass. Pen*., 1989, page 170 *et. seq.*

BIELLI, *Court-appointed and party-appointed expert witnesses in the new criminal process*, in *Giust. Pen*, 1991, III, pages 65 *et seq.*

BRICCHETTI-RANDAZZO, *Defence investigations after Law 397 of 7 December 2000*, Milan, 2001

RIVELLO, *The expert witness and expert evidence commissioned by the Court*, in *Digest of the Provisions of Criminal Law*, IX, Turin, 1995

FRIGO, *The expert witness appointed by the defence in the new criminal process,* in *Cass.pen.*, 1988, 2177 *et seq.*

D'AMBROSIO, in Articles 359-360 C. Cr. P. in *Comment on the New Code of Criminal Procedure*, by Chiavario, IV, pages 173 *et seq.*

GASPARINI, *Court-appointed and party-appointed expert evidence and other technical/scientific aids?,* in Chiavario-Marzaduri, *Systematic case law in criminal procedural law* – Evidence, Turin, 1999

CORBI, *The expert witness appointed by the defence counsel in the context of Court-appointed expert evidence or otherwise,* in *Dif. Pen.*, 1989, page 111 *et seq.*

CALCAGNI-MASCARO, *Role of the expert witness appointed by the party in the new criminal process,* in Giust. Pen, 1992, III, pages 557 et seq.

COSSIGNANI, *Expert witnesses appointed by the Public Prosecutor – between regulative limits and distorted applications,* in *Dir. Pen. Proc.*, 1997, pages 333 *et seq.*

APRILE, *Technical/scientific investigations: judicial issues surrounding the construction of criminal evidence*, in *Cass. Pen.*, 2003, pages 4034 *et seq.*

BASIC PRINCIPLES REGARDING THE UTILISATION OF SCIENTIFIC EVIDENCE IN CRIMINAL TRIALS

* * * * *

While there are some aspects of the law concerning the expert evidence in criminal trials which call for reform and regulation of new forms of proof, the existing safeguards can be implemented in order to obtain the most reliable evidentiary results and avoid wrong verdicts. In order to pursue this goal, expert evidence must be dealt with according to the following principles.

In the first place, the entry of expert evidence in the criminal trial must be carefully scrutinized in order to avoid decisions based on unsafe scientific theories (junk science). The misuse of scientific evidence is a serious problem. The judge, in the decision about the admissibility of the evidence, has to verify the reliability of the specific piece of scientific evidence, controlling its epistemologic value in the light of the level of acceptance in the scientific community and suitability for the particular case before the judge himself.

This judicial assessment of reliability must be carried out thoroughly and the reasons of the decision must be expressed in written taking into account the justifiability of the methods employed and the possible results. The described evaluation will be acceptable as far as it will be conducted without analyzing the probative value of the evidence in relation to the specific facts of the case. In this way the fact finder will keep her/his neutrality and the decision about the admissibility of scientific evidence will not result in an anticipation of the final verdict.

The parties have the right to full argument about the admissibility of expert evidence and the right to the admission of expert evidence when non-juridical matters become relevant in the criminal proceeding. Judges have the duty to appoint an expert or to let the party appoint its own expert when, according to article 220 C.Cr.P., “specific technical, scientific or artistic expertise” is needed (right to proof). Therefore, the judge could not

refuse the access to expert evidence on the ground of sufficiency of other types of evidence.

The selection of experts by the judge and the parties should be done taking into consideration the specific professional and scientific qualification and, even if not provided by the law, persons with certifications released by commonly recognized authorities must be preferred.

About the questions posed to the expert, particularly, the judge appointed expert, they should be formulated excluding legal definitions or qualifications which pertain exclusively to the judge evaluation. Asking the experts to give legal definitions and qualifications would cause a serious loss of independence of the judge's decision.

It is fundamental to restrict the expert answers to the task to give only data, factual elements, scientific and technical evaluations which the judge will use in the construction of legal concepts necessary to the decisions to be taken in the course of criminal proceedings.

The compliance with all the above stated principles is recommended not only during the trial but is equally vital during the pre-trial stages. It must be taken into account that in the Italian Judicial System time to completion for each stage is often delayed. In the most complex cases each stage can last even several years in which the defendant could be in custody.

In the described situation it is very important that the reliability of the scientific evidence on which the prosecution bases the charge is evaluated under strict scrutiny.
In many cases it has occurred that, after a long period of custody, the innocence of the defendant has been declared after the first instance trial or after appellate judgments. Therefore, even if miscarriages of justice due to the use of scientific evidence don't seem to be an alarming matter, the lengthy determination of guilt over the course of the entire

criminal proceeding has determined, in practice, a similar effect on many defendants' life.

This perspective leads to the vital issue of physical evidence collection which is performed according to techniques completely left to the discretion of the police investigators, who are, sometimes, not trained to execute such a difficult task. In order to stimulate the adoption of homogeneous best practice guidelines, the judges should evaluate the action of evidence collection according to strict criteria.

REFORM PROPOSALS ON DNA EVIDENCE

* * * * *

Although the techniques of DNA analysis can have a highly probative value in the determination of innocence or guilt, the Italian parliament, unlike other European legislatures, has not disciplined the genetic investigations about suspects; so, it is lacking an adequate regulation, which, according to the Constitutional principles, specifies requirements, aim and guarantees.

The normative gap has lasted since over a decade, starting from the well-known sentence no. 238 of 1996 of the Constitutional Court, which declared the violation of Constitution by article 224, par. 2, C.cr.p. According to it, the restrictive measures of personal freedom allowed by article 224 in order to take samples for the purpose of DNA analysis were contrary to article 13 of the Constitution because they did not determine the typology of the measures and identify the cases and the manners in which the measures could be used. From decision n. 238/1996 police investigators have been left only the power to collect biological material unintentionally provided from the suspect: the biological tracks left on a cup or a glass, on cigarettes, hair found in a brush, etc.

The first step of the Italian legislator in the field of genetic investigations, the July 31st, 2005, no. 155 law, containing "Urgent measures for the contrast of the international terrorism" has faced the problems partially, acting exclusively in the perspective of the police investigations without disciplining the probative dimension of the genetic investigation. According to article 349, par. 2 bis, C.cr.p, officers belonging to the Criminal investigation department (neither the judge nor prosecutors) are authorized to collect, without the consent of persons involved, samples from living persons (hair and saliva) only for the purposes of identification; according to article 354, par. 3, C.cr.p. similar powers are provided in case of need of urgent investigations in the crime scene.

Further consideration should be given to the extent to which the suggestion in the final document drafted by the National Committee for biosafety and biotechnology, to

establish a rule which allows the judge, in absence of consent of the person involved, to authorise the taking of organic material, at least when deemed necessary for serious crimes prosecutions, should be implemented. The order of the judge should indicate the alleged offence, nature and type of biological sample, the reasons that make it necessary, place and time for the completion of the act and its mode, and inform of the right to be assisted by a person of trust. The injunction of the judge should be notified to the suspect and to his lawyer at least three days before the date of the execution.

Further consideration should be given to the extent to which the prosecutor should have limited power to conduct genetic investigations, as part of the investigation provided for in article 359 C. Cr. p. The measure should be similar to the one provided for the judge; in addition, the order should be sent immediately or no later than twenty-four hours, to the judge, for validation within the next forty-eight hours.

While in the past five years several European countries have established national databases containing genetic profiles of individuals suspected or convicted and those extracted from traces found on the crime scenes regarding unsolved cases, in Italy there are no guidelines for the communication of data between police laboratories and forensic organizations usually appointed by the courts for the purpose of DNA analysis. Further consideration should be given to the extent to which a strictly regulated national DNA database should be established, according to the existing rules on security and privacy and avoiding direct consultation from external bodies and private entities.

However, the extraordinary sensitivity that characterizes DNA analysis techniques for forensic purposes, gives rise to the problem of reliability of the results obtained from traces of biological materials, either those gathered on the crime scene, or those used for comparisons. Such reliability depends on the ability of laboratories to ensure a proper conduct of the operators, availability of appropriate resources and technical and logistical equipment, validity of the research methods used.

Such issue, in other countries, has been faced and solved assuring the accreditation of laboratories, according to the family of the ISO rules, but also through specific guidelines. The laboratories involved in the forensic activity have to comply with important criteria such as: high professional knowledge and skill coupled with appropriate quality control procedures; scientific integrity; adequate security of the installations and of the substances under investigation; adequate safeguards to ensure absolute confidentiality about the identification of the person to whom the result of the DNA analysis relates.

They have also to submit to periodic programs of control on the good quality (QA and QC).

In Italy, there aren't specific rules about the matter and the competence degree of the laboratories is very heterogeneous. In fact, the evaluation on laboratories' competence is left to the prosecutor or to the judge, which, from time to time, appoint those subjects (laboratories) that they consider expert and reliable.

In view of the institution of a national DNA database, it is absolutely indispensable to establish, also in Italy, a system of prevention of the mistakes and a body of good practice rules, regarding all the relevant activities (from the crime scene investigations to the interpretation of the data obtained) in order to assure the "quality" of all the operations.

This aim is only pursuable if the public and private laboratories will manage to comply with the international standards, so as to guarantee a high quality standard of their staff and adopted methods.

The process for the certification is neither simple nor fast and implies also remarkable investments. In accordance with the Council of Europe Recommendations and the experiences of European and North American laboratories, who are already accredited, the Italian laboratories will have to obtain the ISO 9001 and ISO 17025 certification before 31 December 2008 and have also to start, in the meantime and without delay, a

quality control program, as suggested by the document of the Working Group on DNA of ENFSI (European Network of Forensic Science Institutes).

BEST PRACTICES REGARDING SCIENTIFIC EVIDENCE IN CRIMINAL TRIALS

It is the Italian Task Force's opinion that, in order to obtain the most reliable evidentiary results and avoid wrong verdicts, expert evidence must be dealt with according to the following principles.[60] The compliance with all of these principles is recommended not only during the trial but is equally vital during the pre-trial stages.

1) Expert evidence in criminal trials must be carefully scrutinized by the judge to verify the reliability of evidence relied upon and avoid decisions based on *junk science*.

2) The judge, in the decision about the admissibility of the evidence, has to verify the reliability of the specific piece of scientific evidence and to control its epistemologic value in the light of the level of acceptance in the scientific community and suitability for the particular case before the judge himself.

3) Judicial assessment of reliability must be carried out thoroughly. Reasons of the decision must be expressed in writing taking into account the justifiability of the methods employed and the possible results.

4) Judicial evaluation on admissibility of expert evidence will be acceptable as far as conducted without analyzing the probative value of the evidence in relation to the specific facts of the case. Decision about the admissibility of scientific evidence must not turn into an anticipation of the final verdict.

5) Parties have the right to full argument about the admissibility of expert evidence and the right to the admission of expert evidence when non-juridical matters become relevant in the criminal proceeding.

[60] [60] The Task Force Report from Itlay represents the views of the Italian Task Force and may not represent the views of the Law Society of Enlgand and Wales.

6) Judges have the duty to appoint an expert or to let parties appoint their own expert when specific technical, scientific or artistic expertise is needed (right to proof). Access to expert evidence can't be refused on the ground of sufficiency of other types of evidence.

7) Selection of experts by the judge and the parties must be done taking into consideration the specific professional and scientific qualification. Persons with certifications released by commonly recognized authorities must be preferred.

8) Questions posed to the expert must be formulated excluding legal definitions or qualifications, which pertain exclusively to the judge evaluation. Expert answers have to convey only data, factual elements, scientific and technical evaluations which the judge will use in the construction of legal concepts necessary to the decisions to be taken in the course of criminal proceedings.

RECOMMENDATIONS ON GENETIC INVESTIGATIONS

As suggested by the final document drafted by the Italian Committee for biosafety and biotechnology and in the light of the Bill n. 2042,[61] recently approved by one chamber of the Italian Parliament and under discussion in the other, the Italian Task Force recommends that consideration be given to legislative reform in respect of the use of DNA evidence. Genetic investigations have to be disciplined according to the Constitutional principles, EU legislation, ECHR decisions, specific requirements, aims

[61] Adesione della Repubblica italiana al Trattato concluso il 27 maggio 2005 tra il Regno del Belgio, la Repubblica federale di Germania, il Regno di Spagna, la Repubblica francese, il Granducato di Lussemburgo, il Regno dei Paesi Bassi e la Repubblica d'Austria, relativo all'approfondimento della cooperazione transfrontaliera, in particolare allo scopo di contrastare il terrorismo, la criminalità transfrontaliera e la migrazione illegale (Trattato di Prüm). Istituzione della banca dati nazionale del DNA e del laboratorio centrale per la banca dati nazionale del DNA. Delega al Governo per l'istituzione dei ruoli tecnici del Corpo di polizia penitenziaria. Modifiche al codice di procedura penale in materia di accertamenti tecnici idonei ad incidere sulla libertà personale

and guarantees. The Task Force suggests that further consideration should be given to the following:

a) the extent to which the judge, in absence of consent of the person involved, should be able to authorise the taking of organic material, at least when deemed strictly necessary for serious crimes prosecutions;

b) the order of the judge should have to indicate the alleged offence, nature and type of biological sample, the reasons that make it necessary, place and time for the completion of the act and its mode, and inform of the right to be assisted by a person of trust. The injunction of the judge must be notified to the suspected and to his lawyer at least three days before the date of the execution;

c) the extent to which the prosecutor should have limited power to conduct genetic investigations in certain situations. Anyway, its measures must be validated by the judge within the next forty-eight hours;

d) the extent to which strictly regulated national databases containing genetic profiles of individuals suspected or convicted and those extracted from traces found on the crime scenes regarding unsolved cases should be established for the course of the investigation;

e) databases have to be kept according to the best rules and practices on security and privacy. Direct consultation from external bodies and private entities must be forbidden;

f) laboratories involved in the forensic activity have to comply with important criteria such as: high professional knowledge and skill, coupled with appropriate quality control procedures; scientific integrity; adequate security of the installations and of the substances under investigation; adequate safeguards to

ensure absolute confidentiality about the identification of the person to whom the result of the DNA analysis relates;

g) the accreditation of laboratories is suggested (according to the family of the ISO rules, but also through specific guidelines);

h) laboratories have also to submit to periodic programs of control, so as to constantly guarantee a high quality standard of their staff and adopted methods.