



The Law Society  
of England and Wales

# **Safeguarding the use of expert evidence in the European Union**

Final Project Report

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supporting  
solicitors



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# **Safeguarding the Use of Expert Evidence in the European Union: Project report**

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## Introduction

The Law Society of England and Wales (the Law Society) was awarded a grant by the European Commission under the AGIS programme 2006 to carry out a project entitled 'Safeguarding Expert Evidence in the European Union.'

Task Forces were established in five Member States of the European Union (England and Wales; Denmark; Finland; Slovakia and Italy) to examine the way in which expert evidence was used during criminal proceedings within the relevant jurisdictions. Task Forces were asked to examine current practice and procedure and where appropriate to make recommendations for practical or legislative change.

In addition, representatives of 15 Member States and Norway completed questionnaires designed to ascertain the means by which expert evidence is used in criminal proceedings in each of the relevant jurisdictions.<sup>1</sup>

Both the Task Force reports and the questionnaire responses focused upon five key areas of consideration:

- 1) The instruction and/or appointment of expert witnesses
- 2) Disclosure
- 3) Funding
- 4) Admissibility of evidence
- 5) Mutual legal assistance

This report deals with the methodology and activities of the project as well as providing an analysis of the material provided by the Task Forces. The following material is provided in Annexes I-IV: the Task Force reports; Comparative Matrix from Member States; Conference Programme and Conference Materials.

The views expressed are not those of the European Commission. The views expressed are those of the Law Society of England and Wales except for the reports presented by the specific Task Forces which present their own views.

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<sup>1</sup> The participating Member States were Austria, Belgium, Czech Republic, Estonia, France, Germany, Greece, Lithuania, Malta, Netherlands, Norway, Poland, Portugal, Slovenia, Spain and Sweden.

## **Methodology and activities**

The project was managed by the Law Society in partnership with bar associations from Denmark, Finland, Slovakia and Italy. Each partner bar association established a task force to manage project activities in each country.

The England and Wales Task Force members were

- Mr Justice Fulford
- Karen Squibb-Williams, Barrister and Strategic Policy Adviser, The Crown Prosecution Service
- Louise Hodges, Kingsley Napley Solicitors (Chair of the Task Force)
- Anand Doobay, Peters and Peters Solicitors
- Mike Allen, Forensic practitioner and representative of the Council for the Registration of Forensic Practitioners
- Joanna Evans, Barrister, 25 Bedford Row (Task Force co-ordinator)

The Danish Task Force members were

- Jørgen Lougart, Association of Judges
- Jesper Hjortenbergt, Police
- Claus H. Svendsen, The police department for special financial crime
- Flemming Kasper Beck, Criminal technical dept. Police
- Lawyer Hanne Rahbæk

- Tine Lehman (Task Force co-ordinator)

The Finnish Task Force members were

- Pekka Koponen, State Prosecutor, Office of the Prosecutor General
- Pia Sandvik, Judge, Espoo District Court
- Kimmo Himberg, Laboratory chief, National Bureau of Investigation Forensic Laboratory
- Taina Neira, Senior Detective Superintendent, National Bureau of Investigation Criminal Intelligence Division
- Nina Keskinen, Administrative Officer, National Bureau of Investigation Criminal Intelligence Division
- Janne Nyman, Lawyer, Susiluoto Attorneys-at-Law Ltd.
- Pirkko Kivikari, Deputy Secretary General Finnish Bar Association
- Minna Melender, Deputy Secretary, Finnish Bar Association

The Slovakian Task Force members were

- Mr Jozef Olej (Head of Task Force)
- Mr Matus Gemes, Lawyer
- Ms Eva Misikova. Lawyer, Slovak General Prosecution Office
- Mr Andrej Popovec, Secretary General of the Slovak Bar Association)

- Mr Roman Toman, Lawyer
- Ms Katarina Mareckova (Task Force co-ordinator)
- Ms Jana Kasanicka, Researcher
- Professor Gustav Kasanicky, Director of the Slovak Forensic Institute
- Mr. Juraj Kliment, Superior Court Judge

The Italian Task Force members were

- Avv. Marco Stefenelli, advocate, CNF member
- Professor Rino Froidi, Professor in forensic science
- Avv. Vincenzo Comi, advocate
- Dott. Sergio Sottani, magistrate, Public prosecutor
- Avv. Giuseppe Colavitti, Lawyer, Ufficio Studi CNF (Task Force co-ordinator)
- Avv. Giuseppe Dante, advocate

The project consisted of four central activities:

1. Task Force reports – each Task Force produced a report on the use of expert evidence in criminal proceedings within their own jurisdiction including research into any problems arising within the present system as well as identifying any need for reform.
2. Questionnaire responses – in addition to the detailed reports provided by Task Force partners, the views of representatives from an additional 15 Member States and Norway were gathered by way of a questionnaire which addressed

specific areas of concern relating to the use of expert evidence. This information has been collated into a grid matrix which provides a comparative analysis of the differences in approach between Member States of the European Union.

3. Conference – in September 2008 a conference was held at the Law Society of England & Wales in London involving 19 speakers and 54 attendees which included representatives from 15 different Member States. Speakers included members of each of the partner Task Forces as well as the former Attorney-General of England & Wales; private lawyers; a forensic scientist and representatives from the European Commission, Eurojust and the Crown Prosecution Service.
4. Training materials – the research, reports and recommendations of the partner Task Forces as well as the European comparative analysis matrix and conference presentations have provided a valuable resource of training materials which will be made available in e-learning form which will be hosted by the website of the European Criminal Bar Association.

### **Analysis of the findings**

The project provided an opportunity to explore the law and practice of different jurisdictions in relation to the use of expert evidence in criminal proceedings thereby increasing understanding of different legal systems. Each Task Force has provided detailed reports which may be found at Annex I. This report does not attempt to repeat all the detailed information contained within those reports but instead draws out the findings of some of the key areas of comparison considered by the project.

Those involved in contributing to the project research and findings included members of the judiciary, lawyers for both the prosecution and defence as well as forensic practitioners themselves. Such a diversity of approach and experience amongst participants provided a broad-ranging and in-depth assessment of the relevant topic.

Five key areas were examined and are considered below in turn:

- 1) The instruction and/or appointment of expert witnesses
- 2) Disclosure
- 3) Funding
- 4) Admissibility of evidence
- 5) Mutual legal assistance

## **1. Instruction/Appointment of Experts**

In terms of the instruction or appointment of expert witnesses the main differences arising between the various jurisdictions studied relate to the use of or lack of compulsory registration of expert witnesses and the method of instruction or appointment.

In Slovakia experts are required to be admitted to a register of experts prior to any instruction/appointment as an expert within criminal proceedings. This is also the case in Italy for expert witnesses commissioned by the prosecution.<sup>2</sup> In Slovakia the official register of experts is maintained centrally by the Ministry of Justice and registration is limited to those who have passed an examination of professional competence. In Italy the register is maintained by each court – whilst admission to the register is usually based on the production of certificates and documents attesting to the applicant's expertise, the Committee with responsibility for preparing the register has the discretion to require further practical information.<sup>3</sup> In both countries experts who are not on the relevant registers may be admitted on an *ad hoc* basis. In Slovakia this may be done where no expert in the required field is available on the list whereas in Italy reasons must be given for appointing an expert who is not on the register and preference must be given to individuals who are professionally employed by a public body.<sup>4</sup>

In contrast to Italy and Slovakia no compulsory registration process exists in Denmark, Finland or England & Wales and each expert witness is instead assessed for each individual trial or proceedings on the basis of whether he or she possesses the relevant expertise required.

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<sup>2</sup> Italy final report, page 24-25

<sup>3</sup> Italy final report, page 9

<sup>4</sup> Italy final report, page 8



In Denmark however preference is given to experts ‘who carry out official duties’<sup>5</sup> and in practice it is the police who appoint the experts.<sup>6</sup> There are no statutory general rules regarding who the police may appoint as experts and neither are there any general rules regarding accreditation or similar of experts for use in police investigations.<sup>7</sup>

In addition, variations are apparent in respect of how the appointment or instruction occurs. In England & Wales, in common with most adversarial systems an expert witness may be instructed by either the prosecution or defence. However in the other Task Force Member States expert witnesses are often appointed by the court, either on its own volition or at the request of an interested party.<sup>8</sup> Alternatively they may be appointed by the prosecution.<sup>9</sup>

The role of the defence varies according to each system but in Slovakia the accused and/or the victim may also instruct an expert providing they bear the cost themselves.<sup>10</sup> In Denmark however, the defence may request additional questions to be asked of the expert which has been appointed and/or ask that an expert statement be obtained.<sup>11</sup> In Finland, the court must hear from the parties before appointing an expert.<sup>12</sup>

## **2. Disclosure**

The disclosure provisions which apply to the preparation of expert evidence also vary between the Task Force Member States studied.

In Slovakia, two different disclosure regimes apply depending on how the expert witness is appointed: an expert appointed by the prosecution or court is provided with full access to the complete case file and may also propose supplementary evidence. The police,

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<sup>5</sup> Denmark final report, page 10

<sup>6</sup> Denmark final report, page 11

<sup>7</sup> Denmark final report, page 10-11

<sup>8</sup> Most expert witnesses in Finland are nominated by interested parties and it is extremely rare to use an expert appointed by the court in criminal cases. [Finland Final Report, pages 3-4].

<sup>9</sup> In Slovakia, an expert may be instructed by a law enforcement agency at the pre-trial stage. Slovak report page 3. In Denmark “the practical, principal rule is that it is the police or prosecuting authorities who ....appoint and instruct an expert” Denmark final report, page 9.

<sup>10</sup> Slovakia final report para I.1.5

<sup>11</sup> Denmark final report page 13-14

<sup>12</sup> Finland final report, page 4

court and parties to the case are also under an obligation to provide any necessary assistance to the expert in the preparation of his report. However an expert appointed by an accused person or victim does not have the same access or assistance and instead is limited to that information which the accused/victim is entitled to see in accordance with the Code of Criminal Procedure.<sup>13</sup> The expert must prepare his report based on this information however should he/she feel that information needed to prepare the report is missing then he may ask the defence to petition the court or investigator to gather supplementary evidence.<sup>14</sup>

By contrast, in England & Wales, all material obtained in the course of the investigation which *“might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused”* must be disclosed.<sup>15</sup> Following disclosure by the prosecution, (and providing the defendant has disclosed the relevant details of his/her defence) then the defence may also apply to the court for further disclosure if there is reasonable cause to believe that the prosecution are in possession of additional material which they are required to disclose.<sup>16</sup> It is for the party instructing an expert witness to provide all necessary material to enable the expert to provide an accurate and fully informed opinion.<sup>17</sup>

In Denmark the disclosure system operates on an equality of arms principle which is explained as the defence being *“able to acquaint itself with the material that the police have provided for use in the case to which the charge relates and that the defence shall have copies of the material provided to the extent that it can be copied without disadvantage.”*<sup>18</sup> Requests from the defence to have copies of reports and other annexes provided for use in the case as they are prepared should generally be agreed to<sup>19</sup> but access to documents by the accused himself may be restricted under specific

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<sup>13</sup> The defence counsel may be present at almost all acts performed at the pre-trial stage and must be provided with the written record and account of such acts. He may also inspect the file at the pre-trial stage, make copies and extracts therefrom, and re-examine the file once the pre-trial stage is over. [Slovakia final report, page 11-12, paragraph II.2.3] However, these rights may be denied by the investigating officer at pre-trial stage if there are grounds to believe that the defence might obstruct or frustrate the investigation [Slovakia final report page 14, paragraph II.5.2].

<sup>14</sup> Slovakia final report, page 10-11

<sup>15</sup> England & Wales final report, paragraph 2.1

<sup>16</sup> England & Wales final report, paragraph 2.3

<sup>17</sup> England & Wales final report, paragraph 1.7

<sup>18</sup> Denmark final report, page 19

<sup>19</sup> Denmark final report, page 21

circumstances (e.g. out of regard for state security) until he/she has made a statement during the main proceedings.<sup>20</sup>

The system in Finland appears to work on a similar principle of equality of arms *“it is part of the requirements of a fair trial that all parties involved have the material, findings and observations made in the crime-technical investigation presented to them in the investigation. The basic principle is that the parties have the right to have access to all the material gathered during the investigation for their use.”*<sup>21</sup> Before the court appoints an expert, the parties meet to discuss the matter and the information which will be given to the expert is decided at that time. It is ultimately the judge (having heard from the parties) who will decide what information will be provided to the expert and what questions he will be asked.<sup>22</sup> However, where an expert is appointed by one of the parties, it is that party which provides the expert with whatever information/evidence which is thought necessary. In these circumstances concerns sometimes arise as to whether the material is either being chosen in a prejudiced manner or that the material is being presented to the expert in a subjective manner which may have the potential to influence the expert’s opinion towards that of the party concerned.<sup>23</sup> It is for the opposing party to raise any such concerns before the court so that the comprehensiveness and accuracy of the information provided can be supervised where necessary.<sup>24</sup>

In Italy, expert witnesses acting for the defence are not authorised to perform investigatory acts on their own initiative and must first be vested with a mandate from defence counsel who is under an obligation to exercise control over the *“correctness and authenticity of data and findings provided by the expert.”*<sup>25</sup> An expert acting for the defence is authorised to interview witnesses and have access to premises or property etc. which may be required.<sup>26</sup> In addition, the defence expert has the power to perform ‘unrepeatable technical investigations’ provided notice is given to the public prosecutor<sup>27</sup>

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<sup>20</sup> Denmark final report, page 22

<sup>21</sup> Finland final report, page 17

<sup>22</sup> Finland final report, page 18

<sup>23</sup> Finland final report, page 18-19

<sup>24</sup> Finland final report, page 18-19

<sup>25</sup> Italy final report, page 29

<sup>26</sup> Italy final report, page 31

<sup>27</sup> Italy final report, page 32

and may 'examine items seized in situ, be party to inspections or examine the subject of inspections at which they have not been present.'<sup>28</sup> However, the defence must obtain authorisation before exercising these rights.<sup>29</sup>

### 3. Funding

In England & Wales in a legally aided case, public funding is available for expert witnesses instructed by either the prosecution or defence.<sup>30</sup> For defence experts, the amount payable in these circumstances is decided by an external body called the Legal Services Commission. In reviewing this topic, the Task Force recommended that the rates payable to experts instructed by the defence should be kept under continual review in order to ensure that the defence is able to instruct suitably qualified and competent experts in the relevant fields.<sup>31</sup>

In Finland, an expert witness appointed by the court is entitled to a 'reasonable fee' and it is for the court to determine what is to be considered 'a fair reimbursement'.<sup>32</sup> An expert nominated by a party rather than the court is only entitled to receive a 'witness fee' which does not include a fee for expert work. In legally aided cases, this fee will be paid by the state.<sup>33</sup> It was recognised by the Finnish Task Force that with regard to experts appointed by the parties, this may be problematic from an equality of arms standpoint and with this in mind, the Task Force suggested that the court make more use of its power to appoint expert witnesses.<sup>34</sup>

In Denmark, it is the police who take responsibility for payment of expert witnesses appointed.<sup>35</sup> Where additional statements or further questions put to an expert are authorised by the court at the request of the defence then financial assistance will also

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<sup>28</sup> Italy final report, page 33

<sup>29</sup> Italy final report, page 33

<sup>30</sup> England & Wales final report, section III

<sup>31</sup> England & Wales recommendations and best practice

<sup>32</sup> Finland final report, page 20

<sup>33</sup> Finland final report, page 20

<sup>34</sup> Finland final report, page 20

<sup>35</sup> Denmark final report, page 22

be authorised<sup>36</sup> but if the accused is found guilty at a later stage then he/she may be required to compensate the public for expenses incurred in dealing with the case.<sup>37</sup>

In Slovakia, where an expert has been instructed by police, prosecutor or the court, the costs will be met by the instructing party. Equally, if an expert is instructed by any of the above parties but at the request of the defence then the same arrangements apply.<sup>38</sup> However, where the defendant or a victim instructs an expert in a legal aid case there are no public funds available to cover the costs incurred and the parties bear the cost of instruction themselves.<sup>39</sup>

In Italy, in the past the system of legal aid for people of limited means was restricted 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. In 2002 the law was changed to allow 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 an amendment introduced in 2005, in a different district, excluding travel expenses and allowances. However 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, are not met.<sup>40</sup>

#### **4. Admissibility**

In Slovakia, “anything which can contribute to the proper elucidation or clarification of the case may serve as evidence, provided that it was obtained in accordance with applicable legal rules.”<sup>41</sup> The opinion of an expert witness does not have any special standing by comparison with other evidence and is subject to the general rules of admissibility in criminal proceedings.<sup>42</sup> Furthermore, the court and law enforcement agencies assess

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<sup>36</sup> Denmark final report, page 23-24

<sup>37</sup> Denmark final report, page 24

<sup>38</sup> Slovakia final report, paragraphs III.1.1-III. 1.2

<sup>39</sup> Slovakia final report, paragraphs III.3.1-3.2

<sup>40</sup> Italy final report, page 30

<sup>41</sup> Slovakia final report, paragraph IV.1.1

<sup>42</sup> Slovakia final report, paragraph IV.4.1

and appraise evidence independently of who the expert was instructed by.<sup>43</sup> Evidence gathered illegally or improperly may not be put before the court.<sup>44</sup>

In Denmark it is possible to submit and read out expert statements during a criminal case if those statements are made pursuant to a public duty.<sup>45</sup> Expert statements from persons not engaged in a public duty may only be submitted and read out in court where the court grants exceptional permission.<sup>46</sup> The quality control of expert statements is a matter for the court and in some cases statements that have encroached upon matters which are the subject of the court's assessment of evidence have been refused.<sup>47</sup>

In Finland, an expert who has made a statement in writing will only be heard orally in court if an interested party requires it and the court deems the testimony to be not insignificant.<sup>48</sup> The court evaluates the strength of every piece of evidence according to the principle of 'free evaluation of evidence.'<sup>49</sup>

In Italy however there is a reverse presumption: the opinion of the expert witness must be expressed in verbal form and only exceptionally admitted by way of the filing of a written report.<sup>50</sup> The expert's evidence is open to 'free evaluation' and the judge is also required to verify the "scientific correctness" of the principles and methods employed as well as the accuracy of the application of the principles to the case in point.<sup>51</sup> It is noted by the Italian Task Force that the difficulty of the judge conducting such a role increases with the complexity of scientific investigations.<sup>52</sup>

In England & Wales, the position is somewhat different due to the use of juries in criminal trials. In order for the evidence of an expert witness to be presented before the jury, it must first be relevant to an issue in the case. Secondly, the subject matter upon which the expert witness expresses an opinion must be outside the experience and

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<sup>43</sup> Slovakia final report, paragraph IV.5.1

<sup>44</sup> Slovakia final report, paragraph IV.7.1

<sup>45</sup> Denmark final report, page 26

<sup>46</sup> Denmark final report, page 26

<sup>47</sup> Denmark final report, page 35-36

<sup>48</sup> Finland final report, page 4-5

<sup>49</sup> Finland final report, page 2

<sup>50</sup> Italy final report, page 16

<sup>51</sup> Italy final report, page 18

<sup>52</sup> Italy final report, page 18

knowledge of a judge or jury and the witness must have sufficient knowledge of the subject in question to render his opinion of value to the court.<sup>53</sup> Where the opinion of an expert is in issue between the parties then he or she must ordinarily attend to give oral evidence.<sup>54</sup> The weight accorded to the evidence of the expert is a matter for the jury and where expert evidence is presented before them, the judge will direct them upon the approach they must take to that evidence. Importantly, the jury are directed that they do not have to accept the opinion of an expert witness and that any verdict reached must be done so upon consideration of all the evidence in the case including any expert evidence they choose to accept.<sup>55</sup>

## **5. Mutual Legal Assistance**

In England & Wales, a request for mutual legal assistance will be considered even in the absence of the existence of a treaty arrangement or international agreement although any relevant treaty provisions must be taken into consideration when interpreting domestic legislation.<sup>56</sup> Responsibility for mutual assistance in criminal matters lies with the Secretary of State for Justice and his department, the Ministry of Justice acts as the 'central authority' for the transmission of incoming and outgoing requests for mutual legal assistance in criminal matters.<sup>57</sup>

Finland also provides legal assistance on a wider basis than that which is required by international agreements by using diplomatic channels to forward any such requests which are outside the scope of the agreements.<sup>58</sup> The grounds for refusing to execute requests are prescribed by law but are extremely rare in practice. Instead if a request is deemed deficient, a foreign state will usually be asked for further clarification or additional information. In general it is always possible to give legal assistance if a similar legal action would be taken nationally in the same situation.<sup>59</sup>

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<sup>53</sup> England & Wales final report, paragraph 4.2

<sup>54</sup> England & Wales final report, paragraph 4.3

<sup>55</sup> England & Wales final report, paragraph 4.6 (please see this paragraph for full text of the relevant jury direction)

<sup>56</sup> England & Wales final report, paragraph 5.2

<sup>57</sup> England & Wales final report, paragraphs 5.1-5.6

<sup>58</sup> Finland final report page 22

<sup>59</sup> Finland final report page 25

In Denmark the basis for mutual legal assistance is the convention on Mutual Assistance in Criminal Matters 1959 and the official channel for mutual assistance is the Ministry of Justice. Although Danish authorities appear rarely to obtain expert evidence abroad for use in criminal trials the Danish police widely use technical statements from other countries which are obtained directly from one police authority to another.<sup>60</sup>

In Slovakia, mutual legal assistance is provided for by way of international treaty obligations which take precedence over national law.<sup>61</sup> Importantly, all acts in a criminal proceeding involving any foreign country, insofar as they are to produce evidence admissible at trial must be performed within the MLA framework.<sup>62</sup>

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<sup>60</sup> Denmark final report page 44

<sup>61</sup> Slovakia final report page 22

<sup>62</sup> Slovakia final report page 24



## **Best practice and Recommendations from project partners**

### **England & Wales**

#### **RECOMMENDATIONS AND BEST PRACTICE**

##### **I. Instruction/Appointment of experts**

1. The Task Force supports the steps which are being taken by the Forensic Science Regulator and others<sup>63</sup> to assess the best means of managing and regulating the accreditation of expert witnesses.<sup>64</sup>
2. The Task Force suggests that the Regulator gives consideration to the creation of a central database which will hold comprehensive details in respect of expert witnesses (including qualifications; when and where he or she has previously given evidence or submitted a report in proceedings; and any adjudications made against him or her by any professional body).
3. The Task Force emphasises the need for continued quality control by those instructing expert witnesses. It suggests that prosecuting authorities and the Legal Services Commission may wish to consider some means of encouraging practitioners to register with an appropriate body; this might include a provision making registration one of the criteria to be taken into account when an expert is selected. However, in these circumstances, registration should not rule out the use of an unregistered expert, provided sufficient justification can be demonstrated.
4. The Task Force urges the Regulator to consider how best to guard against the possibility of an expert or other service provider putting commercial interests before his or her overriding duty to the court and the interests of justice.

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<sup>63</sup> Other bodies contributing to the review process include United Kingdom Accreditation Service (UKAS), National Police Improvements Agency (NPIA) and Skills for Justice.

<sup>64</sup> See summary prepared by the Forensic Regulator December 2008 – reproduced at Annex I to the England & Wales Task Force Report.

5. Furthermore, the Task Force observes that in the emerging marketplace of forensic science provision for the Criminal Justice System, the Regulator should play a vital role, *inter alia*, by emphasising the need for suppliers to adhere to appropriate high standards when demonstrating provenance, and providing clear audit trails, in respect of any scientific analysis they conduct.

## **II. Disclosure**

1. The Task Force encourages professional bodies to set out area-specific guidance as to the material which should generally be provided to an expert in order to enable him or her to provide an opinion within that particular area of expertise. It is hoped that this guidance will assist in providing clarity for instructing solicitors and funding bodies as to the material it is necessary for the expert to access and consider in order to provide an opinion.

## **III. Funding**

1. The Task Force encourages the Legal Services Commission to keep the rates payable to expert witnesses under continual review so as to ensure that they are set at an appropriate level, thereby enabling the instruction of suitably qualified and competent experts.

## **IV. Admissibility, Exclusion and weight**

1. The parties should be encouraged to indicate at the earliest possible stage the areas of agreement and disagreement as regards the expert evidence which is to be relied on at trial. To this end, the Task Force encourages practitioners at all times to comply with the provisions of the Criminal Case Management Framework and the Criminal Procedure Rules, in order to facilitate effective pre-trial agreement.
2. The Task Force encourages advance indication (where appropriate) both generally, and particularly under s.6 A Criminal Procedure and Investigations Act 1996, of the matters of fact which are relevant to the expert evidence in the

case, in advance of any tests or examinations which are to be undertaken by the prosecution. This will enable consideration of those aspects of relevance to the defence case at an early stage of proceedings and help prevent the unnecessary repetition of forensic tests or examinations.

3. The Task Force further encourages the preparation of an agreed summary of the expert evidence presented during the trial which, with the leave of the judge, can be provided to the jury upon their retirement.
4. Generally, the Task Force emphasises the important role of an active judiciary in ensuring the effective implementation of the above matters.

## Denmark

### **1. Summary and questions to actors from the justice sector**

This section contains a short summary of the report's subject as well as a statement of the questions that the report and the AGIS project give particular occasion to request the judicial system's professional actors to respond to. In addition to the questions stated below it would be of value to the project if the judicial system's professional actors also otherwise consider commenting on the subjects that are touched upon in the report.

The questions raised below are based on the point of departure that the use of expert statements in criminal cases should be regulated by rules that secure the interests of both society and the accused as well as any victim, in a fair trial and a correct determination of the criminal case.

As is seen from the report the requisite quality control of expert statements in Denmark is, for the most part, based on The Administration of Justice Act's general rules concerning, in particular, the objectivity of the prosecution authority, the equality of arms principle, the defence's right to contradiction and the court's free weighing of evidence. There are not, however, statutory rules that are particularly aimed at securing the quality of expert statements by, for example, making the defence or the court's withdrawal in the appointment and instruction of experts obligatory, or by giving the defence a right to expert assistance in particularly complicated cases.

The absolute overall question must, against this background, be whether this model - with a broad ability to obtain and submit expert evidence in return for a broad ability for the court to censure evidence against, in particular, the background of the defence's objections - is, in practice, suited to securing a fair trial and a correct determination of the criminal case. Or if it would be better with statutory, general rules, that particularly aim at quality assuring expert statements, particularly upon obligatory withdrawal of the defence and the court at an earlier juncture.

As part of the answering of the above questions one may touch upon the question of whether the current practice of expert information concerning the case should be

departed from in favour of employing The Administration of Justice Act's chapter 19 regarding expert opinion which, as stated, is not used in practice in criminal cases.

As part of the answer the professional players in the judicial system should further state whether the normal practice for the expert information concerning the case at present means that the defence has expert assistance placed at its disposal and/or is involved in the expert information concerning the case, to an adequate extent with regard to the fulfilment of the equality of arms principle.

In conclusion all those with an interest in the employment of experts in the Danish criminal procedure may, to advantage – among many other good presentations – read a (further) short introduction to the subject and the thereto associated questions in the above-mentioned article “Several types of negligence – regarding good practice and expert evidence”, by Professor, lic.jur. Jørn Vestergaard in the “Celebratory volume prepared for Nils Jareborg and published by Iustus Förlag in 2002.”

## **2. Summary of consultations with actors from the justice sector**

### The police (rigspolitiet)

The police are of the opinion that the report fully covers the problem in question. They believe that the defence in criminal cases enjoys the same rights as the prosecution with respect to the expert assistance which is made available for the defence.

It is the impression of the police criminal technical centre that where the prosecution is present, the defence has the same opportunities and uses it, which is typical in reconstructions with expert witnesses, for an example forensics or fire experts.

### The public prosecutor on financial crime (statsadvokaten for særlig økonomisk kriminalitet)

According to practice audit reports and audit themes are normally sent to the defence and the suspect at an early stage, which gives the opportunity for the wishes of the defence to be included.

This practice assures that the supplementing questions and wishes of the defence can be taken into account and brought before the court at an early stage. The efficiency of the arrangement presupposes that the defence is able to specify its supplementing wishes from researching the case and through talks with the suspect at this early stage.

The development in practice where the defence lawyer is already involved from the drawing up of the audit theme should be included in the report. Likewise the report from the law preparing committee (report 1066/1986) should be included, which gives the defence lawyer an opportunity to demand expert opinions (syn og skøn) of estimates, if it would be relevant.

The prosecutor on financial crime believes that the current involvement of the defence is sufficient, but will be interested in a dialogue if the Danish Bar and Law Society receives information about defence lawyers who are being refused the assistance of experts to the necessary extent.

In order to ensure the quality of the expert evidence, it is not as much a question of who formulates the questions and selects a suitable expert, but rather a question of a critical evaluation of the quality of the final expert statement.

The prosecutor on financial crime believes that the current practice is both adequate in order to ensure that all the facts of the case are put forward, and to ensure that no evidence is used in court without a critical evaluation.

#### Director of public prosecutions (rigsadvokaten)

According to the administration of justice act the police plan and carry out investigations and the court rules on disputes about the legality of the different steps of the investigation. As a result thereof it is the police and the prosecution who decide to gather expert evidence, including pointing out and instructing the relevant expert. However, this often happens in cooperation with the defence lawyer. The prosecution is subject to the principle of objectivity, and this should ensure an impartial and professional evaluation of the need for and the implementation of the gathering of expert evidence.

The case law presented in the report shows that the Supreme Court has had the opportunity to evaluate the position of the defence in relation to expert evidence. This shows that the interests of the defence have been taken into consideration. The Supreme Court undertakes an evaluation of the process as a whole in order to decide whether it lives up to the requirements of a right to a fair trial. The case law shows that the Supreme Court has undertaken such an evaluation and found that the rights of the defence were not set aside. The evaluation must be one of the actual circumstances not only one of formal rules.

The Danish model adequately secures the right to a fair trial, and it would not change the actual opportunities of the defence if the right of access to expert evidence were put into statutory form.

#### The association of defence lawyers

In order to live up to the principle of the equality of arms the defence lawyers should always be given an opportunity to obtain the necessary expert evidence in order to facilitate the execution of the duties of a defence lawyer. This includes access to experts and expert witnesses used by the prosecution, but also the possibility of including the payment of the expert as legal costs. The defendant/indicted person, who may have special expertise, should also be provided with a copy of the expert evidence.

There will always be a risk that a closer dialogue between the requesting party and the expert may influence the content of the expert evidence.

With respect to financial crime there are a number of rulings which establish the right of the defence to obtain a “second opinion.” This right is also referred to in the travaux préparatoires of financial crime legislation. This principle should apply within all areas of expert assistance, as well as securing the defence and the defendant the opportunity of getting access to expert assistance if they so wish.

It is neither considered practical nor desirable to abolish the wide access to obtain and introduce expert evidence and replace these with formalised rules of expert appointment.

### The Criminal Law Committee of the Danish Bar and Law Society

It may in practice be difficult to receive funding for obtaining expert opinions, and there have been examples of cases where the expert would have been disqualified on the grounds of a conflict of interest by the ethical rules that apply for lawyers, had he or she been a lawyer.

In financial cases the defence lawyers and defendants may some times feel that the auditor is acting in the interests of the prosecution due to the often close cooperation with the prosecution. However, many defence lawyers also experience that the audit reports are impartial, and it is acknowledged that auditors are acting in accordance with their own ethical rules. In some cases a risk of self incrimination may arise, as the auditor also works for the prosecution. It may appear unfair to the accused when the same auditor is used throughout a case, at all instances.

There is a need for clearly establishing which assistance the defence is entitled to receive throughout the case. The Criminal Law Committee will continue the dialogue with the appropriate justice sector actors.

There are examples in practice where access to expert evidence at the early stages of financial cases is not always easy, and the process of consultation has revealed that the courts do not always seem to scrutinise the expert evidence as thoroughly as the Danish system requires due to the lack of formal regulation. This system requires an active role of the defence lawyer in questioning the expert evidence, the expert and the circumstances in which the evidence has come about. The Criminal Law Committee is of the opinion that Danish defence lawyers can be more active to this effect and has thus defined a need for training and for raising the awareness of defence lawyers on this matter, with the purpose of improving the protection of the rights of the client. The topic may also be included in dialogues with other legal sector actors, and in a project on best practice for defence lawyers, which is currently in the making.

### Recommendations

- Further study of the topic
- Incorporation into the best practice of defence lawyers project
- Training of defence lawyers



- Dialogue with the legal sector actors in particular the prosecution and court system

### Conclusion

All actors consulted, defence lawyers and police/prosecution alike, are satisfied with the current system and support the broad possibility to produce expert evidence in the courts. It is generally believed that the system posing the possibilities for the defence lives up to the equality of arms principle.

However, the prosecution and police tend to be more satisfied with the current practice than some of the defence lawyers. The process of writing the report has revealed issues which will need to be addressed in the future through further study, training, awareness raising among defence lawyers, and possibly in the wider legal society.

## Finland

### **CONCLUSIONS AND RECOMMENDATIONS**

The Finnish Task Force paid attention to the following facts related to the production of expert evidence in the Finnish criminal procedure:

- as there is no regulation on the proficiency of experts in Finland, more attention should be paid to inspecting and confirming the quality of their proficiency.
- the expertise of the expert should be established in the pre-trial investigation phase. It is advisable to hear the testimony of experts during the pre-trial investigation phase.
- with regard to the experts, the preparation phase should include: going through all the expert witness (statements) with all parties concerned to avoid overlapping witnesses/experts.
- the use of experts appointed by the court should be increased, for this would increase the equality and the transparency of the trial. This could even influence the quality assurance of the experts and would mean more attention would be paid to quality.

The Finnish Task Force has asked if lawyers, judges, prosecutors or experts have anything to add to this report. The result was that the report describes the situation in Finland well and they can approve the recommendations mentioned above. Finally they have found that the expert evidence system in criminal proceedings works well in Finland.

## Slovakia

### **RECOMMENDATIONS FOR PRACTICAL AND LEGISLATIVE CHANGES**

Mr. Olej, Head of the Slovak Task Force, co-operates with the Criminal Law Reform Group working under the Slovak Ministry of Justice. He is also the head of the Criminal Law Committee working under the Slovak Bar Association. In this capacity, he is able to liaise between the two organisations, and put forward proposals to the Criminal Law Reform Group, mainly in terms of the Slovak Criminal Procedure Code.

#### **Main problem:**

*Reimbursement of costs incurred in connection with the preparation of expert evidence*

When an expert is instructed by the defence or by the victim, these parties have to bear all costs themselves. A very specific situation arises when there is a need to instruct an expert by the defence in a legal aid case. There are no public funds available from the state to cover these expenses. Therefore the Slovak Bar Association will propose (as an outcome of this project) appropriate legislative changes in the Slovak Code of Criminal Procedure.

#### **Expected Results:**

In a legal aid case, the defence counsel will be provided with funds from the state budget as an **advance payment** to cover the costs of necessary expert evidence being prepared.

#### **Practical Issues:**

One of members of the Slovak Task Force is the Director of the Slovak Expert and Forensic Institute, which has great experience with expert evidence. The Institute is in charge of methodology and proper practice procedures. Moreover, other members of the Slovak Task Force were the representatives of judiciary and prosecution, and in their respective capacity they will be able to implement outcomes of the project both at the pre-trial and trial stage.

#### **Training Materials:**

1. The Slovak Bar Association organises seminars for trainee lawyers. As far as the training scheme is concerned, trainees are divided into three groups (anyone who wants to sit for the Bar Examination, must have practised law as a trainee lawyer under the supervision of a lawyer duly admitted to the Bar for **three years**). Each seminar focuses on a particular topic. Having regard to the outcomes of the AGIS Project, the issue of expert evidence will be incorporated into the syllabus of seminars to a greater extent. The Slovak Bar has been considering an idea to organize one seminar focused solely on expert evidence issues. In October 2008, the Slovak Bar organized a very successful conference in cooperation with the European Criminal Bar Association. One of topics on the agenda was legal aid, the problem partly linked to expert evidence and financial impact on the parties.
2. Moreover, the Slovak Bar Association organises seminars for its lawyers in individual regions within Slovakia. On 27 November 2008, we already held a seminar in Bratislava (with 50 participants) on expert evidence. One of the speakers was a member of the Slovak Task Force who informed the audience of the London Conference in September 2008 and its outcomes. We intend to continue with this initiative due to a number of changes in the criminal legislation currently applicable in Slovakia.
3. The Slovak Bar Association publishes a journal on the regular monthly basis "Bulletin of Slovak Advocacy." We will summarise outcomes of the AGIS Project and publish a short analysis in the Bulletin.

*The Slovak Bar in co-operation with the Law Society of England and Wales might consider the idea of translating the whole summary made by the Law Society (or at least some parts of special importance for Slovak lawyers) with a view to providing Slovak lawyers with information about this Project and a comparative analysis. However, in order to do that, additional funding under the AGIS Project financial scheme would be required as the Slovak Bar has not allocated any funds to this initiative.*

## **EXECUTIVE SUMMARY OF ACTION PLANS:**

- Expert evidence as an integral part of the continuous education scheme both for Slovak lawyers and trainees at the national and regional level
  
- Legislative initiative: expert evidence in legal aid cases and reimbursement of costs incurred in connection therewith
  
- Publication of results of the AGIS Project in the Bulletin of Slovak Advocacy.

## Italy

### **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. 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-judicial matters become relevant in the criminal proceeding.

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,<sup>65</sup> 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 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;

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<sup>65</sup> 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

- 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.



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