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GOVERNMENT ACCOUNTABILITY INITIATIVE

COMPARATIVE LEGAL STUDY ON THE ROLE OF FORENSIC ACCOUNTANTS IN FINANCIAL INVESTIGATIONS

APRIL – AUGUST 2020

Submission Date: August 12, 2020

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SUBCONTRACTOR: MR. ROB MCCUSKER

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TABLE OF CONTENTS

LIST OF ACRONYMS

LOSJA	Law on Organization and Jurisdiction of Government Authorities in Suppression of Organized Crime, Terrorism and Corruption
ECHR	European Convention of Human Rights
ECtHR	The European Court of Human Rights
CEPEJ	European Commission for the Efficiency of Justice
EEEI	European Expertise and Expert Institute
AML/CTF	Anti-money laundering/counter terrorist financing
ACA	Anti- Corruption Agency
AMELP	Activity Monitoring, Evaluation and Learning Plan
COP	Chief of Party
COR	Contract Officer Representative
GAI	Government Accountability Initiative
SAI	State Audit Institution
USAID	United States Agency for International Development
USG	United States Government

PROJECT DESCRIPTION

The USAID Government Accountability Initiative (GAI) is working at the national and local levels of government in Serbia to strengthen institutional capacities to increase accountability and combat corruption.

The project is structured around three components:

• **Local Government Accountability -** GAI supports efforts to increase public participation in local government decision making and oversight to enhance the transparency and accountability of local self-government (LSG) operations. GAI is providing technical assistance to LSGs interested in increasing public participation in local budget planning, spending, improving public service delivery, institutionalizing whistleblower protection programs, and increasing transparency through improved strategic communications.

• **Independent Oversight Institutions -** GAI aims to strengthen monitoring of government performance and accountability by providing technical assistance to independent oversight institutions (IOIs), such as the State Audit Institution, Anti-corruption Agency and the Commissioner for Protection of Information of Public Importance. GAI is providing technical assistance to these institutions to increase their focus on risk-based prevention and detection of corruption, improve oversight through the introduction of related policy and procedural reforms, build organizational capacities to implement policy reforms, and facilitate cooperation between IOIs and enforcement institutions to improve the prosecution and adjudication of corruption cases.

• **Adjudication of Corruption Cases -** GAI works with specialized anti-corruption court units and public prosecutors' offices (PPOs) to support the adjudication of corruption cases and to establish an electronic register of corruption cases. The register will provide timely information on the status of corruption cases, detect bottlenecks in the prosecution and adjudication of these cases and enable the identification of strategies to increase the efficiency of these court units and public prosecutor's offices.

TASK AND OBJECTIVES

GAI consultant Rob McCusker was engaged to deliver following tasks:

Conduct analysis of comparative international legal systems focused particularly on the Balkan region, that engage and use a forensic accountant, on a full or part-time basis, by the relevant state institution (law enforcement, public prosecution). The focus should be *only on the legal status* of a forensic accountant *in criminal, adversarial proceedings.* The analysis should also reflect on the Serbian legislation and practice in part related to the position of experts (expert witness, professional consultant, forensic accountant), with recommendations towards possible refinement of the normative framework.

EXECUTIVE SUMMARY

This study is essentially an analysis of the use of forensic accountants within the Balkan region in general, and Serbia in particular, in relation to criminal adversarial proceedings which draws upon a comparative assessment of other jurisdictions in both the civil and common law legal traditions. It became clear in the early stages of the preparation of the interim report that the **statutory** inclusion of forensic accountants (as in Serbia) was relatively unique, given that other jurisdictions opted to include experts per se within their legislative framework. Accordingly, much of the analysis inevitably

focusses upon the nature and role of experts in general, with reference particularly to forensic accountant experts where the evidence permitted.

Forensic accountants have become an essential resource in the investigation of financial crimes and can be allocated to all stages of a criminal case, from the gathering and analysis of intelligence and evidence leading up to charges being laid, through to the presentation of oral and written evidence at trial. It is also abundantly clear, particularly in cases involving organized crime and/or corruption, that forensic accountants form an integral part of a task force approach to tackling such crime, given that their skillsets and experience segue into, and facilitate the effectiveness of, a range of allied forensic disciplines (such as financial investigators and analysts) needed to successfully prosecute such offences.

Civil law and common law tradition jurisdictions each adopt a different approach to the provision of expert witness testimony, with the common law tradition permitting both the prosecution and the defence to appoint their own experts and the civil law tradition opting for experts to be court-appointed only. There are reputed advantages and disadvantages of each approach. In the common law tradition, for example, it is argued that experts become biased towards the party that engages them, but that the ability of one side to cross-examine the expert of the other mitigates that bias. In the civil law tradition, for example, it is argued that court-appointed experts will be deemed to operate in the interests of justice rather than in the interests of any one party but, conversely, it remains a possibility that such an expert is incompetent or unskilled in an area of the case. Proponents have argued, however, that any such defects can be mitigated by the ability, in a number of civil law jurisdictions, of the other parties to the case to dispute the experts' findings in court.

In terms of the evidence presented by expert witnesses, there are equal advantages and disadvantages in relation to each legal tradition. In the civil law system, the investigation is undertaken by the examining judge, who reviews all the evidence and appoints the expert witnesses, and therefore the neutrality of that investigation rests squarely on the impartiality of the judge. However, the other parties may raise questions to be put to the expert and provide the expert with the opportunity to reconsider her/his position accordingly. In the common law system, the judge plays a more neutral role, with the defence able to put up their own expert witnesses and cross-examine the witnesses put up by the prosecution. Conversely, because experts are engaged by one or other of the parties it is likely that they will not agree with one another on key facts in the case because to do so would undermine their client's case.

Guidance documents discussed in the study, on the nature and role of court-appointed experts within jurisdictions following the civil law tradition, provide a rigorous template as to ideal best practice and protocol in terms, inter alia, of the qualifications, skills and experience necessary to undertake the role of expert effectively, and the overriding importance for experts to clearly and concisely report their findings. Two Law Commissions in respective common law tradition jurisdictions, noted in the study, have explored the notion of the expert witness in considerable detail, including issues pertaining to tests for reliability and admissibility of expert witness testimony.

Within European judicial systems, the manner in which experts are engaged varies considerably, as do their respective rights and obligations, with no universal system of procedural rules in place and no systematic check on the skillsets, experience or ability of experts. The need to create some degree of uniformity within the EU, in order to tackle the complexity of financial crime cases, has prompted the suggestion of a number of key steps in that regard, including the creation and maintenance of public registers of experts, a statute of experts which would specify the experts' obligations to the court and the values of independence and impartiality required, the strengthening of the role of judges in order that they might supervise the creation of expert reports more effectively and the creation of a standard format and procedure for the delivery of expert witness reports.

The engagement and utilisation of expert witnesses in criminal proceedings in Serbia are controlled by the Criminal Procedure Code 2011 (as amended). Although the provisions of that Code are clear and

concise, there are issues remaining in relation to the use of expert witnesses, including the lack of a fixed term of appointment, lack of an entry examination for prospective expert witnesses, lack of an obligation on the part of experts to remain updated on their area of expertise and a tendency, on occasion, for experts to offer, or be asked to offer, legal rather than purely factual opinions to the court. There remain a number of logistical difficulties, including the lack of a cap on the number of experts who may be engaged by the courts (which can lead to an overuse of multiple experts) and a disconnect in terms of the types of expert required by the courts and the types of expert licensed by the Ministry of Justice. However, under the auspices of the LOSJA (Law on Organisation and Jurisdiction of Government Authorities in Suppression of Organized Crime, Corruption and Other Severe Criminal Offences), Serbia has made a positive step in the formal statutory recognition and use of forensic accountants in tackling such crime. In relation to the provision of expert witnesses per se in Serbia, much could be achieved by revisiting aspects of the Criminal Procedure Code, by introducing more systematic training of judges in the areas of knowledge likely to appear in the cases that come before them and through the court system managing the trial process and the work of expert witnesses more effectively.

The European Court of Human Rights (ECtHR) has driven the importance of the principle of the equality of arms, that is, the requirement and expectation that each side in a case should have a reasonable opportunity to present its case in a way which does not place it at a clear disadvantage compared with other parties. This has arguably caused a degree of consternation in jurisdictions operating within the civil law tradition, since the ability of the defence in a case to call expert witnesses as a matter of right has been denuded by the system of court-appointed experts. Accordingly, the majority of cases brought under the European Convention of Human Rights (ECHR) have been brought by civil law jurisdictions. However, it is clear that a balance needs to be struck between the need to protect society from crime on the one hand and the protection of the personal freedoms and fundamental rights of defendants on the other, and that, consequently, the equality of arms principle does not in practice imply full equality of the parties in criminal proceedings or absolute protection of a defendant's rights.

Whilst Serbia has a robust normative framework in place, it is clear that some changes are required in order to give full effect to that framework, and that such changes could be affected relatively easily without transgressing procedural rules. These include, introducing more regular calls for expert witnesses and regular examination of existing witnesses, a prescribed period for which an expert might be licensed before some form of renewal was required and demonstration that they had maintained and/or updated their area of expertise. Achieving these steps might involve creating an organisation of experts akin to those operating in other jurisdictions, such as the UK-based Academy of Experts and the US-based Forensic Expert Witness Association. Moreover, four Articles of the Criminal Procedure Code (namely, Articles 113, 114, 115 and 124) could be altered so as to broaden the requirement for expert witness engagement, tighten the definition of expert witness, remove or reduce the issue of sanctions being applied to professionals who offer up their services as expert witnesses and clarify and/or restrict the repetition of expert examinations, respectively.
More broadly, however, the amelioration of issues pertaining to the use of expert witnesses will not render the utilisation of forensic accountants in tackling financial crime cases an automatically easier task. To achieve that outcome, it is necessary to ensure that the process of financial investigation as a whole becomes more structured, more fluid and engages a wide number of disparate, but connected, subject disciplines.

METHODOLOGY

Part 1 – Background

The Government Accountability Initiative (GAI), implemented by Checchi and Company Consulting, Inc. (Checchi) is a four-year United States Agency for International Development-funded project with the overall objective to strengthen the capacities and connections of key Serbian stakeholders resulting in increased government accountability at the national and local levels. The project is structured around three components: Local Government Accountability, Independent Oversight Institutions, and the Adjudication of Corruption Cases. GAI counterparts included the State Audit Institution (SAI), the Anti-Corruption Agency (ACA), local governments, specialized anti-corruption courts and civil society organizations.

a) Scope of the Study

The study, which considers ***procedural*** matters only, comprises three key sections:

1. Analysis of the Serbian legal system in terms of the status and role of the forensic accountant within criminal proceedings;
2. Analysis of comparable legal systems on the status and role of the forensic accountant within criminal proceedings;
3. Provision of recommendations on the potential refinement of the Serbian normative framework, primarily, the Criminal Procedure Code but also, if and where appropriate, the LOSJA (Law on Organisation and Jurisdiction of Government Authorities in Suppression of Organized Crime, Corruption and Other Severe Criminal Offences).

As was noted in the preceding interim report, this study rests against the backdrop of a relatively new departure in Serbia for the tackling of organized crime and corruption, namely the express provision (within Article 19 of the LOSJA) of a forensic accountant as a discrete type of expert housed with the Forensic Service of the Public Prosecutor's Office. The study records that many jurisdictions utilise the services of forensic accountants (usually within law enforcement agencies, such as the UK's National Crime Agency and Australia's Victoria Police Service, and/or as part of a Task Force and/or as an ad hoc or full-time member of a dedicated prosecution team, such as within the UK's Serious Fraud Office) but that few specifically name and devise the scope of that involvement in **statutory** form. **This is principally because such jurisdictions regard forensic accountants as having the same standing as any other expert and tend to adopt legislative provisions which determine admissibility criteria for experts *per se* rather than for individual categories of expert.** Accordingly, this study analyses the nature and admissibility of expert evidence per se in a number of jurisdictions with specific reference to forensic accountants where the evidence notes their utilisation by, and/or role within, the criminal justice system.

In the context of this study, therefore, **"expert"** refers to any form of expert witness and **"forensic accountant"** refers to a forensic accountant expert witness.

The study argues that the capacity of a justice system to meet the challenges of organized crime and corruption cases is demonstrated by

i) How expert evidence is permitted to be adduced,
ii) How the expertise of proffered experts is determined, and
iii) How expert evidence is reported and utilized.

b) Methodological approach

The overarching aim of the study comprised of an analysis of the role and limitations of the use of forensic accountants in financial investigations in Serbia with a comparative review of jurisdictions with similar and different legal traditions. The study was required to address the following issues:

1. The legal status, in comparable legal systems, of forensic accountants engaged in a similar manner to those within Serbian legislation.
2. The nature and method of the engagement of forensic accountants by the respective parties in criminal cases in respective civil and common law jurisdictions.
3. The nature of the tasks they undertake.
4. The use of their services within financial investigation.
5. The status of their reports and their evidentiary value including whether they are legally binding on the court.
6. The differences, if any, between the respective services of forensic accountants and other expert witnesses.
7. The normative changes that might be introduced in order to improve the status of forensic accountants without contravening, for example, the equality of arms principle.

The adopted methodological approach involved a detailed qualitative desk-based and systematic literature search of all relevant source material provided by academic and government organisations, from international expert bodies and applicable legislation drawn from across the Western Balkans, the United Kingdom, Ireland, France, Germany, Australia and the United States of America. All collected research was assessed for quality, relevance and applicability to the aim of the study.

Part 2 – The nature, scope and jurisdictional skillsets of forensic accountants as expert witnesses per se and in relation to organized crime and corruption

Definition of a forensic accountant

There are many differing definitions of the term "forensic accountant", but the most cited is arguably that provided by the Association of Certified Fraud Examiners which notes that it is *'…the use of accounting skills in potential or actual civil or criminal cases, including the generally accepted accounting and audit principles, to determine lost profits, income, asset values or to assess damage, including the assessment of the efficacy of internal controls, uncovering a fraud or the performance of other activities requiring the inclusion of accounting expertise in the legal system'*[1]. As with all experts in general, and forensic experts in particular, forensic accountants should have relevant professional qualifications, training, professional training and practical experience. Thus, a sound forensic accountant will have advanced and continued education in appropriate disciplines, diversified accounting and auditing experience, written and oral communication skills, practical business experience, diversified forensic auditing experience and an ability to work in a team environment. Forensic accounting is deemed to be an interdisciplinary field and a forensic accountant should, in addition to her/his knowledge of accounting and its regulation, also be familiar with the legal regulations, legislation and procedures of the country in which s/he performs his activities.

Forensic accountants should ensure that they acquire the investigative skills necessary to augment their professional skills of financial analysis, and it is crucial that the qualities of honesty and objectivity

[1] Čudan, A and Cvetković, D (2019), 'The Importance of Forensic Accounting in Forensic Economic and Financial Examination', Journal of Security and Criminal Sciences, Faculty of Security Studies University of Banja Luka and University of Criminal Investigation and Police Studies, Serbia

are upheld in the profession of forensic accounting. Accordingly, in terms of providing expert evidence, it has become expected in many jurisdictions that they observe professional standards when conducting their work including, broadly, acting with fairness, without bias and presenting evidence that is relevant, reliable and cost-effective. Where expert witness organisations exist, they will often have codes of practice to which their members must adhere. Examples of such codes include those operated by the British-based Academy of Experts[2], EuroExpert[3] (the Organisation for European Expert Associations whose code is based on the British Academy of Experts' code) and the Statement of Ethical Principles and Principles of Professional Practice provided by the US-based National Association of Forensic Economists[4].

Selecting Expert Accountants

The process of selecting a forensic accountant begins with ascertaining whether or not the expert is in fact an expert in the field. It has become a common experience to speak of forensic accountants as if each practitioner has knowledge of everything connected with financial irregularity, but that would be akin to suggesting that a surgeon could perform brain and heart surgery with equal aplomb. Thus, forensic accountants may have a core of general knowledge but a detailed knowledge in only one of fraud detection in financial statements, tax evasion, money laundering etc. The complexity of organised crime and corruption cases is such that much greater attention needs to be afforded to ensuring that the qualifications and experience in both forensic accountancy in general, and in the precise parameters of the crime type in particular, are achieved. Thereafter, timing of the engagement of the forensic accountant can be crucial in a case. If they are hired early on in a case during the investigation stage, they can advise lawyers on how best to proceed with the case logistically, and, conversely, if they are engaged later on in the case (perhaps for reasons of saving costs) the impact can be counterproductive.

In the case of courts within the common law tradition, forensic accountants should, if engaged by the prosecution, receive clear instructions, as to the issues their expertise should focus upon, from the prosecution lawyers and, if engaged by the defence, by defence lawyers. In the case of courts in the civil law tradition, those instructions should be provided by the judge.
The terms of the forensic accountant's engagement should include the nature and extent of services to be provided and the timeframe within which the expert report should be completed. The forensic accountant should only accept an assignment where s/he has the knowledge, experience, qualifications, professional training and the resources necessary to complete the assignment within the agreed timescales. The forensic accountant should also be candid with the lawyers and the court, where that is permitted, as to what can, and cannot, be achieved. It is this combination of factors that should, if followed, reduce the degree to which the case in which an expert witness appears is compromised.

Role of a Forensic Accountant

The primary role of a forensic accountant in the criminal justice context is to analyse, summarise and present interrelated financial data in order to identify patterns of activity and apply her/his findings to the determination of the nature and patterns of economic crime activity. In this latter context, forensic accounting is primarily concerned with undertaking a comprehensive investigation of criminal activities, integrating knowledge in accounting, auditing and investigative techniques.

Broadly speaking it takes two forms, namely (a) **financial crime investigation** and (b) **forensic auditing of financial statements**.

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[2] https://academyofexperts.org/practising-as-expert/expert-witness/codes-of-practice/

[3] https://euroexpert.org/standards/code-of-practice

[4] *Statement of Ethical Principles and Principles of Professional Practice*, National Association of Forensic Economics (NAFE) https://nafe.net/resources/Documents/NAFE_SEPPPP_Effective_January_4_2020.pdf

a) **Financial crime investigation** – a special discipline within forensic accounting that investigates financial statement fraud and financial transactions fraud schemes and both of which consist of proactive and reactive approaches, undertaken usually by a dedicated team within law enforcement agencies. It has emerged as an invaluable tool in the fight against serious and organised crime and corruption given that it can support all stages of a criminal investigation, from assisting with the gathering of intelligence and evidence, to adding charges at the indictment stage and removing criminal assets post-conviction. This type of forensic accounting work is performed by investigators, who typically work in the office of state controllers and investigative/ detective agencies, auditing agencies, and criminal police services. The form part of a team of experts, with different knowledge, skills, and experience which they use to detect and document criminal activities. By way of example, the United Kingdom utilises accredited financial investigators (attached to government departments and police services in the fight against serious and organised crime) who provide support at all stages of a criminal investigation, from assisting with the gathering of intelligence and evidence, to adding charges at the indictment stage, to removing criminal assets post-conviction. The financial investigators operate under the auspices of the Proceeds of Crime Act 2002 (POCA), which was created with the aim of removing assets from criminals, recovering the proceeds of crime and deterring and disrupting criminality and which provides them with a range of investigative powers as well as powers to restrain and confiscate the criminal assets via criminal confiscation, civil recovery, cash forfeiture and criminal taxation. Additional powers to those conferred in POCA are available in the United Kingdom's Serious Crime Act 2015 (which, inter alia, contains provisions to increase prison sentences for failure to pay confiscation orders, ensure that criminal assets cannot be hidden with spouses, associates or other third parties, require courts to consider imposing an overseas travel ban for the purpose of ensuring that a confiscation order is effective, enable assets to be restrained quicker and earlier in investigations, reduce the defendant's time to pay a confiscation order and extend investigative powers so that financial investigators are available to trace assets once a confiscation order is made) and the Criminal Finances Act 2017 (which, inter alia, contains provisions to create unexplained wealth orders, requiring individuals to demonstrate that the origins considered disproportionate to their income are not criminal, enable disclosure orders for money laundering investigations, provided for greater information sharing between entities in the regulated sector, grant civil recovery powers to the Financial Conduct Authority and Her Majesty's Revenue and Customs and create two new "failure to prevent" offences relating to corporate failure to prevent tax evasion).

   Although POCA was designed to remove criminal assets, it is clear that financial investigation has a greater role to play. Because of the profit-motivated nature of organised crime, a financial investigator can exploit financial audit trails in order to provide evidence of criminality. Financial investigation can also support criminal investigations by adding to the intelligence picture, such as through the establishment of the identity, lifestyle and movements of offenders, co-conspirators and victims.

Further to this, the Financial Action Task Force (FATF)[5] has posited a global approach to financial investigation of organised crime, corruption, and the money laundering activity that inevitably flows from both, particularly if the financial investigation is complex, which, in organised crime cases, it invariably will be.

The FATF[6] argues for the assembly of a multi-disciplinary group or task force to ensure the

> *…effective handling or the investigation, prosecution and eventual confiscation'* of assets. Such groups may comprise *'…a range of individuals, including specialised financial investigators, experts in financial*

[5] Financial Action Task Force (2012), Operational Issues – Financial Investigations Guidance

[6] ibid

analysis, forensic accountants, forensic computer specialists, prosecutors and asset managers. Experts may be appointed or seconded from other agencies, such as a regulatory authority, the FIU [Financial Intelligence Unit], a tax authority, an auditing agency, the office of an inspector general, or even drawn from the private sector on an as-needed basis. The multi-disciplinary groups should include individuals with the expertise necessary to analyse significant volumes of financial, banking, business and accounting documents, including wire transfers, financial statements and tax or customs records. They should also include investigators with experience in gathering business and financial intelligence, identifying complex illegal schemes, following the money trail and using such investigative techniques as undercover operations, intercepting communications, accessing computer systems and controlled delivery. Multi-disciplinary groups should also consist of criminal investigators who have the necessary knowledge and experience in effectively using traditional investigative techniques. Prosecutors also require similar expertise and experience to effectively prevent the case in court.

The FATF notes[7] that *'[f]inancial investigators develop hypotheses and draw conclusions based on available information…'* and that a financial *investigation '…combines tried and tested investigative techniques and traditional accounting and auditing practices to investigate the financial affairs of targets of investigations.'* A valuable role that forensic accountants can play in this regard stems from the purported use by criminal elements of accountants per se. The FATF[8] has also identified a number of money laundering threat vectors where the involvement of accountants is known to occur including (i) financial and tax advice, (ii) company and trust formation, (iii) buying or selling of property, (iv) performing financial transactions such as cash deposits, foreign exchange operations and sending and receiving international funds transfers and (v) acting as introducers of, or intermediaries for, criminal clients in relation to financial or other institutions. Forensic accountants are able to utilise their accountancy skillset to anticipate how corrupt accountants might move the illicit assets of organised criminals and corrupt individuals. This value-added service that forensic accountants can provide can only serve to enhance any financial investigation.

b) Forensic auditing of financial statements - a new specialized service used in the financial statement audit process whereby an auditor with specialist training and experience in fraud prevention and detection is engaged and utilised by the forensic accountants and her/his colleagues. Clearly, however, it is common practice for forensic accountants to draw upon a range of additional evidentiary sources, including a range of financial transaction records between the accused and others parties, records indicating details of beneficial owners of companies and, in relation to suspected money laundering activity, suspicious transaction and suspicious activity reports, respectively.

Forensic accounting in the form of forensic accountant expert witness support and testimony can be classified in broad terms into two categories, namely (1) **litigation support** and (2) **investigative accounting**.

Typically, (1) **litigation support** will focus on issues such as the quantification of economic damages arising, for example, from a breach of contract. However, more recently, forensic accounting has extended its reach into areas concerned with tracing assets, recovering revenue and undertaking financial analysis of records. In this context, the forensic accountant will undertake tasks such as assisting in securing the documentation necessary to prosecute the case, review relevant documentation in order to provide a preliminary assessment of the case and identify points of engagement with the evidence, assist in the examination and discovery process, including the formulation of pertinent questions to be posed by the legal team, review the opposing party's expert report(s) and determine the relative strengths and weaknesses and areas upon which to challenge their content(s).

[7] ibid

[8] Financial Action Task Force (2019), Guidance for a Risk-based Approach - Accounting Profession

Typically, (2) **investigative support** comprises investigations of a criminal nature such as fraud, kickbacks etc. In this context, the forensic accountant might review the factual situation of the case and provide suggestions on alternative courses of action, assist in the preservation, protection and recovery of assets, coordinate with other experts and assist in the tracing and recovery of assets through civil, criminal and other administrative or statutory proceedings. In order to achieve the best impact possible, forensic accountants should understand the legal parameters of the case in which they are engaged before proceeding to assist in the litigation process or investigation. This should assist them in understanding the steps both necessary and acceptable for them to take to ensure the admissibility of any evidence they obtain.

Establishing the Value of the Expert Testimony of a Forensic Accountant

It has been often suggested that forensic testimony is but one part of the evidence base as a whole, whereas others have maintained that it is a conduit through which direct assistance is provided to the judge or relevant body conducting the fact-finding proceedings. Others still, have suggested that expert opinions may, rightly or wrongly, directly influence the decision itself. Myers[9] has suggested that all experts simply pose to themselves a number of questions, which, if answered in the affirmative, will meet the necessary, even if not legally required, burden of establishing that the expert's evidence is offered with a reasonable degree of certainty. Those questions are:

1) In formulating my opinions, did I consider all the relevant facts?
2) Do I have adequate understanding of pertinent principles pertaining to my field?
3) Did I use methods of assessment that were appropriate, reliable and valid?
4) Are my inferences, assumptions and conclusions reasonable and defensible?

In practice, the perceived value of an expert's forensic evidence depends upon the level and range of their expertise, the quality of their expert reports and the decisions of judges in relation to their treatment of such reports. In relation to expert forensic accounting evidence, the value of the evidence is determined by the value placed on it by the court and the extent to which the court will defer to the opinion of the accountant.[10].

Forensic accountants must, as with all experts, be objective in the provision of their testimony. There have been cases in the United States, for example, where that objectivity has been found wanting. In Wagner Construction, Inc v. CIR [2001][11], the Tax Court rejected the testimony of both parties' experts on the ground that *'…the reports and testimony of the experts in this case are so dissimilar that the reliability of the experts is brought into question.'* The court concluded that the experts had served the interests of their respective clients rather than the court and indeed, *'…the experts' lack of impartiality has caused a disservice to the Court and the system of tax administration.'*

In Monsanto v. Tidball [2009][12], the court argued that the expert had disregarded the directives from the Federal Circuit on the appropriate method to establish quantum of damages, that the expert's opinions contradicted precedent and the expert's report was deemed by the Court as *'…unreliable, untrustworthy, and unable to assist the jury.'*

[9] Myers, J (2015), 'What is the Meaning of "Reasonable Medical Certainty"? Your Guess is as Good as Mine', 50 Child Abuse & Neglect, The International Journal, 228–231.

[10] Odeon Associated Theatres Ltd v. Jones, [1969] 48 TC 257

[11] Wagner Construction, Inc. v. CRIR [2001]

[12] Monsanto v. Tidball [2009] Case No. 4:07CV2079 CDP

In Australia, where there is no recognised industrial standard for forensic accountants, commentators have noted that where there is questionable conduct on the part of a forensic accountant, the profession may be brought into disrepute and the lack of a qualifications framework may have an impact upon the value of testimony proffered by forensic accountants.

In the case of Makita (Australia) Pty Ltd v Sprowles [2001][13] Justice Heydon noted that *'[i]f evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of "specialized knowledge"; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be "wholly or substantially based on the witness' expert knowledge…".'*

Moreover, former High Court Justice Michael Kirby has noted (Van Akkeren and Tarr[14]) that the complexity of the role of forensic accountants in a range of legal proceedings, together with the lack of formal qualifications held by forensic accountants, led to two core issues.

First, there was a perceived danger of potential damage caused by under-qualified forensic accountants undermining the integrity of the evidence trail.

Secondly, judges were reported to be fearful of forensic accountants meeting the preliminary expert standards in the absence of a framework within which to situate the forensic accountants' qualifications. That expressed view has been countered by dint of the court and lawyers being able to discern the expertise of any expert, including forensic accountants, through effective cross-examination or through consultation with the expert from their own team.

Equally, however, it has been argued[15] that, in general terms, in countries operating under a civil rather than common law system, forensic accounting is a specified profession and the requirements for entry are similar in terms of education, work experience, certification etc. By way of illustration, in Latvia, for example, registration as a forensic expert, including as a forensic accountant, is governed by the Law on Forensic Experts[16] which provides (Chapter II (Granting of a forensic expert certificate), Article 6 (Candidate of forensic expert) that a person can become a forensic expert if s/he has acquired an accredited study programme concerned with their proposed specialism, has acquired the professional knowledge and experience of a forensic expert at a forensic institution or under the supervision of a forensic expert and has an impeccable reputation. Prospective experts are required to take an examination, which, for forensic accountants, is in 'Accounting' and overseen by the Ministry of the Interior. More broadly, the Baltic Register of Forensic Science Experts provides a means by which forensic experts can be identified in Latvia[17], Lithuania[18] and Estonia[19] through the presence of three independent, but connected, national registers which allow for fast searching for, and access to, a range of regional experts who can be deployed in any of the states.

[13] Makita (Australia) Pty Ltd v. Sprowles [2001] NSWCA 305

[14] Van Akkeren, J and Tarr, J-A (2014), 'Regulation, Compliance and the Australian Forensic Accounting Profession', Journal of Forensic & Investigative Accounting Vol. 6, Issue 3, Special International Issue

[15] Liodorova, J and Fursova, V (2018), 'Forensic Accounting in the World: Past and Present', Journal of Economics and Management Research. Vol. 7

[16] Law on Forensic Experts, https://likumi.lv/ta/en/en/id/280576-law-on-forensic-experts

[17] https://eksperti.ta.gov.lv

[18] https://ekspertai.ltec.lt

[19] https://kohtuekspert.just.ee

Jiang[20] has suggested that a potential route to a reduction in the actual or perceived impartiality of expert witnesses would be to create a system of court appointed experts. However, as Jiang observes, *'…appointing experts conflicts with the sense of the judicial role, which is to trust the adversaries to present information and arguments.'* In the civil law tradition, of course, the selection of experts is primarily a judicial role, but the capacity of judges, particularly those not au fait with the subject matter for which they require an expert, to select an appropriately qualified and experienced expert should be considered. In the common law tradition, judges have always trusted the parties to the case (whether the prosecution or defence) to appoint the most effective expert for their side since they will have a detailed knowledge of the evidence and the issues it raises. The notion of judge-appointed experts has been debated in a number of common law jurisdictions. In Australia, for example, one witness for the New South Wales Law Reform Commission noted[21] that *'[c]ourt appointed experts may limit discretion by forcing judicial hands. Judges may lose the ability to weigh competing claims and produce policy sensitive compromises … Judges should not underestimate the discretions and institutional benefits conferred by having a range of expert perspectives. If they exclude dissenting views or reduce the range of perspectives judges may become increasingly beholden to expert elites.'*

[20] Jiang, Y (2006), 'Reconsidering the Medical Expert Witness System', cited in DiGabriele, J.A. (2010), 'An Empirical View of the Transparent Objectivity of Forensic Accounting Expert Witnesses', SSRN

[21] Edmond, G (2005), 'Expert Evidence', Submission to the NSW Law Reform Commission, http://www.lawreform.vic.gov.au/sites/default/files/Chapter+7+-+Changing+the+Role+of+Experts.pdf

Part 3 – The nature, role and scope of expert witnesses in Civil (inquisitorial) and Common (accusatorial) legal systems

There are two predominant approaches taken in relation to the provision of expert witness testimony in respective common (accusatorial) law and civil (inquisitorial) law traditions.

In the common law legal tradition, the public prosecutor and the accused select and appoint their own experts who act for their respective clients rather than the court. They have no special status but are merely witnesses, albeit with a specialised knowledge in a particular field. They are therefore referred to in statute and caselaw as "expert witnesses".

In the civil law system experts are court-appointed and are deemed to be auxiliaries to the court. Accordingly, they have their own special status and are deemed to undertake their work under the direction of the court, rather than the parties, addressing only the questions that the court has set them to address.

Each approach is argued to have issues attached to it.

In terms of the common law tradition, it is alleged that the experts become biased towards the party that hires them and that impacts upon the objectivity of their evidence. However, it is argued that any bias can be challenged by cross-examining the other side's expert and/or by providing their own expert to counteract the other side's expert. Despite this ability, it is also argued that balance of interests may not in practice be possible because the prosecution may have greater resources available than the defence and there is therefore a danger of there being no equality of arms between them.

In addition, it is argued that a so-called "battle of the experts" may occur where the jury may find it difficult to decide upon the differences in evidence provided by each side's expert and that this might lead to skewed verdicts or indeed miscarriages of justice. Equally, however, it is argued that the judge is able to remain completely impartial in relation to the expert evidence because the court was not involved in selecting either expert.

In terms of the civil law approach, it is suggested that court appointed experts will automatically be given respect since s/he will operate only in the interests of justice rather than the interests of any one party. There is, arguably, a possibility that an expert is incompetent or unskilled in an area of a case and/or that corruption may occur through, for example, courts appointing experts in return for favours, parties bribing judges in order to secure the appointment of a favoured expert or parties bribing the expert to deliver an opinion to the judge which is also favourable to their case.

However, in many jurisdictions, the other parties to the case are:

i) able to appoint their own consultants,
ii) be informed of the schedule of the expert's mission and participate in some of her/his activities,
iii) communicate, interact and monitor the activities of the expert,
iv) submit comments and requests for further investigations and suggest alternative modes of approach,
v) dispute the expert's findings in court and
vi) submit to the court separate findings where there is a persistent disagreement as to the expert's findings.

In the common law system, the prosecution and defence present respective versions of the facts to a jury which determines which of the two versions is the truth. The judge acts largely as a mediator with a passive (monitoring and chairing proceedings) and reactive (responding to questions of law or procedure) role. The respective sides therefore have responsibility for presenting expert and other

witnesses to the jury. There are complex rules which determine which evidence may be included and which must be excluded. Experts and other witnesses who appear are examined and cross-examined directly by the respective parties.

In the civil law system, the investigation is conducted by an examining judge who seeks evidence that will either incriminate or exonerate the defendant. It is the judge who collects evidence, interviews witnesses and appoints experts if s/he deems that to be necessary. The judge has in her/her possession all available documents relating to the case which all parties may consult. Thereafter, if the examining judge is not able to convict or acquit (that is, in less serious cases), this preliminary phase is followed by a more adversarial stage before a different judge who utilises the material contained in the file. The judge can take further information if s/he feels there is insufficient evidence on which to base a decision. During the trial, the judge examines witnesses and experts.

In terms of dealing with evidence there are advantages and drawbacks in relation to each system.

In the civil law system, the neutrality of the investigation rests largely on the impartiality of the examining judge. The contribution which the defence is permitted to make is limited and, although it can offer evidence, this may be refused by the judge on the grounds that it is not relevant or that the facts have, according to the judge, been sufficiently proven. Since the judge has prior knowledge of a case brought to court before the trial occurs, there is a possibility of bias and this bias may be heightened by the fact that the examining judge who undertook the initial investigation believed there to be sufficient evidence to commit the case to trial. During the trial itself, the parties cannot cross-examine the witnesses and experts, and this may lead to a situation where the credibility of any witnesses cannot be challenged.

Experts themselves are appointed by the examining judge or the court (usually, but not always, from an official list of experts), work under their supervision and tend to have a superior status to other witnesses. There is a risk that the court may place considerable trust in incompetent experts who, by dint of their special status and protection from probing cross-examination by the defence, might not be thoroughly tested. However, it is also argued that parties may raise questions throughout the proceedings for the expert and provide the expert with the opportunity to reconsider her/his position accordingly.

In the common law system, the defence has a far greater role to play in proceedings since it can, during cross-examine of prosecution witnesses, challenge the credibility of their evidence. However, since experts in the common law system act on behalf of the party that engages them, it is possible that areas of the evidence over which there is actually agreement are not revealed to the court thereby potentially reducing the opportunity for cases to be concluded at an earlier stage.

Admissibility and evaluation of expert witness testimony

In the civil law tradition, the written report of the expert is counted as evidence, whereas in the common law tradition the evidence is submitted orally before the court or jury. Where the civil law tradition provides for a judge to render the decision, the key issue is the evaluation by her/him of the expert opinion in the final judgement. The court can disregard the expert's report, but in practice cannot simply ignore that evidence. In Italy, for example, the Court of Cassation has held on a number of occasions that the judge must explain in detail the reasons for placing no reliance on expert opinion, and in France, the Court of Cassation has expressed the view that although a judge is not required to indicate reasons for accepting an expert's opinion s/he is required to provide a detailed explanation for refusing to accept the expert's findings.

In broad terms, those EU countries following the civil law tradition do not specify the criteria for deciding whether evidence is reliable or not. For example, Article 244 II of the German Code of Criminal Procedure
(Strafprozessordnung[22]) provides that *'[i]n order to discover the truth, the court shall take evidence ex official from every fact and proof that is relevant to the judgement'* and, under Article 427 (1) of the French Code of Criminal Procedure[23], offences can be established by any mode of proof that *'…can establish the truth.*' In Switzerland[24] , Article 139 of the Criminal Procedure Code provides that *'…[t]he criminal justice authorities shall employ all lawful types of evidence which, in the current state of scientific knowledge and experience, are apt to establish the truth.'* In practice, certain types of evidence are admitted because historically they always have been and certain types of evidence regarded as pseudo-science are rejected and in the case of any doubt the court will appoint an expert to decide the evidentiary value of the expert testimony.

Similarly, there is no real test of admissibility, since a judge who admits unreliable evidence has to provide reasons for her/his decision to do so. There is some criticism of any approach that places the decision on reliability of scientific evidence in the hands of judges because judges are not in a position to determine whether a body of knowledge is, or is not, a science. That means that there may legal uncertainty created as different judges rule evidence inadmissible because they formed a different opinion as to its reliability.

In order to alleviate such issues, some civil law tradition jurisdictions have a legislative requirement for there to be official registers of approved experts. However, judges are not compelled to select witnesses from those registers and, once an expert is placed on such a register, it becomes ever more difficult to challenge her/his testimony. Furthermore, although there is a degree of oversight of the lists, this tends to be a largely bureaucratic exercise with the courts usually willing to accept onto the list any person who is a member of a recognised professional body without necessarily checking on the person's quality of work.

In the common law tradition, the focus is more keenly placed upon the way in which the evidence was offered to the court, and the parties are able to challenge the admissibility of expert testimony. In the United States, for example, in Daubert v. Merrell Dow Pharmaceuticals, Inc. [1993][25] , the Supreme Court, in determining the reliability of the expert testimony offered, referred to the concept of "scientific validity" and proposed five criteria for reaching a decision on that point. In the subsequent case of Kumho Tire Co v. Carmichael [1999][26], the Supreme Court suggested that the same criteria might usefully be used in the assessment of expert testimony in non-scientific situations also. The criteria determined in Daubert were:

1. The method's falsifiability (that is, can the method be, or has it been, tested?)
2. Peer review and publication (which would reveal any issues with the method followed)
3. The method's margins of error (known or presumed)
4. The standards governing application of the method
5. General acceptance within the relevant scientific community

[22] Champod, C and Vuille, J (2011), 'Scientific Evidence in Europe — Admissibility, Evaluation and Equality of Arms', International Commentary on Evidence, Vol. 9, Issue 1, Article 1

[23] ibid

[24] ibid

[25] Daubert v. Merrell Dow Pharmaceuticals, Inc. [1993] 113 S Ct 2786

[26] Kumho Tire Co v. Carmichael [1999] 526 US 137

The Supreme Court argued that only valid scientific evidence should be put before a jury and that therefore the judge, as a type of gatekeeper, should make that determination before admitting it into evidence.

Daubert has nevertheless been criticised on the grounds, for example, that expert opinions may draw upon very complex reasoning processes which may not satisfy or fit into the Daubert criteria and because the judges in cases making the determination must, as a dissenting judge in Daubert, Judge Rehnquist, argued, become amateur scientists. In that context, it is difficult to ascertain how a judge will be able to determine whether or not the criteria are met.

Admissibility of evidence is governed in the United States by the Federal Rules of Evidence[27]. **Rule 702** guides the court's analysis in determining admissibility of expert testimony and was amended following the Daubert case in order to permit consideration of any of the factors enumerated in that case.

The Federal Rules of Evidence, however, do not require experts to testify that their opinions are reasonably certain. In Samuel v. Ford Motor Co. [2000][28] , the Court stated that *'[a]n expert opinion based on speculation or guesswork will not meet the helpfulness requirements of Rule 702, nor will it be the product of reliable facts, as required by Rule 703. Thus, if speculative or conjectural, the opinion of an expert should be excluded by the trial judge…However, nowhere in any of these rules is there a requirement that before an expert's opinion testimony may be admitted, he or she must affirmatively state that the opinion is held to a "reasonable degree of certainty or probability.'*

Rule 703 establishes the bases on which experts may form their opinions. Notably, it allows experts to base their opinions on information that is inadmissible at trial so long as such information might reasonably be relied upon. In addition, the inadmissible evidence can only be disclosed to the jury if it is deemed helpful in aiding the jury's understanding, and its probative value substantially outweighs any prejudicial effect.

Rule 704 permits the expert to testify as to the ultimate issue of fact with the exception that the expert at a criminal trial may not testify as to whether a defendant had the requisite mental state to commit the charged offence.

Rule 705 allows experts to rely on information that would be otherwise inadmissible at trial and undisclosed to a jury. There are obvious benefits to nondisclosure of facts and data, as it allows the experts to rely on a greater breadth of information. If the material relied upon by the expert is helpful in facilitating an understanding the issues at trial, and can be easily presented to a jury, disclosure may assist it in reaching a decision.

Rule 706 permits courts to unilaterally choose an expert on its own and such court-appointed experts may be deposed, cross-examined, and called to testify by any party.

The provision of expert testimony in the United Kingdom is based both on common law and statute, with scientific evidence generally deemed admissible if it fulfils the following conditions:

1. It concerns a subject exceeding the ordinary knowledge and experience of whoever must decide the case.
2. It concerns a subject in a field of knowledge which is sufficiently well organised and recognised to be considered a reliable source of knowledge, a field of which the expert in question has special knowledge that could assist the court in its task.

[27] Federal Rules of Evidence (2014), https://www.uscourts.gov/sites/default/files/Rules%20of%20Evidence

[28] Samuel v. Ford Motor Co. [2000] 96 F.Supp.2d 491

3. The expert must have acquired through study or experience sufficient knowledge to render his opinion useful to the court.
4. The expert must be impartial.

It is slightly problematic to satisfy the second criterion since there are no rules (as in Daubert[29]) for determining the scientific admissibility of evidence. In the UK, the judge decides, using her/his discretion, whether the evidence provides adequate guarantees of scientific reliability and is relevant. It has been suggested that the defence faces the burden of proving the unreliability of evidence adduced by the prosecution. In practice, an expert who is accredited or has the necessary qualifications on the subject will generally be permitted to testify.

The criteria for when it will be appropriate to call an expert witness was set out by the Court of Appeal in R.v Luttrell [2004][30], citing the Australian case of R v. Bonython [1984][31].

The first criterion is that study or experience will give a witness's opinion an authority which the opinion of one not so qualified will lack.

In R v. Bonython [1984][32], Chief Justice King set out a three-fold test for deciding whether to allow expert testimony:

1. Does the court need expert evidence to reach an informed conclusion? In short, is the subject matter of the case such that no-one who lacks the experience or skillset would be able to form a sound opinion on it without the assistance of an expert.
2. Is there a reliable body of expert knowledge which is sufficiently recognised and accepted as such?
3. Is the particular witness an expert in her/his field by dint of her/his experience and knowledge? This was expressed as follows:

   (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and
   (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court.

The second criterion is that the witness must be so qualified to express the opinion.

The admissibility of evidence test at common law is based on four requirements, namely (1) assistance, (2) relevant expertise, (3) impartiality and (4) evidentiary reliability.

(1) Assistance – Following the case of R v. Turner [1975][33], an expert's opinion is admissible if it furnishes the court with information likely to fall beyond the experience and knowledge of a judge or jury. It follows therefore that, if on the facts the judge or jury can reach their own conclusions without assistance, the expert testimony is deemed unnecessary.

[29] Op. cit

[30] R v. Luttrell [2004] EWCA Crim 1344

[31] R v. Bonython [1984] 38 SASR 45

[32] ibid

[33] R v. Turner [1975] QB 834

(2) Relevant Expertise – the professed expert must be an expert in the relevant field, which was described in the case of R v. Bonython [1984][34] as a requirement that the expert concerned *'…has acquired by study or experience sufficient knowledge of the subject to render his [or her] opinion of value.'*

(3) Impartiality -the expert must be able to provide impartial, objective evidence on the matters within her/his field of expertise. In the case of Toth v Jarman [2006][35], the Court of Appeal recognised that an expert witness *'should provide independent assistance to the court by way of objective unbiased opinion'* and that where an expert witness has *'… a material or significant conflict of interest, the court is likely to decline to act on his [or her] evidence, or indeed to give permission for his [or her] evidence to be adduced.'*

(4) Evidentiary reliability – the expert's evidence must satisfy a threshold of acceptable reliability. The judge is the sole and final arbiter and courts have expressed opinions as to the strength or otherwise of expert evidence presented. In relation to expert accounting evidence, and the limits on the extent to which courts will defer to an expert accountant's opinion, the case of Odeon Associated Theatres Ltd v. Jones [1969][36] observed that *'[i]n order to ascertain what are the correct principles [of the prevailing system of commercial accountancy] it has recourse to the evidence of accountants. That evidence is conclusive on the practice of accountants in the sense of principles on which accountants act in practice. That is a question of pure fact, but the court itself has to make a final decision as to whether that practice corresponds to the correct principles of commercial accountancy. No doubt in the vast proportion of cases the court will agree with the accountants, but it will not necessarily do so … At the end of the day the court must determine what is the correct principle to be applied.'*

In the case of R v. Pabon [2018][37], a purported financial expert, Saul Haydn Rowe, had provided evidence during the trial. On appeal, the court heard that Rowe *'…had signed documents stating that he had complied with his duties when he knew he hadn't; he had failed to report with any detail or accuracy as to how he reached his opinions; he secretly consulted with a number of undisclosed advisors; he blatantly disregarded the directions of a trial judge during the course of a criminal trial; and he knowingly gave evidence about matters outside his area of competence. These are deeply troubling failings that bring the system of justice into disrepute …'*

In 2019, the case of R v. Sulley & Ors[38] had to be stopped, and not guilty verdicts entered against all defendants, when it transpired that the prosecution's expert witness was not, in fact, an expert at all. The judge observed that *'Andrew Ager is not an expert of suitable calibre. He had little or no understanding of the duties of an expert. He had received no training and attended no courses. He has no academic qualifications. His work has never been peer-reviewed.'*

In order to mitigate some of the vagaries of the common law approach, the courts in the United Kingdom must now have cognisance of the Criminal Procedure Rules 2015 (as amended), **Part 19** of which concerns expert witnesses. These Rules provide advice, inter alia, on the need for objectivity of witness testimony **(19.2 (1))**, for the need to provide evidence in accordance with the expert's areas of expertise and to declare where that expertise is lacking in relation to the instant case **(19.2(3))**, on the need to disclose anything which might reasonably be thought capable of undermining the reliability of the expert's opinion or detracting from the credibility or impartiality of the expert **19.3(3)(c)** and of the requirements of a properly formatted expert report **(19.4)**.

[34] Op.cit

[35] Toth v. Jarman [2006] EWCA Civ 1028

[36] Odeon Associated Theatres Ltd v. Jones [1969] 48 TC 257

[37] R v. Pabon [2018] EWCA Crim 420

[38] R v. Sulley & Ors [2019] – Trial abandoned (no formal record of proceedings created)

The law on the provision of expert witness testimony in Ireland is governed by the Criminal Procedure Act 2010, which concerns itself solely with expert evidence adduced by the defence in a criminal case. A party wishing to adduce expert evidence needs to prove that such evidence is needed in the circumstances and that the person they select is suitably qualified to provide expert evidence. The burden of proof rests with the party wishing to adduce the evidence. In practice, expert evidence will be permitted in all matters that are deemed outside the scope of the knowledge and expertise of the court or, as the case of McFadden v. Murdock [1867][39] expressed it, *'…wherever peculiar skill and judgment, applied to a particular subject, are required to explain results, and trace them to their causes.'*

Any expert must confine her/himself to expressing opinions that are within her/his realm of expertise and an expert must not express an opinion on legal or technical issues related to the case nor on the merits, or otherwise, of the parties' cases. The court is not obliged to accept or act upon expert evidence and can refuse to admit it or reject it if they so wish, in keeping with the courts' decision-making function. This was acknowledged in the case of Davie v Edinburgh Magistrates [1953][40] , where Lord President Cooper acknowledged the fact that the expert's opinion was uncontested, he noted that *'…[e]xpert witnesses, however skilled and eminent, can give no more than evidence. They cannot usurp the functions of the jury or Judge sitting as a jury……The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge or jury.'* In determining the weight of expert evidence, the courts may take into account the nature of the evidence, the impartiality of the witness and the facts upon which s/he bases her/his opinion. As in most jurisdictions, there will be situations where the expert evidence presented by one party will conflict with that provided by the expert for the other. A consequence of the ability of the courts to hear expert evidence on any subject matter the court is dealing with has led to a difficulty in Ireland of defining precisely what an expert is, and typically issues of definition have tended to reside within caselaw.

The Australian Law Reform Commission[41] identified some of the main challenges of expert evidence in Australia. These included the fact that experts are, by dint of being engaged by the respective parties in a case, skewed towards the position of those parties, that questioning of experts by lawyers may elicit an inaccurate and misleading portrayal of the evidence and, where there is a disagreement on the evidence presented, asking the judge to adjudicate on the differences is arguably irrational since s/he will have no reference point against which to decide. The High Court of Australia originally adopted a general acceptance test for expert evidence, noting in the case of HG v. The Queen [1999][42] that, in order to qualify as expert evidence, the expert's knowledge and experience must be *'...sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience.'* Reliability of expert evidence was also considered in Velveski v. the Queen [2002][43], where the appellant appealed against a conviction for murder on the grounds that expert evidence should not have been admitted from the prosecution which sought to prove that the appellant's wife had been murdered rather than committed suicide. The appellant argued that such evidence should not be admissible as it was not established that, based on the test in HG v The Queen[44] , *'...there is a reliable body of knowledge and experience, based on the observation of wounds, which would enable a person to express an expert opinion whether particular wounds were self-inflicted.'* This argument was rejected on the grounds that, whether the wounds may have been self-inflicted was capable of being the subject of expert evidence if a suitable foundation as to the witnesses' training, study or experience has been laid, which the court argued it had.

[39] McFadden v. Murdock [1867] Exchequer IR ICL 211

[40] Davie v. Magistrates of Edinburgh [1953] SC 34

[41] Australian Law Reform Commission (2004), Review of the Evidence Act 1995

[42] HG v. The Queen [1999] HCA 2

[43] Velveski v. The Queen [2002] HCA 4

[44] Op.cit

In contrast with the South Australian case of R v. Bonython[45], the Victoria Court of Criminal Appeal, in the case of R v. Johnson 1994][46], argued that the applicable admissibility requirements in that jurisdiction *'…provided the judge is satisfied that there is a field of expert knowledge … it is no objection to the reception of the evidence of an expert within that field that the views which he puts forward do not command general acceptance by other experts in the field.'*

The Australian High Court said in Smith v R [2001][47] that, *'…although questions of relevance may raise nice questions of judgment, no discretion falls to be exercised. Evidence is relevant or it is not. If the evidence is not relevant no further question arises about its admissibility. Irrelevant evidence may not be received. Only if the evidence is relevant do questions about its admissibility arise. These propositions are fundamental to the law of evidence and well settled.'* In terms of forensic accountants as expert witnesses, it has been noted that within Australia the lack of a framework for identifying qualifications and expertise is problematic.[48]

Former High Court Justice Michael Kirby (Van Akkeren and Tarr[49]) identified a range of cases in which forensic accountants have played key roles and whose areas of required expertise included *'[c]ommercial contract claims for breach of contract terms or repudiation; intellectual property; merger and acquisition disputes, trade practices infringements, loss of income or earning potential arising from tort and workplace accidents, product liability claims, environmental claims, insurance claims, ledger liability claims for of a contract to lend or invest funds, taxation, construction and family law disputes involving business valuations and property settlements.'* He argued that the complexity of this role, combined with the lack of formal qualifications held by forensic accountants, posed two distinct problems.

First, a number of commentators have expressed concern that the potential damage that under-qualified forensic accountants may inflict, through inter alia, contaminating admissibility trails, is such that formal standards are needed.

Secondly, concerns are expressed, even by judges themselves, as to the difficulty of satisfying preliminary expert standards for appearing in court in the absence of an official framework within which to situate an individual's qualifications. Although these arguments are compelling on initial review, and would seem to mandate the introduction of some formal industry recognition standard, several commentators argue that the Court systems and their participants are well used to vetting expert witnesses and dealing with the potential shortfalls that surround this role. Further, judges and opposing barristers are capable of assessing the quality of proffered opinions.

In 1998[50] (but amended subsequently), the Federal Court of Australia issued a practice direction for expert witnesses. It presents the general duties of expert witnesses to the Court, namely that witnesses have an overriding duty to assist the Court on matters relevant to the expert's area of expertise, that an expert not be an advocate for a party, and that the expert's paramount duty is to the Court rather than to the party retaining the expert. The guidelines also provide that all assumptions of fact made by the expert should be clearly and fully stated, that where her/his report includes several opinions the expert should summarise them and the expert should provide reasons for each opinion ventured. In terms of the expert's report, the expert should attach a statement of

[45] Op.cit

[46] R v. Johnson [1994] 75 A Crim R 522

[47] Smith v. R [2001] 206 CLR 650

[48] Makita (Australia) Pty Ltd v. Sprowles, op.cit

[49] Van Akkeren, J and Tarr, J-A (2014), 'Regulation, Compliance and the Australian Forensic Accounting Profession', Journal of Forensic & Investigative Accounting Vol. 6, Issue 3, Special International Issue

[50] Federal Court of Australia, Practice Note CM7

the questions or issues that s/he was asked to address, the factual premises upon which the report proceeds and the documents and other materials that s/he was instructed to consider.

It may be difficult to determine whether expert evidence is, in fact, relevant and it may be necessary to conditionally admit an expert report, and consider its admissibility, in whole or in part, at a later stage. However, to be considered by the court in its deliberations, the expert evidence must be relevant. The Australian Federal Court (Commonwealth) allows a party to retain an expert, provided that the expert is qualified by dint of expertise, training and specialised knowledge. An expert witness may be retained to provide opinion evidence in the proceeding but the parties must advise the Court of their views on the number of experts, the issues that the expert will address and how the expert evidence might best be managed.

The role of the expert witness is to provide relevant and impartial evidence in their area of expertise and aid the Court in reaching its conclusion in the proceedings. The role of the expert is further expanded upon in the Expert Evidence Practice Note[51], issued by the Federal Court, and those seeking to utilise an expert witness also need to be cognisant of the Evidence Act 1955, section 17 and follow the Harmonised Expert Witness Code of Conduct[52], which applies to any expert witness engaged or appointed to (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings or (b) to give opinion evidence in proceedings or proposed proceedings.

The following overviews of reports on the use and value of expert evidence seek to demonstrate the issues other jurisdictions have experienced in determining the role, selection and operational parameters of expert witnesses and the route they have elected to follow as a result. Those overviews therefore aim to provide Serbian authorities with a range of blueprints from which they can extract best practice conclusions and apply them directly to the Serbian context.

3.a) European Commission for the Efficiency of Justice, Guidelines on the Role of Court-appointed Experts in Judicial Proceedings of the Council of Europe's Member States[53]

For EU jurisdictions, the Guidelines outline a range of ***ideal*** requirements in relation to the utilisation of expert witnesses within the respective member states.

The Guidelines provide that the expert should be tasked with locating and presenting the court with facts that only s/he can obtain but that it should be the judge alone who appraises and evaluates the facts presented and formulates the judgement of the court.

In terms of the selection of experts, this is something that ordinarily the court will do (although the court may also ask the parties in the case to propose the appointment of an expert) on the basis of the qualifications of the expert which the judge might determine by utilizing a list of experts. Any expert selected must possess a suitable qualification and/or the necessary experience or skills, be independent and impartial in terms of his/her relationship to the parties in the case and have the time and resources to conduct the assessment and to testify in court.

The parties in the case should have the opportunity to deliver an opinion on the selection of the expert and disclose any pertinent information they might have which could call the selection into question. Factors which might reverse the selection of an expert will tend to imply an actual or potential violation of the factual independence or personal impartiality of the expert. The court should

[51] Federal Court of Australia (2016), Expert Evidence Practice Note, https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-expt

[52] Federal Court of Australia (2016), op.cit; Annexure A

[53] European Commission for the Efficiency of Justice (CEPEJ) (2014), Guidelines on the Role of Court-appointed Experts in Judicial Proceedings of the Council of Europe's Member States

be able to terminate the appointment of an expert during court proceedings if the expert proves to be inept or lacks the requisite and professed expertise.

The expert has to produce, and report, her/his expert opinion in person, must take responsibility for its contents and cannot delegate that responsibility to any third person. Courts should be vigilant as to the potential monopolization of particular experts and consider a formal rotation of experts in order to avoid actual or prospective non-independence of experts. The expert should affirm her/his independence through the issuing of a public oath and should maintain an up to date knowledge of her/his field of expertise. The expert should provide her/his expert opinion in a reasonable time and certainly no later than the specified deadline. The Court should retain the right to ask the expert questions where the opinion is deemed incomplete or otherwise unclear or objectively incomplete. If the expert proves to be unqualified to act as such, the court may refuse to agree to, or indeed revoke, the status of expert. Where the expert does not complete her/his expert opinion on time the court should be able to impose a fine and/or in severe cases withdraw the expert from her/his appointment.
The expert's opinion will not be binding on the court or on the parties. The court must be able to evaluate the opinion freely and make its own determination as to whether the opinion is convincing or not, based in part upon any objections raised by the parties to the expert's opinion. Expert opinion should have the same probative value as any other piece of evidence. If the opinion is meant to aid the court in its understanding of evidence the expert's statements should have no binding effect. In that sense, the judge should be at liberty to diverge from the expert's position if s/he has reasonable grounds to do so.

In summary, all EU Member States should either introduce legal regulations concerning the rights and responsibilities of experts in the judicial process, or, review whether the afore-mentioned guidelines meet the prescribed minimum standards of the rules of conduct for experts that should apply in their jurisdictions.

3.b) Examination of the Guide to Good Practices in Civil Judicial Expertise in the EU[54]

The Guide suggests that the principles it contains should apply to **all** judicial experts, whether appointed by the Court, by both parties or by one or other of the parties. Although the Guide concerns itself with civil rather than criminal cases it does in fact deal with the notion of 'experts' per se and does not specifically refer to experts in civil cases or indeed differentiate those experts from those used in criminal proceedings. In addition, in its Annexes, the report specifically includes criminal regulations, codes and guidance.[55] It is also noteworthy that Judicial training events for Serbian judges provided by English judges[56] have, equally, focused on the role of the expert per se, drawing upon both civil and criminal cases). Thus, the "expert" is the key issue **not** whether s/he practices in civil or criminal courts. In that sense, the civil or criminal focus is almost incidental to the consideration of the role and nature of the expert. Forensic accountants are used in both types of case, but the focus should be first and foremost their expertise as forensic experts with subsequent fine tuning if a particular skillset or experience is required.

The Guide suggests that the principles it contains could apply to three categories of experts:

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[54] European Expertise and Expert Institute (2015), European Guide for Legal Expertise (EGLE) *Guide to Good Practices in Civil Judicial Expertise in the European Union*

[55]For example, the Netherlands Decree of 18 July 2009 (establishing the Netherlands Register of Court Experts and containing quality requirements for experts in criminal cases (Register of Court Experts in Criminal Cases Decree) 2009), the UK's Forensic Science Regulator guidance (Overseeing Quality, Codes of Practice and Conduct for forensic science providers and practitioners in the Criminal Justice system, 2014) and the UK Crown Prosecution Service guidance (Guidance on Expert Evidence,2014).

[56] Simmons, Judge Michael, 'Admissibility of Expert Evidence Workshop', Belgrade (2018), https://edward-montague.com/new-blog/2019/11/6/admissibility-of-expert-evidence-workshop-belgrade-2018

1. Technical Experts – those who provide scientific and technical knowledge on issues of fact
2. Expert Witnesses – those who provide opinions from their expertise in technical matters to clarify the parties' arguments and
3. Legal Experts - those who can be consulted by a judge on issues pertaining to rules, practices and rights applicable in law

The Guide recommends, for the EU, that the maintenance of quality within the ranks of expert witnesses could best be achieved through the creation by all Member States of a list of judicial experts. To be included on the list, the organisation created (or given the responsibility for the creation of such a list) should, as a minimum, check the expert's technical competence through, for example, (i) the expert's qualifications, (ii) professional curriculum, (iii) knowledge of investigative techniques, (iv) her/his legal knowledge of the standards governing the exercise of her/his main activity of purported expertise and the rules relating to experts' obligations and rights, as well as of the guiding principles of fair trial. The Guide suggests that the appointment of an expert should be based on a legal framework that includes a quality assurance system that should provide agreed criteria to ensure that the expert (i) has the requisite knowledge and competence in her/his professed field of expertise, (ii) is capable of communicating her/his findings orally and in writing in a well-constructed and well-argued report, (iii) is able to act independently and impartially and (iv) is able to work efficiently enough to submit her/his report on time.

The Guide suggests that each EU Member State should establish or appoint a relevant body to create the required criteria, ensure that they are adhered to by the experts and that that body should be able delegate all or part of its remit to expert national associations operating within their jurisdiction. The Guide notes that the judge should ensure that there is an adequate number of experts in each field and should try to avoid appointing the same expert repeatedly and not exclude others who have the same qualifications.

Finally, the Guide recommends that the expert's report should consist of subsections provided in a specific order so that the judge is able more easily to analyse reports emanating from numerous sources. The report must be perfectly clear in terms of what are matters of fact and what are assumptions made by the expert in relation to those facts[57]. The judge should retain the right to decide whether or not s/he will consider the expert's opinion in her/his final judgement.

3.c) Law Commission of England and Wales, Report on 'Expert Evidence in Criminal Proceedings in England and Wales'[58]

In its consultation paper, the Law Commission[59] had argued that there should be special rules in relation to expert evidence in criminal proceedings. It had maintained that the courts tended to rarely rule expert evidence inadmissible on the grounds of its unreliability, opting instead to assume that the reliability of evidence would be challenged during the course of a trial via cross-examination or the presentation of contrary evidence from the other side. In response to this state of affairs, the Law Commission suggested that:

1. Expert evidence should only be admissible if the court was satisfied that it was sufficiently reliable and that
2. Expert evidence would only be sufficiently reliable if:

    a. The evidence was based on sound principles, techniques and assumptions.

[57] See Annex I for an example of an ideal Expert Report template

[58] Law Commission (2011), Expert Evidence in Criminal Proceedings in England and Wales, No. 325

[59] Law Commission (2009), The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales

b. Those sound principles, techniques and assumptions had been properly applied to the facts of the case and
c. The evidence was supported by, that is was in keeping with, those principles, techniques and assumptions as applied to the facts of the case.

The Law Commission also suggested that the trial judge should be assisted by a number of guidelines to determine evidentiary reliability both of scientific and non-scientific evidence and that the new reliability test should be incorporated into a broader test governing the admissibility of expert evidence generally including separate common law requirements pertaining to assistance, expertise and impartiality.

Following the response to that consultation paper, the Law Commission[60] recommended that there should be a statutory test which would provide that an expert's opinion would be admissible only if it was deemed sufficiently reliable to be admitted (the 'reliability test') and that judges should be provided with a list of factors to assist them in applying the test and that judges should be directed to take such factors into consideration.

The core test of reliability would be that evidence could be admitted if:

(a) the opinion offered was soundly based, and
(b) the strength of the opinion was warranted having regard to the grounds on which it was based.

There would also be examples stipulated in the test as to why evidence would not be deemed sufficiently reliable to be admitted which would broadly concern issues of flaws in the data, method or process used to adduce the evidence.

The Law Commission further recommended that legislation should provide that expert evidence would only be admissible in criminal proceedings if:

(1) the court was likely to require the help of an expert witness; and
(2) it was proved on the balance of probabilities that the individual claiming expertise as qualified to give such evidence.

The Law Commission recommended that:

(1) there should be a presumption that expert opinion evidence tendered for admission is sufficiently reliable to be admitted, but this presumption would not apply if:

   (a) it appeared to the court, following a reasoned challenge, that the evidence might not be sufficiently reliable to be admitted, or
   (b) the court independently rules that the presumption should not apply.

(2) if the presumption no longer applied, the court should direct that there be a hearing to resolve the question of evidentiary reliability, unless the question could be properly resolved without a hearing.

Other recommendations made by the Law Commission included a requirement for pre-trial disclosure by the parties to the other parties and the court of any information relevant to the application of the expertise and impartiality tests, or, if requested, information relating to the reliability test, including evidence underpinning the expert's opinion and information which could substantially undermine the credibility off the experts being relied upon.

[60] Law Commission (2011), op.cit

3.d) Law Reform Commission in Ireland's Report on Consolidation and Reform of Aspects of the Law of Evidence[61]

The Law Reform Commission[62] sought to examine the rules regarding the admissibility of expert evidence in court, the role and function of expert witnesses and an examination of arrangements for ensuring the quality of expert evidence.

A focal point of the Commission's work was the issue of reliability of evidence and principally the arguments for and against the introduction of a reliability test.

In terms of retaining the *status quo*, it was argued, in submissions to the Commission, that any proposal requiring the courts to be involved in testing reliability of evidence was largely counterintuitive given the fact that the whole rationale for introducing a reliability test was because the knowledge of the court on such matters was wanting. Equally, it was submitted to the Commission that the nature of the adversarial system was such that unreliable testimony tended in practice to be detected through cross-examination which negated the need for a reliability test.

It was also contended that a general acceptance test or reputable body of opinion test of reliability would be too restricting in terms of the inclusion of evidence and might ordinarily exclude valuable evidence which did not fit neatly into either category, particularly if the evidence being presented was novel and/or innovative.

Offering a contrary view, it was argued that Ireland would benefit from the introduction of a reliability of testimony threshold to prevent or mitigate the introduction of so-called 'junk science' in which new scientific developments are proffered as evidence without any need on the part of the expert to establish its and therefore her/his reliability.

The Commission concluded that it was in favour of a reliability test and recommended that it be introduced as part of the process for adjudging the admissibility of all expert testimony. The Commission considered the forms such a test might take.

It considered first, creating a statutory provision whereby set criteria for assessing reliability would have to be satisfied by all parties seeking to adduce expert evidence. However, the Commission was of the view that this would have to be placed within the context of a broader instrument such as an Evidence Code or Act which would contain all rules pertaining to expert evidence.

The Commission felt, accordingly, that the formulation of judicial guidelines might be a more positive response to take and would involve a general acceptance test which would require any evidence adduced to reach a set level of acceptance within the field of expertise to which it related which would in itself confirm or deny its validity and negate the need for a judge to make that determination when s/he would lack the expert knowledge of the subject matter to do so.

The Commission accepted that this system might undermine the role of the jury given that, historically, it has been the jury that has been the arbiter, based on examination and cross-examination of expert witness testimony, of whether adduced evidence was reliable or not. Equally, the requirement for evidence to be accepted by the wider community of experts in order to satisfy the test would possibly exclude evidence on a new or innovative approach which had not yet been evaluated by the expert community. The Commission recommended that the notion of what constituted an 'expert' be clarified and that consideration be given to the question of whether experience-based knowledge could

[61] Law Reform Commission (2016), Report on Consolidation and Reform of Aspects of the Law of Evidence

[62] Law Reform Commission (2008), Consultation Paper – Expert Evidence

suffice for the presentation of expert testimony or whether there would still be a requirement for formal professional qualifications.

Moreover, the Commission also recommended that when determining the competency of an expert witness, the court should consider the length of time the expert has devoted to studying or practising her/his area of professed expertise and, if retired, the length of time the expert has been away from the field.

In its final report[63], however, the Commission elected not to introduce a threshold test of reliability for expert evidence, conducted before a judge which would have to be passed before such evidence could be admitted. It took this position for a number of reasons including the fact, in its view, that the adversarial process, through cross-examination and expert testimony from the opposing side, was designed to expose any flaws in the expert evidence and that the judge was not best equipped to assess questions of a scientific nature.

[63] Law Reform Commission (2016), op.cit

Part 4 – Comparative brief overview of the provisions within the Criminal Procedure legislation of EU member states

In all European judicial systems, experts' opinions are not binding on judges but, in reality, arguably, such opinions often have a decisive impact upon the outcome of litigation and the quality of the decisions rendered by the court. Both the EU continental legal systems experts (where experts are proxies for judges) and common law systems (where the expert is a special witness called by the parties), require competence, independence, objectivity and high standards of ethical conduct.

However, the manner in which said experts are engaged varies considerably, as do their respective rights and obligations, and this has led to an apparent distrust amongst judges and the parties. There is no universal system of procedural rules and their engagement is rarely preceded by a systematic check on their skillset, experience or ability as an expert. All countries grant the judge the sole power to commission an expert report but the choice of expert is a matter for the judge or the parties and is not necessarily contingent upon the experts being included on an official register (where those exist).

Ms Griss, the former president of the Supreme Court of Austria, noted[64] that *'…experts establish the facts and draw conclusions based on those facts, while witnesses do not have the right to draw conclusions and must limit themselves to testifying to what they have seen and heard.'* The consequence is that even if EU countries stipulate that experts' submissions are not binding on judges those submissions nevertheless have a decisive influence on the outcome of litigation and the quality of the decisions reached. There is, however, no principle whereby the opinion of an expert rendered in one jurisdiction will automatically be recognised in another jurisdiction. This can impact upon cross-border litigation (which in terms of organised crime is, and will become, more and more likely) since an expert report produced and offered in a court in another jurisdiction may not be accepted willingly since the procedures for recruiting experts differ in respective jurisdictions.

The difficulty in harmonising expertise in the manner needed stems from the variety of rules at play in different EU and other jurisdictions governing the role of and reports created by experts and the role of judges. In common law traditions, the judge plays a largely neutral and passive role in the management of proceedings, appraising evidence presented but assuming that the parties in the case have the responsibility for gathering and presenting evidence. In the civil law tradition, the judge is charged with determining the truth her/himself. Another issue in relation to harmonisation lies in the variation of terms describing experts. Thus, it is possible to speak of court ordered expert report, legal expert report, technical experts, expert witnesses, party experts, legal experts and judicial experts which may be used differently or interchangeable and which may describe the same or different kinds of expertise. Indeed, the European Commission for the Efficiency of Justice (CEPEJ)[65] noted previously that no consensus or standard had been reached in Europe to determine what equated to a judicial expert.

The CEPEJ[66] endeavoured to provide a definition itself, noting that a judicial expert was someone certified or accredited by a court or other authority to provide their expertise to the judicial administration. In

[64] Nuée, A (2015), *Civil-law Expert Reports in the EU: National Rules and Practices*, Directorate-General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs

[65] European Commission for the Efficiency of Justice (2014), op.cit

[66] European Commission for the Efficiency of Justice (2014a), Report on European Judicial Systems – Edition 2014 – Efficiency and Quality of Justice

relation to the expert report ordered by the court, the CEPEJ[67] argued that it was *'…an investigative measure assigned to a technician by, or with the approval of, a court or prosecuting or adjudicatory authority,, in order to contribute to the judicial settlement of present or future litigation by adducing technical or factual evidence. A judicial expert is a technician (doctor, plumber, architect, medial laboratory, etc.) appointed by the judge to carry out this investigative measure.'*

Considering the experts present in the judicial systems of the 47 states party to the European Convention on Human Rights, the EGLE[68] identified three categories of experts:

1. Law experts – these were present in six of the then 28 EU member states (now 27 following the exit of the United Kingdom) and can be consulted by judges on specific questions of law.
2. Technical experts – these were present in 26 countries of the then 28 EU member states and can provide scientific and technical knowledge to the court in its resolution of factual matters.
3. Expert witnesses – present in 20 countries of the then 28 EU member states and are appointed by the parties to a case to offer their expertise in support of the arguments raised by those parties in court.

The manner in which experts working in EU courts are recruited and appointed differ considerably, but, in the broadest sense, there are legal systems based in the civil law tradition which regard experts as proxies for the court and are therefore only able to be appointed by judges and there are those based in the common law tradition whereby each party is invited to appoint its expert.

The former tradition has been criticised on the grounds that court appointed experts are tied financially to the judge appointing them since s/he controls the payment made to them by the parties. In that sense, there is a suspicion that an expert is unlikely to offer evidence which contradicted the view that the judge may already have formed of the facts. Equally, court appointed experts may nevertheless still be challenged during the court proceedings by other experts for the other side also appointed by the judge at their request. Finally, the expert reports drawn up for the courts are often lengthy documents which may confuse, rather than enlighten, judges.

The latter tradition has been criticised on the grounds that expert witnesses do not allegedly provide the degree of independence and impartiality that judge appointed experts do, that the court proceedings are lengthened by dint of having two experts offering testimony and that a judge may often be called upon to adjudicate between two expert reports without necessarily, or probably, having no technical competence to do so.

In EU member states, it is noted that the judge alone selects the expert, with registers of experts being consulted for information only. Whether or not an expert is included on a register seems to have little bearing on the selection process even though arguably the presence of an expert on such a register could be an objective confirmation of her/his professional standing. This apparently reckless disregard is usually explained in terms of the fact that, in a number of jurisdictions, there may be no expert specialising in the matter required in the instant case and that there are some scientific authorities who do not wish to be included on a register but who are nevertheless willing to appear on a case by case basis (those on registers tend to have to appear when summoned or provide sound evidence justifying their refusal to do so).

[67] ibid

[68] European Expertise and Expert Institute (2015), op.cit

In the majority of cases heard in EU courts, the expert's report is a written rather than oral one and, in most situations, there is no guidance provided by the respective jurisdictions as to structure and content. CEPEJ[69] does offer such guidance but it is not compulsory. It has been argued, however, that, in the absence of a rigid structure, all reports should, in order to be credible, have reference to three key strands:

1. The statement of facts (including all of the supporting evidence upon which the report is based),
2. An analysis of the points at issue and
3. An account of the approach taken by the expert which led to her/his reasoned decision

In almost every EU country the judge was deemed not to be bound by the experts' conclusions and indeed the judge may order a counter-expert report if s/he is not satisfied by the original expert's report. One exception to this tradition, however, is Austria, where judges have to explain why they did not follow the expert's conclusion if that is their decision. Less formally, however, all jurisdictions expect their judges to justify the decisions they reach, particularly if they elect to disregard some, or all, of the expert testimony proffered.

There are differences, in short, between the approach taken to expert witness testimony in the respective civil and common law traditions and, in light of the likely changes to the dynamics of organised crime related cases in terms of extra-territorial proceedings, it will become ever more important to achieve a degree of harmonisation. Some initial steps that might be pursued in this regard include[70]:

1. The establishment of public registers of experts with checks undertaken on their competence, ethics and reputation.
2. The creation of a statute of experts, whether the experts have been appointed by the judge or instructed by the parties to provide their opinion to the court. The statute would specify the experts' obligations to the court and to the parties and to the need for independence, impartiality and adherence to the adversarial principle.
3. Strengthening the role of judges such that they could supervise expert reports more effectively and react to issues arising therein.
4. The establishment of a standard presentation for expert reports to facilitate checks on their scientific value.
5. The establishment of a single expert report procedure which, whether in national or cross-border litigation, would facilitate the acceptance of expert witness testimony within.

[69] Op.cit

[70] Nuée, op.cit

Part 5 – Comprehensive analysis of the legal system in Serbia in relation to the role of experts in general and forensic accountants in particular

Across the Western Balkans, expert witnesses perform an important role in judicial proceedings, offering judges evidence-based opinions on specific and complex issues[71]. They are required to advise on facts not law and are therefore not expected, nor should they be permitted, to provide legal conclusions. Nevertheless, it is a truism that the opinions of experts have become an important if not integral part of the judicial decision making process, with greater reliance being placed upon them in a climate where crimes and criminal behaviour are becoming increasingly complex and judges require further clarification of the issues such crimes raise.

In Serbia, the engagement and use of expert witnesses is controlled by the Criminal Procedure Code 2011 (as amended).

Article 113 provides for the authority conducting proceedings to order an expert examination (which it does, under **Article 117**, by means of a written order ex officio or on a motion by a party and defence counsel) when professional knowledge is deemed to be required to evaluate a fact in the proceedings but does not permit the expert to offer any contribution to the solution of any legal questions that have arisen. **Article 118** requires that an order for an expert examination contains *'1) the title of the authority which ordered the expert examination; 2) the first name and surname of the person designated as an expert witness, or the title of the professional institution or state institution entrusted with the expert examination; 3) a designation of the subject-matter of the expert examination; 4) the questions which should be answered; 5) an obligation for exempted and secured samples, traces and suspicious substances to be transferred to the authority conducting proceedings; 6) the time limit for submitting findings and opinions; 7) an obligation for the finding and opinion to be delivered in a sufficient number of copies for the court and the parties; 8) a caution that the facts learned during the expert examination represent a secret and 9) a caution about the consequences of providing false findings and opinion.'*

Under **Article 114**, an expert witness is a person who is deemed to possess the requisite professional knowledge for establishing or evaluating the relevant facts arising in the proceedings. In common with other countries in the Western Balkans, typically only one expert will be engaged but, equally, if the issue is deemed complex, two or more experts can be appointed. In either case, although the norm is for the expert to be based in Serbia, it is possible in exceptional circumstances for a foreign expert to be commissioned if the expertise required is not present in Serbia. The requirements of an expert are detailed in **Article 115** and note that a person summoned as an expert witness must respond to that summons and provide her/his findings within the time specified (or, with justification, request an extension). Failure by an expert to appear without justification may result in forcible attendance and a fine of up to 100,000 dinars. If an expert has already been cautioned for refusing to perform the role and tasks of an expert or refuses to perform the role without justification, s/he may be fined up to 150,000 dinars.

In relation to the provision of an expert opinion, the expert is required under **Article 119** to take an oath prior to commencing her/his expert examination using the *text 'I swear to perform expert examination in accordance with the rules of science or skill, conscientiously, impartially and according to the best of my knowledge, and that I will present my findings and opinion accurately and in full.'* Furthermore, the expert will be cautioned under **Article 120** that providing false findings and opinions constitutes a criminal offence. In a similar vein, the expert is also reminded under this Article to state accurately everything s/he finds and to present those findings accurately in accordance with the skill for which they have been engaged.

[71] See Annex II infra

Where the expert witnesses' findings are deemed to be deficient in some way, **Article 124** provides that the authority conducting the proceedings can *ex officio,* or on the basis of a motion filed by the parties, order an expert examination to be repeated. If the findings are unclear, incomplete, erroneous, self-contradictory or contrary to the circumstances in connection with which the expert examination was performed, or if there is doubt as to its truthfulness and/or if the opinion is unclear or contradictory, the authority conducting the proceedings can, if a repeated examination does not suffice, designate another expert witness to perform a new expert examination.

Although the opinions of experts are typically not binding upon a judge, it is clear that those opinions have a decisive influence on the outcome of the trial.
As Judge Simmons[72] has observed, *'…the opinion of an expert who has been appointed by the relevant court to address issues arising in the case is likely to carry significant weight in that court's assessment of those issues'*. In essence, experts are appointed in order to assist judges in determining the facts in a case where the judges lack the technical knowledge about some of those facts necessary to make that determination. Indeed, it would be counter-intuitive were judges ***not*** influenced by the opinions of the expert witnesses they have appointed for that purpose. What is important in consequence, however, is that selected experts are qualified, experienced and objective finders of fact and that the principle of equality of arms is fully adhered to. In Serbia, licensing of expert witnesses is undertaken under the auspices of the Ministry of Justice which places them on the Register of Expert Witnesses, with the process commencing once the court/prosecutor have informed the Ministry of the need for an expert in relation to a particular area of expertise. Prospective experts require at least five years of work experience and a postgraduate degree. The Ministry of Justice also holds the power to revoke the status of an expert where, for example, s/he performs her/his duties in an unethical or incompetent manner (usually indicated by a refusal to provide expertise, a failure to appear when summoned or a breaching of stipulated deadlines) or does so in an unprofessional manner (usually indicated by the provision of incomplete, unclear, contradictory or wrong opinions).

Unlike other countries in the Western Balkans, where the term runs from 4 to 6 years, and contrary to the guidance provided by both the European Expertise and Expert Institute (EEEI)[73] and the CEPEJ [74], Serbia does not prescribe a time limit on the validity of an expert witness' licence. There are no examinations for entry into the expert witness profession which has caused some concern over the quality of the selection process and the witnesses engaged via it. Although the Law on Experts provides qualification criteria **(Article 6)**, there is no apparent method for checking the bona fides of applicants nor verifying their expertise. This has led to a situation whereby newly appointed experts have no or little trial procedure experience, leading to subsequent delays and to a narrow pool of expert witnesses being engaged by the courts. This leads to those few becoming overburdened with work leading in turn to procedural delay and an apparent lack of transparency in the selection process for expert witnesses. Equally, there is no obligation in Serbia for expert witnesses to regularly update themselves on their areas of expertise. Consequently, experts who are more repeatedly utilised by the courts because of their professed experience may actually offer less credible opinions than those who are newly qualified and possess the latest knowledge but who are seldom selected because they lack the experience the courts favour. The lack of consistent training of expert witnesses also contravenes the recommended practices laid down in the guidance documents provided by the CEPEJ and EEEI.

[72] Simmons (2018), op.cit

[73] European Expertise and Expert Institute (2015), op. cit

[74] Op.cit

In accordance with international convention, and in line with the guidance provided by both the CEPEJ and EEEI, experts' opinions should only assist the court in the establishing of facts and not comment on issues of law. As the CEPEJ guidance notes, *'[t]he work of the experts ends where the appraisal of the facts begins, which is the task of the judge alone'*. However, it has been suggested[75] that, on the basis of information provided by expert witnesses and judges in Serbia, expert witnesses, whether at the invitation of the judge or of their own volition, do provide, contrary to accepted protocol for ensuring independence from the judicial process, opinions on matters of law. By way of example, in an unnamed criminal case[76] before a Serbian Basic Court, the court ordered an expert witness – a construction engineer - to determine whether, inter alia, based on evidence in the case files, a *'… building slab was positioned adequately and in compliance with all relevant regulation and (ii) whether the construction workers were required by law to adhere to the occupational safety rules.'* It is not clear whether the provision of legal opinions is the exception rather than the rule in judicial proceedings, but, arguably, any instance where a legal opinion is proffered by an expert witness should not, in the interests of a justice system that needs to demonstrate objectivity, be countenanced.

In addition, although experts are only supposed to be called where the court does not have the ability to determine relevant facts in a case, it appears that courts nevertheless rely on expert witness testimony irrespective of its probative value and this leads to delays in trials. This over-reliance has been commented on, with observers[77] noting that there was an apparent apprehension amongst lower court judges that Appellate Courts would not support their decisions if they were made in the absence of expert witness testimony.

As noted supra, there is no cap placed on the number of expert witnesses who may be called by the court. Indeed, if two expert witnesses have opposing or otherwise contradictory opinions, the court is permitted to seek validation from a commission of expert witnesses which analyses the findings of both experts and then call yet further experts to analyse the issues at hand irrespective of the determination of that commission. This ability runs contrary to the guidance provided by the CEPEJ, which suggest that multiple witnesses can overburden the trial and cause inefficiencies to arise. The simplest way to mitigate the impact of this practice would be to amend the Criminal Procedure Code so as to introduce such a cap, or, at the very least, provide a limited number of strict criteria under which additional experts may be drawn upon. However, more importantly, it is necessary to ascertain why the courts have elected to engage multiple experts, complementary experts and reviewers of both. It would appear that one or more factors might apply here:

1) The judge is not provided with the clarity of opinion on the facts s/he requires from the expert in order to reach a decision.
2) The expert has not been sufficiently well briefed in terms of what s/he is required to investigate.
3) The expert lacks the requisite skill and experience to address the requirements of the properly provided brief.

Until the rationale for multiple expert selection is determined, altering the legislation will have little direct impact upon the dispensing of effective justice.

[75] World Bank (2019), Examining the Experts - A Comparative Analysis of the Role of Expert Witnesses in Court Systems of the Western Balkans

[76] ibid

[77] World Bank (2014), Serbia Judicial Function Review

There is arguably a skills shortage in Serbia as a result of the process for appointing expert witnesses which requires the courts to notify the Ministry of Justice with information regarding the need for expertise within particular fields, but which does not require the Ministry necessarily to issue a call for said witnesses which they do instead upon their own discretion. This has arguably created a disconnect between the need for expertise expressed by the courts and the call for expertise issued by the Ministry of Justice and falls outside of the requirements laid down in the CEPEJ guidance. The difficulty is compounded by the fact that there are no regular calls for appointment to the list of experts and that the list is also not updated so that it may be the case that some experts will have left the profession but not de-registered and those that remain may not have the updated expertise needed to tackle increasingly complex criminal cases. Further difficulty may be encountered by the fact that experts who equip themselves well in cases might be more likely to be engaged to appear in subsequent cases, not least of all because cases featuring strong expert witness testimony are less likely to be overturned or otherwise challenged on appeal. A natural consequence of this tendency, however, is that the drawing of experts from a diminished pool, ignoring the newly qualified or less experienced witnesses, leads to delays and issues with efficiency in case progression. Moreover, there are no clear rules of engagement for the selection of expert witnesses in criminal proceedings so no way of discerning whether the process is transparent and fair and utilises the best placed and best qualified experts for each case allocation.

In a potentially counter-intuitive and undermining approach, it appears that is not uncommon for expert witness opinions to undergo revisions as a result of the courts' requested supplemental information. This may be tied to the fact that judges may issue unclear or incorrect instructions regarding the required content of the expert witness opinions. Thus, arguably, the time of expert witness is potentially wasted in the first instance and subsequently. It does not seem to be possible to determine whether or not a request for supplemental information in an expert witness testimony is derived from a failure on the part of the expert to construct a report which marries up with the judge's preferred course of action. Conversely, it does appear that a number of appeals are based on issues with expert opinions but it is not clear whether that fault lies with the instructions issued by the judges to expert witnesses, to the supplemental information gathered or the failing of the expert witness to convey the evidence sufficiently well.

In a more generalised administrative manner, it seems clear that expert witnesses do not necessarily adhere to the timetable laid down by the courts in relation to the submission of their opinions which leads to inordinate delays in trial proceedings. Ironically, expert witnesses often lay the blame for their apparent ineptitude on the fact that they are usually overburdened with work with any one witness often juggling multiple cases at a time.

In addition, Serbia does not have in place clear rules for selection by Public Prosecutors' Offices of expert witnesses such that it is not certain how witnesses are selected for pre-investigation stages of criminal proceedings. Equally, some expert witnesses (on the basis of them as individuals rather than because of their area of expertise) tend to be selected more frequently than others. The rationale for this skewed selection seems to be rest upon the high quality of work of some experts leading to their repeated and frequent engagement by the courts. In turn, the rationale for repeated selection seems to lie in the fact that cases featuring those select few leads to fewer appeals against the lower courts' decisions and hence there is a seeming reluctance by the lower courts to draw upon the expertise of less experienced expert witnesses.

The impact and effectiveness of expert witnesses can be affected negatively by the issuing of poor instructions because of the lack of requisite knowledge by judges and Public Prosecutors' Offices needed to determine the scope of the required opinion. This can be exacerbated by the lack of clarity as to the content and format of expert witness opinion reports which can lead to huge variation in structure and

degree of detail provided and in turn of the overall quality of witness reporting. This difficulty is further compounded by the fact that in Serbia, courts often accept the opinion proffered by the experts without critically examining its content, contrary to the CEPEJ guidance which requires a judge to verify and determine whether or not the expert opinion is objectively convincing.

In Serbia, it has been argued[78] that expert witnesses are often late in submitting their opinions leading to subsequent delays in proceedings. In addition, experts may fail to appear, leading to trial adjournments. It is also clear, however, that all of the fault for procedural delay does not rest solely with ineffective expert witnesses but can also be caused by poor trial management. If not symptomatic of poor trial management, the seemingly common practice of releasing the original case file to the expert witness for review out of court seems at least to be a somewhat retrograde step, not least of all because its absence from court halts proceedings, but also because it permits tampering with or loss of some or all of the file. Beyond those logistical issues, delay by the experts in returning the file can also exacerbate the difficulty, irrespective of whether the file has indeed been tampered with or not.

In Serbia, although there are (as detailed supra) sanctions that can be applied to an expert witness who fails in her/his duty by, for example, failing to appear when summoned or fail to provide the requested opinion, it appears that sanctions are rarely applied in practice such that experts who are late in presenting their opinions are not disciplined and warnings and fines tend to be issued only in extreme circumstances and even then are often not enforced. The rationale seems to be that judges are often reluctant to sanction experts whom they rely upon in the administration of their judgements given that it has been the experience of some judges that those experts they have sanctioned previously refused subsequently to appear for them. It follows, not unnaturally, that experts have the right to be reimbursed for their work and an obligation to provide quality expertise and adhere to deadlines in exchange for that right. Interestingly, there is no stipulated requirement in Serbia for continuous training or updating for expert witnesses nor is there a professional body which could provide a focal point for the work of said witnesses.

Serbia has nevertheless endeavoured to create a route for the use of forensic accountancy experts within the judicial process. Article 19 of the LOJSA provides for the use of forensic accountants within a Financial Accounting Service within the Organized Crime Prosecutor's Office.

That article defines and delineates the prospective role of forensic accountants as *'…a person who assists the public prosecutor in analyzing cash flows and financial transactions for the purpose of prosecution…'* and *'…a civil servant with specific expertise in finance, accounting, auditing, banking, stock exchange and business and with completed specialized training in the field of criminal law organized by the Judicial Academy.'*

The LOJSA regards the forensic accountant as having an integral role to play in tackling economic and corruption related criminal offences and pays great store to the need for forensic accountants' analysis, reports and conclusions to be of assistance to the public prosecutor so that s/he can distinguish between legal and illegal activity. Accordingly, the forensic accountant is charged with a range of tasks including reviewing, comparing and connecting the documentation related to the case and forms part of a task force engagement (as recommended by the FATF)[79] in the initial investigative team. Any forensic accountant thus employed must be familiar with and adhere to international accounting standards which are concerned with rules for the preparation, recognition, measurement, valuation and presentation of items of financial statements, as well as standards of professional ethics.

[78] ibid

[79] Financial Action Task Force (2012) op.cit

The LOJSA requires the forensic accountant, in her/his role as an assistant to the public prosecutor, to advise the public prosecutor in terms of the accounting and financial documents need to be obtained, what should be disseminated from their content in order to connect transactions to particular events and analysing databases held in the Judicial Information System. Once that evidence has been analysed by the forensic accountant, s/he applies it to the situation being dealt with in the case.

It is also envisaged by Nikolić and Đorđevic[80] (notwithstanding the **advisory** nature of their publication) that if s/he does not prepare the report, the forensic accountant will also assist the public prosecutor in the preparation of the Motion for Financial Expert Assistance entrusted to the court-appointed expert. During the investigation, the forensic accountant will also assist the prosecutor in connecting disparate pieces of evidence which arise during the course of the investigation.

The forensic accountant's report should record the outcome of analysis undertaken in relation to business transactions, bank statements, open source data and any other relevant documentation contained in the case file and is regarded as evidence gathered under the public prosecutor's authority. The report should conclude with observations on the activities that might constitute a crime and a calculation of respective harm/benefit arising from said activities. On the basis of that report, the prosecutor should decide whether or not to proceed with criminal proceedings.

In order to maximise the impact of the role of the forensic accountant, it is certain that s/he should be knowledgeable about the collection, transformation and analysis of "Big data" in order to conduct a financial investigation. The degree of opacity that surrounds the movement of illicit finance, with multiple disguised banking and company transactions, demands that the forensic accountants allocated to a criminal case are adept at locating and interrogating huge swathes of data. Indeed, the sheer volume of "Big data" leads to issues in relation to its analysis, namely how the data is assessed for reliability, how the data is extracted, how it is refined, different file types synchronized and how the data can be transformed into meaningful evidence. In analysing data, a forensic accountant is required to undertake bespoke text searches of documents, undertake statistical analysis, discern hidden connections across and between datasets, examine and analyse transactions and cash flows and assess the harms and benefits exhibited by the data explored.

In pre-investigation proceedings, forensic accountants will often examine financial statements and compare current and previous data and assess it against control organisations or sectors in order to understand whether, and, if so, how, they demonstrate actual or potential criminal activity. It is clear that a forensic accountant will make use of a number of analytical tools and undertake fraud detection analysis, and there are a host of red flags which may give rise to a reasonable suspicion of criminal activity, including complex but illogical business transactions, transactions with entities outside of the scope of professed business expertise of the organisation and the existence of bank accounts or subsidiaries in tax lenient jurisdictions.

This section has highlighted a number of causative issues pertaining to the use of expert witnesses within the Serbian legal system. There is a clear disconnect between a fairly rigorous legislative framework in the form of the Law on Expert Witnesses and the Criminal Procedure Code on the one hand, and the potential undermining of that framework through the decision-making processes of officials involved in the process on the other. These have already been considered in detail supra, but include the licensing of experts, the selection of experts, the over-use of a limited number of experts, the lack of a requirement for ongoing professional development and a number of issues pertaining to trial and case management. Given the

[80] Nikolić, B and Đorđevic, A (2019) (Eds), Practicum for Investigation and Adjudication of Corruption Offences,

USAID Government Accountability Initiative

centrality of expert witnesses to criminal cases brought before the courts, it is imperative that this disconnect is mitigated.

Solutions to, or mitigation of, the issues identified rely both on changes to the legislative framework and of the decisions taken by prosecutors and the judiciary and it is likely that the latter will occur more easily than the former given the fact that much of the legislative framework across the Western Balkans as a whole is similar in construction and outlook. There are a number of largely avoidable disconnects at play in relation to the status and role of expert witnesses in Serbia and the avoidability stems from the fact that most could be improved by the simple expedient of reversing policy and process decisions.

A core issue which arguably leads to or at least exacerbates other issues is the lack of expert witnesses and/or the lack of expert witnesses within particular fields. The current disconnect which sees the courts notifying the Ministry of Justice of the areas for which they require experts not automatically being actioned by the Ministry but rather within its own timeframe, at its discretion and exercising its perception of need. Aside from the delay caused, there is also a very real danger of a lack of expertise for a number of areas featured in criminal cases. Accordingly, consideration should be given to the need for the Ministry of Justice to accede to the requests of the courts in terms of the experts they regard as being required and for the Ministry to issue scheduled and regular calls for experts. This call, in conjunction with the entry procedure noted supra, should ensure a wide range of available and qualified expert witnesses for the criminal courts. It would also allow the system of extraterritorial use of experts channeled through the Baltic Register of Forensic Science Experts (noted supra) to be introduced, at least conceptually, within the Western Balkans.

Currently, as noted supra, prospective experts are not required to pass any form or entry examination as is currently a requirement for most national expert organisations, such as the UK-based Academy of Experts[81] and the US-based Forensic Expert Witness Association[82] and for most profession-specific organisations, such as the Association of Certified Fraud Examiners[83]. The creation of, and requirement to pass, a standard and recognised examination for entry onto the Register of Expert Witnesses would allow a degree of consistency to be established in terms of qualifications, level and range of experience required. It is important to strive to balance academic and professional experience with trial experience since the lack of the latter may lead to delays if the engaged expert is not familiar with the processes, systems and protocols of the trial.

A licence to be an expert could be granted upon passing the examination and the period over which that licence would extend could be stipulated for all experts. Renewal of the licence could be made contingent upon a demonstrable level of continuous professional development. This would ensure that the original intention for an examination process, that of up to date knowledge, would be maintained. As has been noted supra, the increased complexity of corruption and financial crime in particular requires expert witnesses to ensure that their understanding of such fields constantly evolves in line with that complexity.

The examination, the licence and the steps necessary for its subsequent renewal would also allow for a larger and stronger cadre of experts to be established from which the prosecutor and judge could draw upon for appearance in their cases. This would also obviate a current issue which is the over-utilisation of a limited number of seasoned experts by the courts with the disadvantages that that overuse involves, and which have been detailed supra.

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[81] Academy of Experts, https://www.academyofexperts.org

[82] Forensic Expert Witness Association, https://www.forensic.org

[83] Association of Certified Fraud Examiners, http://www.acfe.combalti

A natural corollary to the examination and licensing requirement is the need for training of experts in criminal procedure, trial processes and the drafting of effective, and consistent, expert witness opinions. Aside from ensuring that expert witnesses do not inadvertently transgress the procedural requirements and thereby cause a delay in, or derailing of, a case, training would also allow a non-seasoned expert to gain the experience s/he would ordinarily have received by appearing as an expert witness. The difficulty for new experts, as noted supra, has been a tendency for the courts to over-select from a narrow field of experienced and therefore perceptually reliable expert witnesses rather than risk engaging a less-experienced expert. However, for this desire to be fully realised, it is important that judges refrain from actualising their reported fear that a failure to rely upon an expert witness' testimony will lead to the Appellate Courts reversing, challenging or criticizing their lower court decisions. This apparent state of affairs has created two connected issues, both of which may serve to undermine the improvement of the selection and utilisation of expert witnesses.

First, judges tend to select the more experienced expert witnesses because they probably gauge that cases featuring strong expert witness testimony are less likely to be overturned or otherwise challenged on appeal. Secondly, those over-utilised expert witnesses may actually provide a less than rigorous service to the court because of the pressure they may be placed under because they are called upon so often. It is a cruel irony, therefore, that the Criminal Procedure Code provides for financial sanctions (noted supra) against any expert witness who refuses to testify or, having agreed to testify, fails to turn up, and the Ministry of Justice can subsequently also revoke the expert's status as an expert for those failures and/or for breaching a report submission deadline and/or for offering up incomplete or contradictory opinions. In those circumstances, it is highly probable that an expert witness will endeavour to appear at whatever personal or professional cost and/or ensure that their reports are submitted in a timely fashion. Both situations may result in a lack of effective evidence because the pressure of time may inevitably lead to certain areas or issues being dealt with in a cursory rather than detailed manner. Either of those situations might have a deleterious effect on the particular case and/or the reputation of the criminal justice system. Indeed, where the case concerns financial crime connected to organised crime or corruption, years of work and potential convictions may be lost as a result of ineffective expert witnesses. Indeed, the principle of equality of arms may also be transgressed.

It is arguable, therefore, particularly in the present situation of certain experts being called upon disproportionately often, that the balance of encouragement of expert witnesses and the maintenance of procedural order is uneven. Experts are clearly of utility to, and important for, the trial process, but the punishment of those who fail to appear or undertake their role as required, rather than simply suspending them or preventing them from appearing as a witness, is counter-intuitive and potentially a serious impediment to justice. This is also in the context of the fact that the sanctions appear (as noted supra) not to be imposed by the courts in any case.

Accordingly, the provisions of the Criminal Procedure Code in this regard should be reviewed. As an additional factor for consideration, rather than apply sanctions to experts who fail to provide their reports, or to provide them in a timely fashion, it would be prudent to ensure that court officials took a more proactive approach to trial and case management . This might include, for example, liaising with the expert witness over the deadline for her/his report so that the selected date fitted both the court's timetable and the expert's commitments and would ensure a timely submission. In addition, the CEPEJ[84] has suggested that *'…certain countries have found it useful to appoint judges who are specifically in charge of expertise-related matters, including matters relating to the selection of experts, the failure of experts to deliver an expert opinion meeting good quality standards, etc.'* Thus, it might be prudent to introduce this concept to the judiciary in

[84] European Commission for the Efficiency of Justice (CEPEJ) (2014), op.cit

Serbia. This might provide a route for the informal mentoring of experts whereby experts could, for example, be made aware of common pitfalls experienced by other experts in terms of the timely completion of their reports, of achieving a consistent approach in terms of the structure of their reports and of ensuring that the content of those reports is accurate. Equally, experts would be able to convey their own concerns regarding, for example, the pressure placed upon them as witnesses by the court's timeframes for delivery of their reports (particularly is they are routinely selected because of their experience). The ways in which such pitfalls and concerns might be managed and/or avoided in the first instance, could then be conveyed by the judges and the experts (particularly those lacking experience) be rendered less prone to making the mistakes that lead to subsequent procedural delays. Moreover, this system would also allow other judges to be informed of, and understand, the characteristic reasons for delay in, or poor quality of, expert report submissions which they could contemplate and respond to in their own cases through, for example, creating deadlines which acknowledge the complexity of each case and/or the other engagements of the experts.

By the same token, part of the reason judges **are** so reliant upon expert witnesses is because they themselves lack the expertise necessary to adjudicate on some of the facts in the case before them. Thus, consideration should be given to the training of judges on the broad aspects of the issues likely to appear at trial. By way of brief example, if, during a financial crime case, evidence of money laundering was likely to be adduced, it might be useful for the judge to be aware of the generic money laundering process (that is the stages of placement, layering and integration of illicit funds) and of the characteristics of the typology thought to have been utilised by the defendant. In that way, the judge would be able to stipulate more precisely the areas s/he required the expert to offer an opinion on and, either, may not require the services of an expert at all or at least be in a position not to feel it necessary to engage more than one expert. This would also allow the system to avoid procedural delays. The Judicial Academy in Serbia provides training but it might be prudent to consider, for example, the wide national and international remit of the UK's Judicial College (which includes formal training programmes as well as judicial expert working groups, peer-to-peer dialogue and the provision of what it refers to as 'judgecraft' which includes courses on 'assessing evidence' and 'case management') and its complementary partners, the European Judicial Training Network and the International Organisation for Judicial Training, respectively.

It is also clear, and this is largely unique to Serbia, that the visible role of, and importance given to, forensic accountants in dealing with financial crime cases (because of their statutory provision in the LOSJA) has brought an added complexity to bear because such cases rely upon a range of other complementary experts and a degree of sophistication and logistical structure within the agencies or departments investigating and prosecuting such cases. The European Commission[85] has observed previously that, of the five financial forensic experts envisaged for Serbia, only two had been employed and that the *'…institutional and technical capacity of police, prosecutors and judges remains insufficient overall and needs improvement.'* Arguably, forensic accountants cannot be viewed as other experts are, not because of their specialism but because they were introduced by the LOSJA with a specific mandate in mind, namely, financial crime components within organized crime and corruption cases. In that regard, there are structural issues, unconnected to their role as expert witnesses per se, which need to be addressed before they can begin to contribute effectively to cases. Although the LOSJA provides for the use of forensic accountants the Criminal Procedure Code is silent in that regard, effectively subsuming them within the broad category of 'expert'. The LOSJA does, as is noted supra, stipulate a broad range of expertise within its definition of a forensic accountant. However, it does not specify how that range might reasonably be obtained, certified or tested. Equally, it is unrealistic to expect a forensic accountant to possess a deep knowledge of all of the areas the LOSJA identifies as being essential to the role.

[85] European Commission (2019), *Serbia 2019 Report*, Commission Staff Working Document

That requirement is not made of any other profession where, rather, it is the norm to specialise in a particular facet within the overall professional remit. Accordingly, those administering the LOSJA should endeavour either to recruit and train forensic accountants in a limited field or, if connected, fields, or to engage certified financial investigators, asset tracing lawyers, experts in money laundering typologies and tracers of capital flight and illicit financial flows etc. to provide the requisite information to forensic accountants for them to then utilise the skills most have in analysing financial records. This will of course have a financial and logistical imperative but a reliance upon a relatively few forensic accountants to be across a large number of specialist fields, particularly in the context of the broad but equally applicable issues pertaining to experts per se in Serbia, is unlikely to result in successful tracking, investigation and prosecution of high-level financial criminals and their cases.

Moreover, the LOSJA does not specify the level or degree of experience required in order to qualify for engagement as forensic accountant expert in criminal proceedings. Conversely, the range of activity, at the investigation, case preparation and case delivery stages, is wide. It is also the case that in most financial crime investigations, particularly those arising from corruption and/or organized crime (which is the key driver of the LOSJA), the forensic accountant is part of a broader team of experts all of whom rely upon and/or give support to one another in order to attain, analyse and present evidence of the crime being investigated. It is therefore unrealistic and potentially unfair to expect forensic accountants to form the central plinth of the criminal prosecution and thought should be given as to how forensic accountants' skill set and experience could be sufficiently tested and assessed.

Part 6 – The equality of arms principle

The principle of 'equality of arms' requires each side in a case to have a reasonable opportunity to present its case in a way which does not place it at a clear disadvantage compared to the other parties. This means in practice, in broad terms, that each party should have the right of equal access to equal information, an equal opportunity to present their arguments and observations and the granting of equivalent status for their experts as is granted to those presented by the prosecution. Caselaw provides that the principle should be assessed on a case by case basis with the procedure as a whole being considered rather than one particular part of it. In the accusatorial legal tradition, the principle means that the defence expert must be placed on the same footing as the expert put up by the prosecution. In the inquisitorial system, the expert is deemed to be neutral irrespective of whether her/his opinions advantage or disadvantage the defendant.

However, the European Court of Human Rights (ECtHR) has held in a number of judgments that the defence had been placed in a disadvantageous position and the equality of arms had been violated. This is pursuant to Article 6 of the European Convention on Human Rights[86] (ECHR) which provides:

> *1. In the determination of ... any criminal charge against him [sic], everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law....*
> *3. Everyone charged with a criminal offence has the following minimum rights:*
> *(a) to be informed promptly, in a language which he [sic] understands and in detail, of the nature and cause of the accusation against him [sic];*
> *(b) to have adequate time and facilities for the preparation of his [sic] defence;*
> *(c) to defend himself [sic] in person or through legal assistance of his [sic] own choosing or, if he [sic] has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
> *(d) to examine or have examined witnesses against him [sic] and to obtain the attendance and examination of witnesses on his [sic] behalf under the same conditions as witnesses against him [sic…*

In the case of Eggertsdottir v. Iceland [2007][87], the applicant complained that a body that provided the Icelandic Supreme Court with an expert opinion (State Medico-Legal Board) comprised four members who were employed at the hospital where the applicant was treated and three members who were part of a Forensic Chamber to whom the State Medico-Legal Board had previously referred the matter for examination. The ECtHR held that this situation gave rise to an understandable apprehension on the part of the applicant as to the impartiality of the court.

In the case of Bönisch v. Austria [1985][88], the ECtHR held that there had been a violation of the principle of equality of arms because the expert (later appointed as an expert by the court) had set the criminal proceedings in motion and should therefore have been regarded as a prosecution witness. As such, the defence expert witness should have been placed on a similar footing as the prosecution witness. However, the defence expert was interviewed as an ordinary witness whereas the prosecution witness has been interviewed as an expert, permitted to attend the hearings and to put questions to the defendant, to witnesses and to comment on their evidence.

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[86] *European Convention on Human Rights 1950* (as amended), https://www.echr.coe.int/Documents/Convention_ENG.pdf

[87] Eggertsdottir v. Iceland [2007] ECHR 31930/04

[88] Bönisch v. Austria [1985] Application No. 8658/79, ECHR

Conversely, in the case of Brandstetter v. Austria [1991][89], the court had appointed an expert and refused to interview any further experts. The expert belonged to the same institute as the person who had set the criminal action in motion but because the defence could not provide evidence that the expert was impartial the mere fact that he was a member of the institute was not sufficient to call his neutrality into question. The ECtHR argued that to adopt a different view would have severely restricted the number of experts available to the court system.

The ECtHR has also ruled in favour of the defendant where the procedural position of the expert was not in doubt, but the impact of her/his evidence was adjudged unfair. In the case of G.B. v. France [2001][90], an expert was provided, when he was being interviewed, with documents concerning the defendant's previous criminal activity. Following a fifteen- minute adjournment during which he read the documents, the expert changed the assessment he had reached in his earlier written report. The defence then requested a second expert report which was refused, and the defendant was sentenced to 18 years' imprisonment. The ECtHR held that this refusal did not constitute a violation per se of the Convention but that the complete change of mind during the same hearing would have made an impression on the jury and a second report should therefore have been ordered by the court.

It is clearly essential, lest the equality of arms principle is violated, that court appointed experts should balance their own opinions with explanations provided by the defence. In Mantovanelli v. France [1997][91], the court held that *'…the principle of equality of arms (within the wider concept of a fair trial, including the adversarial character of the proceedings, and an opportunity to contest the evidence of the other side) must also apply in the case of a report on technical matters.'* In this case, the applicants argued that (a) they had not been afforded the opportunity to give instructions to the medial expert appointed by the court, (b) neither they nor their counsel had been informed of the dates of the interviews conducted by the expert in the hospital (where the applicants' daughter had died) and (c) they had not been afforded the opportunity to cross-examine the expert when he provided his evidence at trial. The ECtHR held that the domestic proceedings were unfair and that there had been a violation of Article 6 (right to a fair trial) of the ECHR).

However, the ECtHR also held that the principle of adversarial proceedings could not give rise to a general right to be present during the expert's activities since the principle should be applied to proceedings in a broad sense. In a dissenting opinion, one judge opined that is was sufficient for a party to be able to challenge the expert report in court at the point at which the evidence was assessed. The principle of equality of arms is relevant to matters concerning the appointment of experts in proceedings. The fact that the experts are employed by one of the parties does not constitute a sufficient reason for declaring the proceedings unfair. The ECtHR has argued that although this may give rise to a perception of bias on the part of an expert it is not decisive. What is decisive, however, is the position occupied by the expert through the course of the proceedings, the manner in which they perform their function and the way in which the judge assesses their expert opinion. In ascertaining the expert's procedural position and role in the proceedings, the ECtHR has taken into account the fact that an opinion provided by a court appointed expert may carry significant weight in the national court's assessment of the issues the expert speaks to.

In Shulepova v. Russia [2008][92], the applicant complained that the proceedings concerning the lawfulness of her detention in hospital had been unfair because the court-appointed experts had been biased. She relied on Article 6 § 1 of the ECHR and the ECtHR noted that the experts appointed by the court were

[89] Brandsetter v. Austria [1991] Application Nos. 11170/84; 12876/87; 13468/87, ECHR

[90] GB v. France [2001], Application No. 44069/98, ECHR

[91] Mantovanelli v. France [1997], 8/1996/627/810 ECHR

[92] Shulepova v. Russia [2008] ECHR 1666

employees of the respondent hospital and owed a general duty of obedience and loyalty to their employer. They were asked to assess the accuracy of the diagnosis given by their colleagues and to review their finding as to the necessity of the applicant's involuntary confinement. They were thereby required to analyse the performance of their colleagues with the view to assisting the court in the determination of their employer's liability. Given that the hospital's representative had clearly expressed the hospital's position that the medical findings in the applicant's case had been correct and that the applicant's claims had been unfounded, the applicant's apprehension as to the experts' neutrality can be considered as objectively justified. As regards the experts' role in the proceedings, the ECtHR noted that the main issue in the case was whether the findings of two the medical panels as to the necessity of the applicant's involuntary confinement had been correct. As the applicant contested those findings, the court appointed experts to review them. Having no medical qualifications, the judges of the court were bound to attach significant weight to the experts' opinion on the medical issue and indeed, the experts' opinion was the only evidence confirming the accuracy of the diagnosis made by those panels. Therefore, the ECtHR argued that the experts played a dominant role in the proceedings.

The ECtHR also observed that experts from institutions other than the respondent hospital could have been relied upon by the court. The ECtHR also noted that, although the applicant could have called an expert witness of her choice, the procedural position of that witness would not have been equal to the position of the court-appointed experts. Statements of court-appointed experts, who are by the nature of their status supposed to be a neutral and impartial auxiliary of the court, would carry greater weight in the court's assessment than an opinion of an expert witness called by a party. The ECtHR held that the principle of equality of arms has not been complied with and that there had indeed been a violation of Article 6 § 1 of the ECHR.

Conversely, in Poletan and Azirovik v. the Former Yugoslav Republic of Macedonia [2016][93], both applicants alleged a breach of Article 6 of the ECHR in relation to the refusal of the domestic courts to allow an alternative expert examination by an independent institution. They alleged that the Criminal Investigations Bureau (the Bureau) was biased since it operated within the Ministry of the Interior, the body initiated the criminal proceedings against them. The ECtHR noted that the Bureau provided two expert reports regarding the quality and amount of a substance found in the second applicant's vehicle that those reports confirmed that the substance found was pure cocaine. The ECtHR noted that the fact that an expert was a member of the police did not in itself justify the perception that he would be unable to act in a neutral manner. The ECtHR noted further that the experts were called upon to assist the court in determining the quality and quantity of the drugs and that the subject of the examination did not relate in any way to their employer. The applicants had not in fact challenged the experts' finding that the substance in question was cocaine and the ECtHR felt that the decision by the trial court to refuse the applicants' request for an alternative expert examination was within that court's discretion to decide. Accordingly, there was not, in the view of the ECtHR, any violation by the appointment of members of the Bureau as experts of the principle of equality of arms.

Furthermore, the requirement of a fair trial does not obligate a court to order an expert opinion or other investigative measure simply because a party requests it. The court is free, subject to compliance with the terms of the Convention, to refuse to call witnesses proposed by the defence. In Huseyn and Others v. Azerbaijan [2011][94], the court dismissed testimonies from a number of witnesses in the applicants' favour, noting that those witnesses were members or employees of the political parties of which the applicants were also members. The court had effectively deprived the applicants of the opportunity of a full and

[93] Poltetan and Azirovik v. the Former Yugoslav Republic of Macedonia [2016] ECHR 417

[94] Huseyn and Others v. Azerbaijan [2011], Application Nos. 35485/05; 45553/05; 35680/05 and 36085/05, ECHR

comprehensive assessment of the evidence used against them and accordingly had violated Article 6 § 1 taken together with Article 6 § 3 (b), (c) and (d) of the ECHR.

It is also noted that it is not the ECtHR's role to determine whether a particular expert's report made available to a domestic judge was reliable or not, that decision being one for the judge alone to make. The caveat here is that rules pertaining to admissibility of evidence must not deprive the defence of the opportunity to challenge the findings of an expert through, for example, the introduction of alternative opinions and reports. There are occasions upon which a refusal to allow an alternative expert examination of material evidence might be construed as a breach of Article 6§1 of the ECHR.

In Stoimenov v. the former Yugoslav Republic of Macedonia [2007][95], the applicant complained that the courts had refused his request for an alternative expert examination concerning the quality of the poppy-tar the case was concerned with and that they had based their decisions on the expert reports produced by the same Ministry (of the Interior) as had brought the criminal charges against him. The ECtHR reiterated the principle of equality of arms as part of the wider concept of a fair hearing within the meaning of Article 6 § 1 of the ECHR which required that each party be afforded a reasonable opportunity to present their case under conditions that do not place them at a disadvantage vis-à-vis their opponent. The ECtHR held that this principle was not complied with in this case as the applicant's repeated requests for an alternative expert examination were refused and thus the applicant was unable to challenge the report of the Bureau as evidence submitted by the public prosecutor. The ECtHR held that there had been a breach of Article 6 § 1 of the ECHR.

In relation to Serbia, and to the use of forensic accountants (through the provisions of the LOSJA) in particular, it is difficult to make a determination as to whether or not their use as expert witnesses breaches the principle of the equality of arms, not least of all because such determinations tend to be made on a case by case basis and relate to the ***actions*** of the expert rather than the ***presence*** of the expert. Furthermore, the Criminal Procedure Code itself does not distinguish between categories of experts, with Article 114 defining an expert witness as *'…a person who possesses the requisite professional knowledge for establishing or evaluating a fact in the proceedings.'* In addition, any apparent breach might be attributed to any number of reasons ranging from the fact the defendant might not be able to engage her/his own forensic accountant or that the prosecution-appointed forensic accountant might be biased, under-skilled or incompetent. Equally, the forensic accountant may have used in a case preparation or advisory capacity rather than as a testifying witness and applying the principle in that situation could actually prevent cases, in which the defendant lacks similar support, from coming to court.

Those points aside, it is a fact that the only distinction between a forensic accountant and any other kind of expert utilised by the courts, lies in her/his field of specialism. Thus, the key question should actually be whether a defendant accused of a financial crime and facing a forensic accountant expert witness is at any more a disadvantage than a defendant accused of murder facing a ballistics expert. Accordingly, it is the presence and maintenance of the principle of equality of arms that should be the key issue for consideration, not the particular skillset of the expert. In that regard, the principle of the equality of arms is not specifically mentioned in the Criminal Procedure Code, although it is inferred in Article 16 *('…[t]he court is required to make an impartial assessment of the evidence examined and based on the evidence to establish with equal care both the facts against the defendant and the facts which are in his favour.'*) which alludes to procedural equality. In addition, Article 117 provides for the defendant to make a motion for an expert examination and for an appeal to be submitted in the event that the public prosecutor denies that motion

[95] Stoimenov v. the Former Yugoslav Republic of Macedonia [2007], Application No. 17995/02

and Article 68 details the range of rights with which the defendant is provided, including the right to present facts and propose evidence in her/his defence and to pose questions to any witness presented.

As has also been noted supra, discussants on the application of the principle in Serbia observe that *'…[c]ontemporary criminal proceedings…seek to strike a balance between the need to protect society from crime and the protection of the personal freedoms and fundamental rights of defendants. According to generally accepted views, securing such a balance does not, however, imply full equality of the parties in criminal proceedings, or absolute protection of a defendant's rights. Nevertheless, the principle of equality of arms necessarily implies the existence of a balance of procedural rights making possible for the parties' equal presentation, representation and realisation of their interests in criminal proceedings.'*[96]

In a very real and practical sense, the dynamic at play in Serbian courts, in which the judges and the prosecutor control the engagement of expert witness testimony, the application of the equality of arms principles lies more within their control than it does within legislative provisions, and the manner in which that control is exercised in future economic crime cases will demonstrate the status of the principle and any emerging issues for concern.

[96] Petrović, A and Jovanović, I (eds) (2012), *New Trends in Serbian Criminal Procedure Law and Regional Perspectives - Normative and Practical Aspects*, Organisation for Security Cooperation in Europe, Mission to Serbia

Part 7 – Prospective changes to the normative framework within Serbia

The normative framework established in Serbia, and to a greater or lesser extent across the Western Balkans, is fairly robust. Although the required focus of this study is fixed firmly on procedural matters, it is arguably appropriate to note for the purposes of context that, despite the legislative measures and structural refinements introduced, issues remain. A recent UK Government-led meeting [97] noted that *'[a]lthough capacity has significantly improved, many agencies remain ill-equipped to tackle the threats of organized crime and corruption across the region'* and *that '…specialist investigators in complex fields, such as financial crime and money-laundering, are in short supply, not least because of low salaries. It is not uncommon for law-enforcement officials, having been trained to specialist or expert level, to move to the private sector because of higher wages.'*

The United Nations Office on Drugs and Crime[98] has observed in relation to the Balkans that *'…evidence-based findings indicate that OC activities are particularly significant in a number of areas, such as drug or firearms trafficking, and that some factors, such as corruption and poor economic performance, enable organized crime'* but that *'…due to the lack of advanced statistical and analytical tools to monitor levels, trends and patterns of OC, it has not been possible to understand whether progress is being made in the fight against OC or, on the contrary, organized criminal groups maintain or even increase illegal activities.'*

What seems abundantly clear from the research undertaken for this study, is that the success or otherwise for most jurisdictions in mitigating the nature and impact of the financial crime component of organised crime and corruption is typically measured by dint of reference to successful detection, investigation and prosecution of such crime. The role of forensic accountants in the Serbian context has been highlighted and promoted as a core mechanism for achieving this goal, notwithstanding the systemic issues noted supra. However, ultimately, the successful utilisation of forensic accountants rests upon their acceptance and presence as expert witnesses within judicial proceedings in Serbia, which is administered by the Criminal Procedure Code and controlled by the courts. It is at this point, therefore, that a potential disconnect exists within Serbia and by extension across the Western Balkans as a whole.

As noted supra[99] , there remain a number of issues with the availability and use of expert witnesses. Those issues and their potential resolution have been examined[100] but, in broad terms, include **more regular calls for applications for expert witnesses and/or regular examination of candidates, a prescribed period for which an expert might be licensed before renewal was required, demonstration that they had maintained updated knowledge of their area of expertise in order to remain registered or be considered for re-registration.** This is particularly crucial in forensic accounting since the typologies for money laundering, for example, evolve with great rapidity and increasingly draw upon the benefits of crypto currency. The increased complexity of financial transactions in this context demands that forensic accountants remain constantly apprised of, and experienced in, these dynamic processes. The most logical place to situate rules for the recognition, required expertise, qualifications, training and the updating of professional knowledge is the Law on Experts (which the Balkan states as a whole utilize but which are currently lacking in specificity).

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[97] Wilton Park (2020), Tackling Serious and Organized Crime in the Western Balkans

[98] United Nations Office on Drugs and Crime (2019), Measuring Organized Crime: Assessment of Data in the Western Balkans, Research Brief

[99] See Part 6 supra

[100] ibid

Beyond that, there are recognized associations in a number of jurisdictions which represent a range of subject matter experts and organisations which represent only their respective professions. Thus, the Academy of Experts in the UK[101] vets its members on the basis of a qualifications check, references by instructing lawyers and samples of previous expert reports. It also provides and requires Continuous Professional Development and requires strict adherence to a Code of Practice. The US-based Forensic Expert Witness Association[102] has established the Certified Forensic Litigation Consultant for qualified expert witnesses and forensic consultants who have met the eligibility criteria in terms of the completion of education courses in the subjects of forensic analysis, litigation consulting and expert witnessing. Profession-specific organisations attesting to the expertise of their members' knowledge include the Association of Certified Fraud Examiners[103] which requires proven work experience in a fraud-related area, the passing of an examination and the maintaining a number of hours of common professional education within each year of membership.

In terms of the Criminal Procedure Code, **Article 113** (which provides for the authority conducting proceedings to determine whether or not a case requires expert examination) seems a little counter-intuitive in relation to prospective financial crime cases where it is inevitable that expert analysis and opinion will always be required. Moreover, and not simply because of the principle of the equality of arms, the defence will also need to adduce evidence from its own expert in order to successfully represent its clients. Some thought needs to be given, therefore, to extending the **right** to the defence to call expert witnesses rather than to simply have the ability to **request** said witnesses.

The definition of an expert witness (**Article 114**) could be augmented. Its current iteration, that is, *'…a person who possesses the requisite professional knowledge for establishing or evaluating a fact in the proceedings'*, is vague given that it does not automatically stipulate what the 'professional knowledge' consists of, nor how such knowledge is to be tested and certified. Equally, having professional knowledge of forensic accounting does not, as noted supra, necessarily denote expertise in all aspects of that discipline and this may lead to cases involving complex, multi-layered financial transactions being examined by a generalist rather than specialist expert witness. The augmentation referred to therefore could be a requirement for demonstrable additional qualifications, expertise and/or experience in the specific issue at the centre of the case. This would in turn require a more dynamic and wide-ranging register of experts and of their individual specialisms. The prospective amendments to the Law on Expert Witnesses referred to supra may also provide assistance in this regard. This might then obviate the need for multiple expert witness examinations because the expert would be more properly aligned with the specific issues within the case at the outset of proceedings.

Article 115, which, inter alia, deals with the duties of an expert witness and sanctions for purported failures in that role, should be revisited. The first issue to consider is why experts fail to respond to the summons to appear, fail to provide their findings and opinions or fail to do so within a timely fashion. If, as has been discussed in the study, their apparent intransigence is connected to workload pressures rather than to unprofessional behaviour, the issuing of fines to experts seems somewhat unfair. It is also counter-intuitive because it may lead to examinations being rushed and to reports being submitted in an unfinished state in order for the expert to avoid the sanctions that would otherwise be applied. If experts are deemed to be professionals, they should be treated as such. It would, arguably, be a better outcome for the system of criminal justice to simply dispense with inefficient or unwilling experts rather than to utilise but then fine them.

[101] Op.cit

[102] Op.cit

[103] Op.cit

Article 124 (which allows for the expert examination to be repeated in the event that it, inter alia, contains findings that are *'…unclear, incomplete, erroneous, self-contradictory or contrary to the circumstances in connection with which the expert examination was performed, or if there is doubt as to its truthfulness'*, or if the opinion provided is *'…unclear or contradictory*') should be revisited. This does not mean that courts should not be able to rectify apparent shortcomings but, rather, that a serious attempt should be made to determine why such shortcomings occur. Logically, if the expert is qualified in terms of qualifications and experience in the field with which the case is concerned, such issues should not arise and certainly not with the regularity that the presence of this Article might suggest. Equally, an effort should be made to qualify the criteria since it is not entirely clear how a court could reasonably determine how evidence was, for example, 'erroneous', 'unclear' or 'contradictory'.

One way in which such a determination could be reached, however, would be for the right for the defence to call its own witnesses (within Article 13, as noted supra). In that way, any inconsistencies in the expert witness testimony would be teased out by the respective experts' evidence and by any cross-examination undertaken or authorised by the courts.

Notwithstanding the fact that forensic accountants should, by dint of standard international requirements, be qualified, it is arguable that **a defined or more defined procedure for the selection of experts by public prosecutors be created to ensure the required quality and experience of expert witnesses is maintained**. This is simply because, qualification as a forensic accountant does not necessarily mean that s/he is qualified in all aspects of that field nor that any evidence proffered by a forensic accountant will necessarily be sound, reliable and admissible. Serbia might usefully draw upon other jursidictions' and commentators' experiences and determinations in this regard.

Thus, for example, Myers[104] suggested that a degree of self-analysis should be undertaken by an expert before s/he offers up their testimony to the court. The US Federal Rules of Evidence and the case of Daubert v. Merrell Down Pharmaceuticals, Inc.[105] require the court to consider a range of factors which relate to the perceived value of the expert knowledge when determining the admissibility of proffered evidence. In a case cited in training of Serbian judges[106], a three-fold test was laid down in R v. Bonython[107] by Chief Justice King which might assist Serbian courts in deciding whether or not expert evidence was needed, whether the body of knowledge from which the expert was drawing her/his evidence was sound and whether the expert was indeed an expert in her/his field. Beyond those examples, the study identifies and discusses numerous approaches examined by civil and common law jurisdictions in relation to the provision of expert testimony and to the characteristics such experts should ideally possess and the lessons learned from those jurisdictions' experience could be applied in the broader Balkans and narrower Serbian context.

In addition, other issues and their resolution, discussed supra, include **the need for the creation of guidelines regarding the format and minimum content of an expert opinion**, the more logical connection of demand for, and supply of, required experts according to the expressed needs of the court rather than the need as perceived by the Ministry of Justice, and the reduction by the courts of their over-reliance upon a small number of experienced expert witnesses at the expense of better qualified/trained but less experienced ones.

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[104] Op.cit

[105] Op.cit

[106] Simmons, op. cit

[107] Op.cit

Finally, it was suggested, supra, that Serbia consider **a legislative requirement for mandatory training for prospective experts on trial procedure, a mandatory requirement for registered experts to maintain and update their knowledge in their area of expertise and, in tandem, a requirement for judges and prosecutors to undertake training upon the types of issues likely to feature in cases that will come before them, which would allow judges to more effectively review the expert witness reports.**

However, even if the issues pertaining to the use of experts discussed supra are ameliorated, the tackling of financial crime relies upon a much broader strategic approach and it is that approach upon which dedicated focus must be placed within Serbia and across the Western Balkans more widely. It is clear that the LOSJA has introduced an overarching framework, including the specified use of forensic accountants, for more effectively tackling financial crime within the context of corruption and organized crime. It is, arguably, within the scope of this study to consider the practical requirements of that approach although it is not within its scope to specify the political, legislative or financial changes necessary to allow it to be actioned.

In broad terms, however, any investigation into financial crime conducted in Serbia and ideally, as envisaged by the LOSJA, utilizing the skillset of forensic accountants, must:

- Be independent - investigations may be politically sensitive and, accordingly, it is essential for investigations to be independent and free from interference.
- Have adequate investigative power – the relevant authority should have the power of search, arrest and detention, the power to search bank accounts, the power to intercept communications, require suspects to declare assets, to answer questions on oath and the power to seize travel documents.
- Have access to adequate resources – the authority should have a budget fit for its intended purpose.
- Be confidential - investigations should be conducted covertly prior to any arrests being made in order to reduce the opportunities for compromise or interference.
  Engage international mutual legal assistance as appropriate – multi-jurisdictional cases require assistance with locating witnesses and suspects, detecting and pursuing money trails, a surveillance capacity, exchange of intelligence and arrest, search and extradition protocols and procedures.

The major goal of financial investigation, particularly that in relation to corruption and organized crime, is to identify and document the movement of money during the course of, or, as in the case of Politically Exposed Persons (PEPs), following, criminal activity and to establish a link between the origins of the money and its beneficiaries and to determine the point at which the money was received, where it was stored/deposited and to provide information about, and proof of, the predicate criminal activity. Investigations should, accordingly, initiate money laundering investigations when appropriate in order to uncover financial and economic structures, disrupt transnational criminal networks and gather knowledge on crime patterns.

An investigative strategy should be established with a comprehensive policy that emphasises financial investigation as constituting a core part of law enforcement efforts, ensuring support from high-level officials within the country who publicly promote and adopt a national AML/CTF (anti money laundering/counter terrorist financing) strategy and the releasing of public statements by high-ranking officials supporting and demonstrating commitment to the national strategy and recognising their accountability.

Multi-disciplinary Groups/Task Forces should be created comprising forensic accountant and specialised financial investigators, experts in financial analysis, forensic computer specialists and prosecutors. These groups have been anticipated to a degree by the LOSJA. It is imperative that these groups/task forces enjoy efficient and effective coordination between members of the team and their respective agencies, establish information sharing systems whereby all investigative services are aware of previous or on-going investigations made on the same persons and/or legal entities so as to avoid replication. Equally, policies and procedures should be established that promote the sharing of information/intelligence within intra-agency and inter-agency cooperative frameworks, a process should be created whereby intra-agency or inter-agency disputes are resolved in the best interests of the investigation and competent authorities should consider establishing written agreements such as Memoranda of Understanding or similar agreements to formalise these processes.

Investigations should aim at identifying the extent of criminal networks, the scale of criminality and tracing the proceeds of crime and, in doing so, develop evidence for use in criminal proceedings and thereby enhance the overall effectiveness of the AML/CTF regime. Sources of information routinely drawn upon in the context of an ideal structural framework would include criminal records and intelligence, arrests, indictments, convictions and criminal links, anti-money laundering/counter-terrorist financing disclosures, suspicious transaction reports, currency transaction reports and wire transfer reports, financial information (such as bank accounts and customer due diligence information), classified information(such as terrorist financing information), regulatory information and open source intelligence and general sources.

Key strategic considerations during the investigation phase include managing the material discovered, investigative decision making and developing and implementing the investigative strategy. It is important, *ab initio,* to establish effective management systems and ensure that all material gathered (that is, information, intelligence and evidence) is recorded, analysed and stored. In relation to the material obtained, it is important to provide management and analysis of it in order to assist with decision making, focussing and prioritising lines of enquiry, identifying gaps in material, providing information to make resource decisions, assisting with the development of interview schedules, providing objective summaries of any case and assessing compliance with legislation and guidance. Aside from the need to pursue this systematic approach in order to successfully conclude the investigatory work, it will be imperative that forensic accountants and allied experts are able to distill the information obtained within the court setting in the form of their expert opinions.

Serbia has taken the innovative step of publicly including forensic accountants in its legislative framework rather than simply subsuming them within the broad term of experts so common in other jurisdictions. The full utilisation of forensic accountants in criminal cases, particularly those pertaining to financial crime, is dependent upon the resolution of issues pertaining to expert witnesses per se within the Serbian legal system and the creation of an investigative environment which allows forensic accountants to operate in conjunction with a full range of experts from a number of allied and disparate fields.

APPENDICES

Annex I - Expert Report Template[108]

'I – INTRODUCTORY SECTION:

a) Name of the Court and number of the case;

b) Identity of the authority who ordered the expertise or of the party who appointed the Expert;

c) Date of the report, date of appointment or mandate and date agreed as the deadline to submit the report;

d) Parties involved, their lawyers and/or other representatives with mention of the parties who were present or represented during the expertise operations;

e) Expert(s) in charge, with a Curriculum Vitae mentioning titles, qualifications and past experience;

f) Declaration of independence and impartiality;

g) Expert's insurance certificate;

h) Names and specific tasks of any assistants or Technical Experts who contributed;

i) List of documents that were received and used as the basis of the Expert's opinion or to reply to questions, drawing a distinction between the documents provided by the parties and those collected by the Expert, as well as the bibliography related to the topic in question;

j) Questions asked by the judge or the party who appointed the Expert and specific guidelines, if any;

k) Particularities of the investigation and actions taken;

l) Specifics regarding the procedure (e.g. Right of inspection and blocking law in medical cases);

m) Procedure followed to ensure that the adversarial principle is followed during the whole period of the Expert investigation.

II - BODY OF THE REPORT

Investigation, discussion and Expert's analysis

a) Background information/contextual elements;

b) The facts, their origins and established causes and the parties' declarations regarding these;

c) All relevant scientific or practical facts in relation to the case and questions asked with reference to appropriate scientific literature;

d) The findings/results of the Expert's investigation or research;

e) Observations and or challenges made by the parties on the pre-report (if any);

[108] Abstracted from European Expertise and Expert Institute (2015), op.cit

f) If a range of findings/results, opinions is possible, an indication of the likely range and source of each;

g) Expert's reaction to all requests and answers to all questions asked by the Parties;

h) Record of all discussions with the Parties.

The report may also include any other aspects concerning the Expert's investigation, that are specific to the procedure that are applicable due to rules of local Law, to the ethics of the specific field of expertise or to any professional rule or guidelines of the Expert.

III – CONCLUSIONS

a) A justified and logically presented opinion and/or answer to the questions

b) Information on the degree of reliability of the findings, and

c) Signature of the Expert preceded by a "Statement of Truth" along the following lines:

"I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer."

Annex II – Comparative overview of criminal procedure legislation in Serbia, Albania, Bosnia and Herzegovina, Croatia, Kosovo, Montenegro, Slovenia, Bulgaria and Macedonia

Jurisdiction and Legislative Provision	Engagement of Expert	Number of Experts Engaged	Duty of an Expert	Expert's Report Procedure/ Presentation	Sanctions	Oath of Expert	Additional Expert Opinion	Additional Provisions, e.g. Technical Advisors	Observations
Serbia (Criminal Procedure Code)	Article 113 Expert ordered by the authority conducting the proceedings	Article 114 One single expert but in a complex case two or more experts	Article 115 Expert summoned required to respond to the summon and to present her/his findings and opinion with a certain time limit. Limit may be extended upon provision of justification by the expert	Article 118 Order on expert examination includes questions to be answered, time limit for submission of findings and opinions	Article 115 If expert fails to appear, or appears and then departs without justification, the authority conducting the proceedings may force her/him to attend and impose a fine of up to 150,000 dinars If expert refuses to perform expert examination without justification or failure to provide findings or opinion with the designated time limit, the court may fine her/him up to 150,000 dinars	Article 119 Expert will be asked to take an oath before her/his expert examination in the following form: 'I swear to perform expert examination in accordance with the rules of science or skill, conscientiously, impartially and according to the best of my knowledge and that I will present my findings and opinion accurately and in full.'	Article 124 Where the findings are unclear, incomplete, erroneous, self-contradictory or contrary to the circumstances in connection with which the expert examination was performed or if there is doubt as to its veracity Where the opinion is unclear or contradictory If these issues cannot be rectified by a repeated examination of the expert witness the authority conducting the proceedings will designate another expert witness to perform a new expert examination	Article 125 A professional consultant is a person possessing professional knowledge in the field in which an expert examination has been ordered. A party may select and issue a power of attorney to a professional consultant when the authority conducting proceedings orders an expert examination. Article 300 In order to clarify certain technical and other expert questions which are being posed in connection with obtained evidence or during questioning of a suspect or conduct of other evidentiary actions, the public prosecutor may request from a person holding appropriate qualifications necessary explanations about those questions. If the suspect or defence counsel is present during the provision of explanations, they may request that that person provide more detailed explanations. If necessary, the public prosecutor may also request explanations from an appropriate professional institution.	N/A

Jurisdiction and Legislative Provision	Engagement of Expert	Number of Experts Engaged	Duty of an Expert	Expert's Report Procedure/Presentation	Sanctions	Oath of Expert	Additional Expert Opinion	Additional Provisions*, e.g. Technical Advisors	Observations
North Macedonia (Criminal Procedure Law)	Article 236 Expert drawn from Registry of Experts Preliminary Procedure – order for expert issued by Public Prosecutor Main hearing – order for expert issued by the court	Article 236 One expert unless the task is complex in which case two or more experts appointed	Article 237 Expert shall be obliged to respond to the invitation and provide her/his finding or opinion within the stipulated deadline Report should contain evidence reviewed, tests conducted and opinion including how it was reached	Article 239 Expert invited to review the subject of the expertise and specify all that has been seen or noticed and present her/his unbiased opinion Article 242 The record on the expert's report or the written findings and opinion shall indicate who conducted the inspection and prepared the expert's report The body ordering the expert's report will inform the parties that the report has been completed and that they can review the written findings and opinion	Article 237 Expert who does not appear, does not justify her/his absence or refuses to produce a report s/he may be punished by a fine (500-1,500 Euro payable in Macedonian Denars)	None However, under Article 239, the expert is forewarned that providing a false statement is a criminal offence	Article 243 If the expert's findings or opinion are ambiguous, incomplete or inconsistent the expert will be asked to revise those findings or opinion	Article 244 Public prosecutor, defendant and defence counsel shall have the right to nominate technical advisors from the registry of court approved experts to help gather information or contest the expert's report *Article 45 envisages the formation of investigation centres within the Public Prosecutor's office.	Article 236 If there are no academic, scientific or expert institutions registered to conduct evaluation, a foreign expert may exceptionally be engaged.

Jurisdiction and Legislative Provision	Engagement of Expert	Number of Experts Engaged	Duty of an Expert	Expert's Report Procedure/Presentation	Sanctions	Oath of Expert	Additional Expert Opinion	Additional Provisions, e.g. Technical Advisors	Observations
Albania **(Criminal Procedure Code)**	Article 179 Expert drawn from Registry of Experts by the proceeding authority	Article 179 Where the matter is complex or requires knowledge from different fields the proceeding authority shall assign many experts	Article 179 Expert shall be obliged to perform the entrusted task unless grounds to exclude her/him exist or s/he claims not to be competent or not to be able to carry out the expert examination Article 183 Expert warned of obligations and responsibilities deriving from criminal law Proceeding authority notes the expert examination questions to be addressed by the expert	Article 185 Expert shall provide her/his opinion in writing Where the facts are complex, and the expert cannot give an immediate answer, the proceeding authority shall grant a time period of no more than 60 days For highly complex issues, the period may be extended once only for a period no exceeding 30 days	Article 186 If the expert does not give her/his opinion within the determined time period or the request for time limit extension is not accepted or s/he performs her/his tasks with negligence the expert may be substituted. The substituted expert may be sanctioned with a fine up to 10,000 Albanian Lek	Article 183 'Aware of the moral and legal responsibility concerning the task I am undertaking, I shall perform it with honesty and fairness and keep the secrecy of all the actions related to the expert examination.'	Article 186 Expert may be substituted by another expert if the original expert does not give her/his opinion within the determined time period or the request for time limit extension is not accepted or s/he performs her/his tasks with negligence	N/A	Article 179 Where the expertise required cannot be sourced from the list of experts registered with the court, the proceeding authority shall assign other foreign or local experts from outside the list

Jurisdiction and Legislative Provision	Engagement of Expert	Number of Experts Engaged	Duty of an Expert	Expert's Report Procedure/Presentation	Sanctions	Oath of Expert	Additional Expert Opinion	Additional Provisions, e.g. Technical Advisors	Observations
Croatia (Criminal Procedure Code)	Article 309 Expert witness testimony shall be ordered by the authority conducting the proceedings	Article 309 One expert shall be appointed and if the expert testimony is complex two or more experts shall be appointed	Article 310 Person summoned as an expert is bound to appear and present her/his findings and opinion	Article 312 Expert shall be asked to thoroughly examine the object of her/his testimony, to indicate accurately everything s/he notices or discovers and to give her/his opinion without bias and in conformity with the rules of the pertinent science or skill. Article 314 Findings and opinion of expert witness shall be immediately entered into the record. Expert may be permitted to subsequently submit findings and opinion in writing within a term determined by the authority conducting the proceedings Article 316 Where expert witness testimony is given in the absence of the parties, they shall be notified that the testimony was given and that they may inspect the record on the expert witness testimony or the written expert findings and opinion	Article 310 If an expert fails to appear without justification or refuses to give expert testimony, he may be fined an amount not exceeding 50,000 Croatian Kuna	Article 312 Expert may be asked to swear to give truthful testimony to wit: 'I do solemnly swear that I shall carry out expert testimony confided to me with due diligence and to the best of my abilities and I shall present my findings and opinion accurately, completely and objectively in accordance with rules of this profession.'	Article 317 If findings of the expert witness are unclear, incomplete or contradictory and the anomalies cannot be removed by re-examination of the expert witness, the same or other expert witness shall provide new expert witness testimony Article 318 If opinion of expert witness contains contradictions or other anomalies or if grounds for suspicion arise that the opinion is inaccurate and these drawbacks or suspicion may not be removed by a re-examination of the expert witness, the opinion of the other expert witness shall be requested	N/A	N/A

Jurisdiction and Legislative Provision	Engagement of Expert	Number of Experts Engaged	Duty of an Expert	Expert's Report Procedure/Presentation	Sanctions	Oath of Expert	Additional Expert Opinion	Additional Provisions, e.g. Technical Advisors	Observations
Bosnia-Herzegovina (Criminal Procedure Code)	Article 96 Expert evaluation requested in writing by the Prosecutor or Court	Not specified	Article 97 Expert must present a report to the Prosecutor or Court that shall contain the evidence examined, tests performed, findings and opinion reached and any other relevant information the expert considers necessary for a fair and objective analysis. Expert shall provide a detailed explanation of how s/he came to a particular opinion	Article 99 Expert shall be invited to study the subject of her/his testimony, shall precisely present everything s/he knows and finds and shall be invited to present her/his opinion without bias and in conformity with the rules of her/his science or art. Expert shall rely solely on evidence presented to her/him by authorised officials, the Prosecutor or the Court in forming opinions or inferences on the subject being examined. Expert shall only testify as to a matter derived from first-hand knowledge (unless information s/he relies upon emanates from information reasonably relied upon by other experts in the same field) Expert may be given clarifications and be able to examine the records Expert may propose that evidence be presented that are of relevance for the presentation of her/his findings	None specified	None specified but Article 99 provides that the expert will be specifically warned that presentation of false testimony is a criminal offence	None specified	N/A	N/A

Jurisdiction and Legislative Provision	Engagement of Expert	Number of Experts Engaged	Duty of an Expert	Expert's Report Procedure/Presentation	Sanctions	Oath of Expert	Additional Expert Opinion	Additional Provisions, e.g. Technical Advisors	Observations
Montenegro (Criminal Procedure Code)	Article 117 Expert witness evaluation shall be ordered by the written order of the authority conducting the proceedings	Article 117 One expert witness unless the task is complex in which case two or more experts appointed.	Article 118 Person summoned as an expert witness shall be bound to appear in Court and present her/his findings and opinion within a term determined by the Court order. That term may, upon a motion filed by the expert, be extended if justifiable reasons exist.	Article 120 Expert shall be asked to thoroughly examine the object of her/his evaluation, to indicate everything s/he notices or discovers and to present her/his opinion without bias and in accordance with the rules of science or skills Authority conducting the proceedings shall make sure that all the relevant facts and determined and made clear and for that purpose shows the expert the object to be examined and asks her/him questions and if necessary seek clarification of the expert's findings and opinion. Expert witness may receive explanations and may be permitted to inspect the files and may propose that some evidence be examined, and information obtained which are of relevance to her/his findings and opinion. When the expert witness evaluation is given in the absence of the parties, they shall be notified that expert evaluation has been given and that they may inspect the record on the expert witness evaluation and the written expert findings and opinion	Article 118 If a duly summoned expert witness fails to appear without justification or refuses to give expert evaluation or offends the Court or other parties in the proceedings or if s/he refuses to present her/his findings and opinion within the specified period, s/he may be fined an amount not exceeding 1,000 Euros	Article 120 The expert witness shall be given a special instruction that giving a false expert witness evaluation is a criminal offence The expert may be required to take an oath to wit: 'I do swear to perform the evaluation conscientiously and impartially, according to my best knowledge and to present my findings and opinion precisely and completely.'	Article 125 If data in the findings of experts do not correspond with each other on essential points, or if their findings are ambiguous, incomplete or contradictory and if these anomalies cannot be removed by a re-examination of the experts, other expert witnesses shall provide new expert witness evaluation Article 126 If the opinion of the expert witness is contradictory or inconsistent or if there is grounded suspicion that the opinion is inaccurate, and these deficiencies or suspicion may not be removed by a re-examination of the expert witness, the opinion of other expert witnesses shall be requested	N/A	N/A

Jurisdiction and Legislative Provision	Engagement of Expert	Number of Experts Engaged	Duty of an Expert	Expert's Report Procedure/Presentation	Sanctions	Oath of Expert	Additional Expert Opinion	Additional Provisions, e.g. Technical Advisors	Observations
Slovenia (Criminal Procedure Act)	Article 249 Expert opinion shall be ordered by a written decree of the agency which conducts the procedure and will specify the facts to be established or assessed by experts	Article 249 One expert unless a complex enterprise is involved in which case two or more experts shall be appointed	Article 250 A person summoned as an expert shall be bound to comply with the summons and give her/his findings and opinion Article 252 Expert will be instructed that s/he is bound to study the object of the examination carefully, indicate precisely whatever s/he observes and finds and gives an unbiased opinion in accordance with the rules of science and professional expertise	Article 252 The agency in charge of the procedure shall direct the expert examination, indicate to the expert the objects s/he is to examine, ask her/him questions and, if necessary, demand explanations related to her/his finding and opinion Expert may be given explanations and be permitted to inspect the case file. S/he may propose that evidence be taken or that objects and data material to her/his analysis and opinion be secured Article 254 Expert finding and opinion shall immediately be entered in the record. Expert may be allowed to submit her/his findings or opinion within a set period determined by the agency before which the procedure is conducted	Article 250 If an expert who has been duly summoned fails to appear without justification of if s/he refuses to perform an expert examination s/he may be fined in accordance with Article 78	Article 250 Expert shall be warned that false testimony is a criminal offence Expert may be required to take an oath before commencing expert examination although the precise wording of that oath is not detailed	Article 257 If data in the findings of experts differ on essential points or if their findings are ambiguous, incomplete, contradictory and if such deficiencies cannot be removed by a new hearing of experts, the expertise shall be repeated with the participation of the same or different experts Article 258 If the opinion of experts contains contradictions or deficiencies or if a reasonable doubt arises about the correctness of the presented opinion, and these deficiencies or doubt cannot be removed by a new hearing of experts, the opinion of other experts shall be required	N/A	N/A

Jurisdiction and Legislative Provision	Engagement of Expert	Number of Experts Engaged	Duty of an Expert	Expert's Report Procedure/Presentation	Sanctions	Oath of Expert	Additional Expert Opinion	Additional Provisions, e.g. Technical Advisors	Observations
Bulgaria (Penal Procedure Code)	Article 144 The court or body concerned with pre-trial procedures will institute an expert examination where the clarification of certain circumstances concerning the case requires special knowledge in the field of science, arts or techniques Article 145 Act instituting expert examination shall specify the grounds for the examination and the object and task of that examination	Not specified but Article 147 notes that an expert examination '…shall be entrusted to experts…'	Article 149 Expert obliged to appear and to give an opinion on the questions of the examination	Article 152 Expert shall draw a statement in writing in which s/he will provide the grounds on which the examination was conducted, the means by which it was undertaken, and the conclusions reached	Article 149 In the case of non-appearance or refusal to provide an opinion without justification the expert shall be fined up to 500 lev	N/A	Article 153 Where the expert opinion is not sufficiently complete and clear a complementary expert examination will be provided Where the expert's statement is not well-grounded and there is a doubt about its correctness a repeated examination shall be appointed	N/A	N/A

Jurisdiction and Legislative Provision	Engagement of Expert	Number of Experts Engaged	Duty of an Expert	Expert's Report Procedure/Presentation	Sanctions	Oath of Expert	Additional Expert Opinion	Additional Provisions, e.g. Technical Advisors	Observations
Kosovo (Draft Criminal Procedure Code)	Article 133 State prosecutor may engage expert if there is a question material to either the guilt or innocence of the defendant or the extent of harm caused by the criminal offence The expert must have specialized training or experience that is relevant and current Article 134 The expert will be provided with a specific written question or series of questions Basis for the engagement of the expert including her/his specialized expertise, education, experience and previous service as an expert to the court	N/A	Article 134 Expert must write a report that summarizes her/his method of analysis and conclusions reached Expert may not express an opinion on the guilt or innocence of a defendant Article 135 Expert summoned is required to respond to the summons and to provide her/his findings and opinion within a certain time limit At the request of the expert witness, on justifiable grounds, the authority conducting proceedings may extend the time limit	Article 136 The expert's report shall contain the question material to either the guilt or innocence of the defendant or the extent of harm caused by the criminal offense, the expert's specialized training or experience, why it is relevant, and how current the training or experience is, a description of the evidence that was analysed, description of the analysis, explanation that the analytical practices are generally accepted within the expert's field or has a scientific or technical basis and a conclusion with the expert's opinion answering the question set or explanation as to why the question could not be answered	Article 135 If an expert witness duly summoned fails to appear and does not justify his or her absence, or departs without authorization from the location where s/he is to be questioned, the authority conducting proceedings may order him or her to be brought in forcibly Court may impose a fine of 250 Euros on her/him If an expert witness, after being cautioned about the consequences of declining to perform expert examination, refuses to perform expert examination without a justifiable reason, or does not provide her/his expert opinion within the designated time limit, the court may impose a fine of up to 500 euros on her/him	None specified but Article 122 provides that expert witnesses must '…are obligated.to tell the truth' on pain of prosecution under the Criminal Code. Experts are further obliged to explain the steps taken to obtain their specialised knowledge…'	N/A	N/A	N/A