Common Market Law Review **45:** 941–985, 2008

EXPERT EVIDENCE BEFORE THE EC COURTS

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1. Introduction

The European Court of Justice, the Court of First Instance and the Civil Service Tribunal (the "EC courts") are regularly asked to rule on complex scientific and technical matters, as illustrated by cases concerning the foot and mouth crisis[1] or conglomerate effects in merger control.[2] It should come as no surprise, since the scope of technical issues is extremely wide in EC law: cases brought before the EC courts may raise questions concerning *inter alia* the hazards of pharmaceutical substances, market analysis in competition law, the accuracy of tariff classifications or the reality of an occupational disease.[3] These are all fields of law that may give rise to daunting issues of fact and require expert knowledge.

These issues can indeed be so complex that one may legitimately wonder how the EC courts manage to cope with them. After all, the EC Treaty does not require members of the courts to prove technical skills other than those necessary to be appointed to judicial office.[4] While some judges may enjoy techni-

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1. Case C-189/01, *Jippes and Others*, [2001] ECR I-5689.

2. Case T-5/02, *Tetra Laval* v. *Commission*, [2002] ECR II-4381, and Case C-12/03 P, *Commission* v. *Tetra Laval*, [2005] ECR I-113.

3. See e.g. as regards the hazardous nature of substances, Case T-13/99, *Pfizer Animal Health* v. *Council*, [2002] ECR II-3305, paras. 139–163. It is difficult to define what a "technical issue" is, as the technical character of a discipline is partly a subjective matter. This article will consider technical issues as those whose settlement calls for the use of a discipline that requires specialized training in order for a person to attain sufficient competence to understand its aims and methods, and to be able critically to deploy these methods to achieve these aims, to produce the judgments that issue from its distinctive point of view. This definition is based on Brewer's definition of an "expert discipline" (Brewer, "Scientific Expert Testimony and Intellectual Due Process", 107 Yale L.J. (1998), 1535 at 1589). This definition is very broad. It includes not only "hard sciences", like chemistry, biology or toxicology, but also "soft sciences", like economics or psychology.

4. See Arts. 223, 224 and 225a EC. The Treaty on the Functioning of the EU (O.J. 2008, C 115), does not change these requirements. The only change that would be introduced by the new treaty regarding the appointment of EU judges is procedural in nature. A new Art. 225 pro-

cal expertise in certain fields, they certainly cannot be omniscient: on their own, they cannot solve all the intricate issues raised by economics, chemistry or engineering. However, judges are precisely not on their own: in order to apprehend complex technical issues, the EC courts may, like any other court, rely on expert evidence.

In very schematic terms, a court can use expert evidence by adhering to one of two basic models. The first model is encountered essentially in mainland European countries (e.g., France). In these countries, expert evidence is in most cases adduced by a neutral expert appointed by the court itself. Once the expert has submitted his report, the court formally remains the decision-maker, but it rarely departs from the expert's findings.[5] The second model comes from the common law tradition, in which the parties themselves generally adduce expert evidence. They call experts as witnesses, experts are then examined and the trier of fact/jury and/or the court render a final decision on the credibility of the evidence submitted.[6] In theory, the EC system is a hybrid: as the proce-

vides that a panel will "give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court [the new name of the Court of First instance] before the governments of the Member States make the appointments". The panel will comprise "seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognized competence, one of whom shall be proposed by the European Parliament". The first benefit to be expected from this new procedure is that appointment to the European judiciary will not be governed as much by national political logic as it has sometimes been in the past. This change could have the additional effect of favouring candidates with the best technical knowledge, because former judges and advocates general are well placed to recognize the added value that candidates with technical knowledge relevant to a particular field of European law could bring to EU courts.

5. On the dynamics of judge-expert cooperation in the French system, see Leclerc, *Le juge et l'expert* (LGDJ, 2005) and Dalbignat-Deharo, *Vérité scientifique*, *vérité judiciaire en droit privé* (LGDJ, 2004).

6. In practice, the way the various legal systems deal with expert evidence is more complex. In many if not most common law systems, the courts are allowed to appoint an impartial expert (in the U.S., see Rule 706 of the Federal Rules of Evidence). In the UK, rules of procedure have been amended in the wake of the Woolf Report, which contained the recommendation for "a wider use of 'single' or 'neutral' experts who would be jointly instructed by the parties, or, if the parties could not agree on a single expert, appointed by the court" (*Access To Justice*, Final Report by The Right Honourable the Lord Woolf, Master of the Rolls, HMSO, 1996, Chapt. 13, at para 3). Rules 35.3 and 35.7 of the Civil Procedure rules give the Courts power to direct that evidence be given by a single joint expert, who has an overriding duty to help the court. Conversely, in the mainland European systems, the parties are usually allowed to submit their own expert evidence. It nonetheless remains that, on average, common law systems rely much more on partisan experts than mainland European systems. See e.g. the anonymous note "Developments in the Law – Confronting the New Challenges of Scientific Evidence", 108 Harv. L. Rev. (1995), 1481, at 1589, noting that in the U.S. the appointment of experts by the courts is not frequently used. As regards neutral expert evidence, Jolowicz, "L'expert, le témoin et le juge dans le procès civil en droits français et anglais", (1977) *Revue Internationale de Droit Comparé*, 285 at 290.

dure before the EC courts is neither wholly accusatorial not entirely inquisitorial,[7] both types of expert evidence can be relied upon by the EC courts. However, the law on the use of expert evidence by the EC courts is unclear on many aspects. The purpose of this article is therefore to set out briefly the law on expert evidence, to explore how the EC courts use it and to assess whether improvements are desirable.

Section 2 of this article will first describe how the EC courts use "neutral" expert evidence (i.e., evidence obtained through an expert's report commissioned by the court). An analysis of the case law reveals a paradox: while the status of neutral expert evidence is clearly defined by the rules of procedure governing the EC courts, it is rarely used. Section 2 therefore also endeavours to explain why the use of neutral expert evidence remains exceptional. Section 3 will then focus on how the EC courts use "partisan" expert evidence (i.e., expert evidence that is voluntarily submitted by the parties). It will show that partisan expert evidence is the mirror image of neutral expert evidence: while its procedural status is unclear, it is widely used before the EC courts. Finally, in Section 4 it will be argued that this situation is not wholly satisfactory and some changes will be explored which could be contemplated in order to improve the use of expert evidence by the EC courts.

2. Neutral expert evidence

The main procedural provisions governing the use of neutral expert evidence are quite detailed (2.1). However, the commissioning of an expert's report remains exceptional (2.2), which can be explained partly by quite strict substantive requirements and partly by less obvious non-legal factors (2.3).

2.1. *Main provisions governing the use of neutral expert evidence*

EC rules governing the appointment of experts seem to be mostly inspired by civil law rules, but some convergence with common law systems can also be found, especially with regard to the new UK rules of civil procedure. Article 25 of the ECJ Statute provides that "[t]he Court may at any time entrust any individual, body, authority, committee or other organization it chooses with

7. Lasok, *The European Court of Justice. Practice and Procedure*, 2nd ed. (Buttersworth, 1994), p. 344. See also MacLennan, "Evidence, standard and burden of proof and the use of experts in procedure before the Luxembourg Courts", in Weiss (Ed.), *Improving WTO Dispute Settlement Procedures – Issues and Lessons from the Practice of other International Courts and Tribunals* (Cameron May, 2000), p. 265.

the task of giving an expert opinion".[8] The fact that the expert is appointed by the court is originally borrowed from civil law systems, but no longer represents a distinctly civil law feature, since the reform following Lord Woolf's report on access to justice has introduced this possibility to the English rules of civil procedure.[9] An expert report can be commissioned not only in all direct actions but also, it seems, in preliminary proceedings.[10] In principle, the need to commission an expert's report is systematically examined, as the preliminary report drafted by the reporting judge must contain examination of preparatory measures, which includes the commissioning of an expert's report.[11]

The EC courts may commission an expert's report *ex officio*. However, either of the parties may submit a request to that effect. The party must explain why the commissioning of such a report is a useful measure and identify the facts which it intends to prove, since in the absence of any explanations the courts may dismiss the application.[12] This rule has equivalents in both civil and common law systems.[13] A party will generally move for the commissioning of an expert's report in its main application. In the absence of exceptional circumstances, an application for the adoption of interim measures is not the appropriate procedure to obtain the commissioning of an expert's report.[14] However, there is at least one example of a case in which such an application was successfully made.[15]

8. See also Art. 45(2)(d) of the Rules of Procedure of the ECJ (hereafter: "ECJ RoP"), Art. 65(d) of the Rules of Procedure of the CFI (hereafter: "CFI RoP") and Art. 57(e) of the Rules of Procedure of the Civil Service Tribunal (hereafter: "CST RoP").

9. Woolf Report cited *supra* note 6. The novelty of the rule is captured in the title of Rule 35.4 ("Court's power to restrict expert evidence"). Paragraph 1 of this Rule reads: "No party may call an expert or put in evidence an expert's report without the court's permission". See also Rule 35.7 on the court's power to direct that evidence be given by a single joint expert.

10. Opinion of A.G. Jacobs in Case C-269/90, *Technische Universität München* v. *Hauptzollamt München-Mitte*, [1991] ECR I-5480, para 13, relying on Art. 103 of the ECJ RoP.

11. Art. 44(2) of the ECJ RoP, Art. 52(2) of the CFI RoP and Art. 45(2) of the CST RoP.

12. See, in that connection, Case T-199/01, *G* v. *Commission*, [2002] ECR-SC I-A-207 and II-1085, para 61; Case T-180/01, *Euroagri* v. *Commission*, [2002] ECR II-369, para 204; Case T-257/02, *K* v. *Court of Justice*, unpublished, para 61.

13. See e.g., Art. 143, 144 and 263 of the French *Code de procédure civile* and Rule 35.4 of the English Civil Procedure Rules.

14. See, by analogy, Order in Case 121/86 R, *Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon and Others* v. *Council and Commission*, [1986] ECR 2063, para 17.

15. Order in Case 318/81 R, *Commission* v. *CO.DE.MI.*, [1982] ECR 1325, paras. 1–3. See also Order in Case C-106/90 R, *Emerald Meats* v. *Commission*, [1990] ECR I-3377, para 29 (refusing the commissioning of a report because it did not appear that the findings could be of any "decisive interest" in the main action); Case C-275/00, *First and Franex*, [2002] ECR I-10943, para 45.

The preparation of an expert report is governed by a formal procedure.[16] First, before the court decides on the commission of an expert's report, the parties must be heard.[17] Second, if the court decides to commission a report, it must adopt an order setting out the facts to be proved and a time limit within which the report is to be made.[18] In this respect, EC rules appear to be closer to the civil law tradition than that of the common law. Indeed, an almost identical rule can be found in French civil procedure rules,[19] whereas under English law even court-appointed experts are instructed by the parties.[20] In view of the very complex character of the issues at stake, the EC courts may appoint a college of experts.[21] Here again, it can be noted that a similar rule can be found in some civil law systems.[22] Third, one of the parties may object to an expert on the ground that he is not competent, he is not the proper person to act as expert or for any other reason, in which case the matter is resolved by the court.[23] Such objection must be raised within two weeks of service of the order

16. Lasok, op. cit. *supra* note 7, at p. 398. See, for additional details on the applicable procedure, Art. 45, 46 and 49 to 53 of the ECJ RoP, Art. 66, 67 and 70 to 76 of the CFI RoP, and Art. 57, 58 and 62 to 67 of the CST RoP. See also Lasok, op. cit. *supra* note 7, p. 397 to 401; and Lenaerts, Arts and Maselis, *Procedural Law of the European Union*, 2nd ed (Sweet & Maxwell, 2006), at 24–081 to 24–083, p. 563.

17. Art. 45(1) of the ECJ RoP, Art. 66(1) of the CFI RoP and Art. 58(2) of the CST RoP.

18. Art. 49(1) of the ECJ RoP, Art. 70(1) of the CFI RoP and Art. 62(1) of the CST RoP.

19. Art. 265 of the French *Code de procédure civile*.

20. See Rule 35.8: "Where the Court gives a direction under Rule 35.7 for a single joint expert to be used, each instructing party may give instruction to the expert".

21. See e.g. Joined Cases T-33 & 74/89, *Blackman* v. *Parliament*, [1993] ECR II-249, para 18; and Order of 1 July 1991 in the same case (unpublished); Case C-308/87, *Grifoni* v. *EAEC*, [1994] ECR I-341, para 4. Complexity of facts is not the sole reason why courts may want to jointly appoint several experts. Joint appointment of several experts who are asked to produce a single report is also a means of narrowing down the scope of the dispute over facts, especially where several scientific methods of interpretation of the facts are competing. On individual experts v. expert groups in the WTO panel context, see Alemanno, *Trade in Food – Regulatory and Judicial Approaches in The EC and the WTO* (Cameron May, 2007), pp. 350–3 (stressing the advantages of expert review groups).

22. See Art. 982 of the Belgian *Code judiciaire*, providing that "the judge shall appoint one single expert unless he deems it necessary to appoint several". The same possibility is afforded, in less restrictive terms, by Art. 264 of the French *Code de procédure civile*, which states that "one person only is appointed as expert, unless the judge deems necessary to appoint several" (authors' translations). The issue of several court-appointed experts does not seem to give rise to a specific rule in the UK civil procedure rules.

23. Art. 50(1) of the ECJ RoP, Art. 73(1) of the CFI RoP and Art. 65(1) of the CST RoP. Here again, it can be noted that EC rules bear the imprint of civil law rules, in the sense that this issue does not arise in a system where the parties appoint the expert. In the UK Civil procedure rules, for example, the default rule for choosing a single court-appointed expert is that the parties should agree on the choice of the single expert. When the parties cannot agree, Rule 35.7(3) provides that the court may either choose the expert from a list prepared or identified by the instructing parties or direct that the expert be selected in any other manner as the court chooses.

appointing the expert.[24] The right to object has already been used, albeit unsuccessfully.[25] Fourth, the expert receives a copy of the order, together with all the documents necessary for carrying out his task. He remains under the supervision of the Judge-Rapporteur, who may be present during his investigation and who is kept informed of his progress in performing his task.[26] It is unclear however to what extent the principle of adversarial proceedings requires that the parties be involved in all the steps leading to the drafting of the report. The rules of procedure of the EC courts state that the parties "shall be entitled to attend"[27] or "may be present at the measures of inquiry",[28] a wording that seems to fit better the inspections of the place or thing in question[29] than the various steps that may be required to draft an expert's report (laboratory analysis for instance). It is interesting to compare this rule with the emphasis on streamlining parties' intervention in the preparation of an expert report, which prevailed in the UK reform.[30] This difference in emphasis can be interpreted as a sign of convergence between the various systems: the more adversarial English system is evolving to limit parties' rights which could be used abusively, while, at European level, the inquisitorially oriented system is enriched by new procedural rights for the parties. This movement can also be seen in the case law of the ECtHR, which ruled in *Mantovanelli* that no general, abstract principle may be inferred from Article 6(1) ECHR to the effect that, where an expert has been appointed by a court, the parties must in all instances be able to attend the interviews held by him or to be shown the documents he has

24. Art. 50(2) of the ECJ RoP, Art. 73(2) of the CFI RoP and Art. 65(2) of the CST RoP. The statement of objection must set out the grounds of objection and indicate the nature of any evidence offered.

25. Case T-20/00 OP, *Commission* v. *Camacho-Fernandes*, [2003] ECR-SC I-A-75 and [2003] ECR II-405, para 25. It is interesting to note that in at least one instance, the Court took a preventive step and ensured that parties consented to the Court's choice for a court-appointed expert. See Opinion of A.G. Darmon in Joined Cases C-89, 104, 114, 116, 117 & 125–129/85, *Ahlström and Others* v. *Commission*, [1993] ECR I-1445, para 333. In this case, the Court also submitted the draft questions to the parties. Ibid. at para 339.

26. Art. 49(2) of the ECJ RoP, Art. 70(2) of the CFI RoP and Art. 62(2) of the CST RoP. These matters are dealt with similarly under Art. 266–268 of the French *Code de procédure civile*.

27. Art. 46(3) of the ECJ RoP.

28. Art. 67(2) of the CFI RoP and Art. 58(3) of the CST RoP.

29. Art. 45(2)(e) of the ECJ RoP, Art. 65(e) of the CFI RoP and Art. 57(f) of the CST RoP.

30. See Woolf Report, "Access to Justice", op. cit. *supra* note 6, chap. 13, para 11 et seq. (court control over expert evidence) and para 42 et seq. (discussing the issue whether experts' meetings aiming at narrowing the area of disagreement could be held in the absence of the representatives of the parties and of the court).

taken into account.[31] However, a party's right to adversarial proceedings is breached if he has not been given an opportunity to be involved in the process of producing the report and such report was likely to have a "preponderant influence" on the assessment of the facts by the court, because the question on which the expert was instructed to answer was "identical with the one that the court had to determine" and "pertained to a technical field that was not within the judges' knowledge".[32] In other words, the more decisive and the more technical the issues are, the more the parties must have a fair opportunity to make their views known during the preparation of the report. This principle, which illustrates the weight carried by the opinion of neutral experts, was adopted by the ECJ in the *Steffensen* case.[33]

While the preparation of the report is subject to quite a formal procedure, there are only a few rules concerning the delivery of the report and the subsequent procedural steps. First, in his report, the expert may give his opinion only on points that have been expressly referred to him.[34] Second, once the parties have received the expert's report, they may submit evidence in rebuttal and amplify previous evidence.[35] Third, examination of the expert is possible to a limited extent: after the expert has filed his report, the court "may order that he be examined, the parties having been given notice to attend. Subject to the control of the President, questions may be put to the expert by the representatives of the parties".[36] Moreover, the court may, on application by a party or *ex officio*, issue letters rogatory for the examination of experts.[37] Fourth, after issuing his report, the expert swears before the court that he has conscientiously and impartially carried out his task, unless he is exempted by the court from taking the oath.[38]

Finally, as regards costs, experts are entitled to reimbursement of their travel and subsistence expenses. The cashier of the court may make a payment to them towards these expenses in advance.[39] Of course, experts are also entitled to compensation for their services. The court may request the parties or one of them to lodge security for the costs of the expert's report.[40] The cashier of the

31. ECtHR, Judgment of 18 March 1997, *Mantovanelli* v. *France*, appl. nº 21497/93, para 33.
32. Ibid., para 35.
33. Case C-276/01, *Steffensen*, [2003] ECR I-3735, paras. 77 and 78.
34. Art. 49(4) of the ECJ RoP, Art. 70(4) of the CFI RoP and Art. 62(4) of the CST RoP.
35. Art. 45(4) of the ECJ RoP, Art. 66(2) of the CFI RoP and Art. 58(5) of the CST RoP.
36. Art. 49(5) of the ECJ RoP, Art. 70(5) of the CFI RoP and Art. 62(5) of the CST RoP.
37. Art. 52 of the ECJ RoP, Art. 75(1) of the CFI RoP and Art. 67(1) of the CST RoP.
38. Art. 49(6) of the ECJ RoP, Art. 70(6) of the CFI RoP and Art. 62(6) of the CST RoP.
39. Art. 51(1) of the ECJ RoP, Art. 74(1) of the CFI RoP and Art. 66(1) of the CST RoP.
40. Art. 49(2) of the ECJ RoP, Art. 70(2) of the CFI RoP and Art. 62(2) of the CST RoP.

court pays experts their fees after they have carried out their duties or tasks.[41] These are recoverable costs that are allocated at the end of the proceedings.[42]

2.2. *The commissioning of experts' reports remains exceptional*

It is not unusual for the EC courts to commission an expert's report in cases involving medical issues[43] or in indemnity cases to assess the damage alleged to have been suffered by one party.[44] They have also commissioned experts' reports to appraise other types of technical issues, e.g.: the conclusions which an airman ought to have deduced from weather information;[45] an official's knowledge in computerization;[46] whether the applicant had the required qualifications and the necessary ability to carry out the duties contemplated by several vacancy reports (in a scientific field);[47] a gas tariff system and its effects;[48] the quality of a translation for the purpose of ruling on the authenticity of a

41. Art. 51(2) of the ECJ RoP, Art. 74(2) of the CFI RoP and Art. 66(2) of the CST RoP.

42. Art. 73(a) of the ECJ RoP, Art. 91(a) of the CFI RoP and Art. 91(a) of the CST RoP.

43. See e.g. Case 12–68, *X.* v. *Audit Board of the European Communities*, [1969] ECR 109, para 41 (report commissioned to establish whether at the time of the acts which gave rise to a disciplinary decision, the official sanctioned was mentally disturbed to such an extent as to exclude responsibility for his conduct); Case 18/70, *X.* v. *Council* ECR English Spec. ed., 1205, 1207 (psychiatric analysis); *Grifoni*, *supra* note 21, para 4 (degree of permanent invalidity); Case T-36/89, *Nijmann* v. *Commission*, [1991] ECR II-699, para 12 (on the question whether the failure to inform the applicant of his state of health may have caused him damage); *Blackman*, *supra* note 21, para 18 (on whether a remedial teaching program has a medical character); Case T-90/95, *Gill* v. *Commission*, [1997] ECR-SC I-A-471 and II-1231, paras. 15 and 35 (certain characteristics of the applicant's lung anomalies); *Commission* v. *Camacho-Fernandes*, *supra* note 25, para 25 (to determine whether lung cancer was an occupational disease); Case T-313/01, *R* v. *Commission*, [2004] ECR-SC I-A-129 and II-577, paras. 65, 76, 77, 102 and 103 (on whether medical surgery was made for purely aesthetic purposes).

44. Joined Cases C-104/89 & C-37/90, *Mulder and Others* v. *Council and Commission*, [2000] ECR I-203, para 22 (assessment of the loss of earnings suffered by each of the applicants and determination of the various factors to be applied in calculating the damage); Joined Cases 29, 31, 36, 39–47, 50 & 51/63, *Laminoirs de la Providence and Others* v. *High Authority*, [1965] English spec. ed., 911, 939 (assessment of the damage suffered by the applicant); *CO.DE.MI* (Order), *supra* note 15 (assessment of the liability incurred with regard to certain breaches of contract and assessment of the damage alleged to have been suffered by each of the parties); Case T-351/03, *Schneider Electric* v. *Commission*, judgment of 11 July 2007, nyr, para 324 (assessment of the costs incurred by the applicant to re-notify the merger and due to the differed sale of Legrand).

45. Case 23/81, *Commission* v. *Royal belge*, [1983] ECR 2685, para 7.

46. Case T-169/89, *Frederiksen* v. *Parliament*, [1991] ECR II-1403, paras. 38 and 73–78.

47. Case 785/79, *Pizziolo* v. *Commission*, [1981] ECR 969, para 17.

48. Case C-169/84, *Cdf Chimie et Fertilisants* v. *Commission*, [1990] ECR I-3083, para 10.

document[49] and the characteristics of competition between two modes of transport.[50]

However, the commissioning of an expert's report by the EC courts remains truly exceptional, as to the knowledge of the authors it has happened in only 25 cases.[51] It is rare even in certain fields of law in which technical knowledge is amply required, like competition law. To the knowledge of the authors, as regards competition law, reports were commissioned only in the *Dyestuff*[52] and *Woodpulp*[53] cases, and both related to the proof of concerted practices in the presence of parallel behaviour. It is also worth noting that, in *Flat glass*, which also concerned parallel behaviour, the reason invoked to justify not commissioning an expert's report was the existence of an agreement between the parties as regards the functioning of the market, which suggests that the EC courts are quite open to that measure of inquiry when conscious parallelism is at issue.[54] By contrast, no expert report was commissioned in many cases that raised questions that are certainly as delicate as the ones triggered by parallel behaviour, such as procedures involving collective dominance or conglomerate mergers.[55]

2.3. *Why is the commissioning of an expert's report so exceptional?*

The fact that experts' reports are rarely commissioned may be explained by several factors: quite strict substantive requirements (2.3.1.) and less obvious factors like the EC courts' functions (2.3.2.), the costs and length of the procedure (2.3.3), the margin of appreciation enjoyed by the EC institutions in certain fields of law (2.3.4.), the EC courts' reliance on their own expertise (2.3.5.) and the use of neutral experts as actual assessors (2.3.6.).

49. Case 10/55, *Mirossevich* v. *High Authority*, [1954–1956] English spec. ed. 333, 343.

50. Joined Cases 24 & 34/58, *Chambre syndicale de la sidérurgie de l'est de la France* v. *High Authority*, [1960] English spec. ed., 281, 293.

51. As of 1 Jan. 2008.

52. Case 48/69, *ICI* v. *Commission*, ECR 619, 647; Case 49/69, *BASF* v. *Commission*, ECR 713, 726; Case 51/69, *Bayer* v. *Commission*, ECR 745, 766; Case 52/69, *Geigy* v. *Commission*, ECR 787, 819; Case 53/69, *Sandoz* v. *Commission*, ECR 845; Case 54/69, *Francolor* v. *Commission*, ECR 851, 868; Case 55/69, *Cassella* v. *Commission*, ECR 887, 907; and Case 57/69, *ACNA* v. *Commission*, ECR 933, 944.

53. *Ahlström supra* note 25.

54. Joined Cases T-68, 77 & 78/89, *SIV and Others* v. *Commission*, [1992] ECR II-1403, para 43 ("As regards the assessment of the market, the parties agreed to place in the common file, by common accord, all the statistics needed for an appreciation of the functioning of the Italian and European flat-glass markets. They agreed that it would not therefore be necessary to commission an expert's report in that regard").

55. Case T-342/99, *Airtours* v. *Commission*, [2002] ECR II-2585; and *Tetra Laval*, *supra* note 2.

2.3.1. *Strict substantive requirements: the need for prima facie evidence*

The EC courts enjoy a broad margin of appreciation to commission an expert's report.[56] It is for them to appraise the usefulness of measures of inquiry for the purpose of resolving the dispute.[57] In other words, it is in principle for the courts alone to decide whether expert evidence is necessary.[58]

However, just as for any other measure of inquiry, the EC courts apply quite strict standards to commission an expert's report.[59] Generally, the EC courts do not commission an expert's report unless the "evidence before it is deficient in some material respect"[60] or the requesting party provides *prima facie* evidence in favour of his argument. As noted in an old case, the appointment of an expert "would only be justified if the facts already proved raised a presumption in favour of the applicant's argument, since the burden of proof rests, generally speaking, on him".[61] In an action based on Article 230 EC, the applicant must therefore adduce evidence capable of casting doubt on the validity of the contested decision.[62]

However, the need for *prima facie* evidence was not underlined in all cases in which the EC courts examined whether an expert's report should be commissioned. In fact, it is not always easy to identify the reasons why the EC courts decided or refused to commission an expert's report, as they do not always provide precise grounds for their decision. In some cases they even dismiss the request implicitly.[63] However, in general, the Court must find the measure "relevant" and "necessary" for the purpose of the ruling.[64] Accordingly, the EC courts will not commission an expert's report when (i) the facts

56. Case T-138/98, *ACAV and Others* v. *Council*, [2000] ECR II-341, para 72.

57. Ibid., para 72, and Case T-68/99, *Toditec* v. *Commission*, [2001] ECR II-1443, para 40.

58. Case C-136/02 P, *Mag Instrument* v. *OHIM*, [2004] ECR I-9165, paras. 76 and 77. See, however, Case C-119/97 P, *Ufex and Others* v. *Commission*, [1999] ECR I-1341, paras. 110 and 111.

59. Lasok, op. cit. *supra* note 7, p. 366 to 372.

60. Ibid., p. 369.

61. Joined Cases 19 & 65/63, *Prakash* v. *Commission of the EAEC*, [1965] English spec. ed., 533, 554. See, as regards an action for failure to fulfil obligations, Case 141/87, *Commission* v. *Italy*, [1989] ECR 943.

62. Case 51–65, *ILFO* v. *High Authority*, [1966] English spec. ed., 87, 96 (in the French version "*un commencement de preuve suffisant*"); Case T-266/94, *Skibsvaerftsforeningen and Others* v. *Commission*, [1996] ECR II-1399, para 200; Case T-26/91, *Kupka-Floridi* v. *CES*, [1992] ECR II-1615, para 55; Case T-92/91, *Henrichs* v. *Commission*, [1993] ECR II-611, paras. 28, 29; Case T-106/95, *FFSA and Others* v. *Commission*, [1997] ECR II-229, para 115; Order in Case T-228/99 DEP, *WestLB AG* v. *Commission*, unpublished, para 88.

63. See e.g. Case T-132/89, *Gallone* v. *Council*, [1990] ECR II-549; Case T-7/90, *Kobor* v. *Commission*, [1990] ECR II-721.

64. *ACAV*, note 56 *supra*, para 72, and *Toditec*, note 57 *supra*, para 40.

that one party offers to prove by means of an expert report have no bearing on the legal issue at bar[65] or on the legality of the decision challenged;[66] (ii) they consider themselves sufficiently informed;[67] (iii) it does not appear that the findings which an expert could reach could be of any "decisive interest" in solving the dispute in the main action;[68] or, more generally, (iv) an examination of the party's pleas has disclosed no factor warranting the commissioning of an expert's report.[69] Conversely, an expert's report may be commissioned "[i]n view of the contradictory information given by the Commission and the applicants"[70] or because "both parties' arguments contain[ed] particulars of an extremely technical nature".[71]

2.3.2. *The EC courts' function*

Article 220 EC entrusts the EC courts with the duty of ensuring "that in the interpretation and application of [the EC] Treaty the law is observed" and does not in any manner alleviate the judges' task depending on the technical dimension of the issues brought to them.[72] The EC courts are consequently bound to solve the technical issues raised by the application of the law to the facts of the case, regardless of how complex they are.

However, as noted by the U.S. Supreme Court in *Daubert*, "there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory".[73] The EC courts' role consists in resolving disputes

65. See e.g. Joined Cases 6 & 7/73, *Istituto Chemioterapico Italiano and Commercial Solvents* v. *Commission*, [1974] ECR 223, para 22; Case T-11/89, *Shell* v. *Commission*, [1992] ECR II-757, para 363; Joined Cases T-305, 306, 307, 313, 316, 318, 325, 328, 329 & 335/94, *LVM* v. *Commission*, [1999] ECR II-931, para 749; Case T-199/99, *Sgaravatti Mediterranea* v. *Commission*, [2002] ECR II-3731, para 139; *K*, *supra* note 12, para 61.

66. Joined Cases T-61 & 62/00, *APOL* v. *Commission*, [2003] ECR II-635, para 124.

67. Case T-26/89, *De Compte* v. *Parliament*, [1991] ECR II-781, para 228; Case C-114/94, *IDE* v. *Commission*, [1997] ECR I-803, para 53.

68. Order in *Emerald Meats*, *supra* note 15, para 29.

69. Case T-1/92, *Tallarico* v. *Parliament*, [1993] ECR II-107, para 74. MacLennan, op. cit. *supra* note 7, at p. 279.

70. *Cdf Chimie et Fertilisants*, *supra* note 48, para 28.

71. *Pizziolo*, *supra* note 47, para 14. See also *Prakash*, *supra* note 61, 554 ("In questions of nuclear research, it is not for the Court to decide whether or not a particular set of apparatus is sufficient for undertaking a given piece of research. If necessary, it would have to appoint an expert for that purpose").

72. Opinion of A.G. Jacobs in *Technische Universität*, *München*, *supra* note 10, para 13 ("the technical nature of a case should not cause the Court to forsake its duty, under Article [220 EC], to ensure that the law is observed. The Court cannot shy away from technical questions and must in an appropriate case be prepared to resolve such questions by commissioning an expert's report").

73. "Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-rang-

and finding a fair and legally sound solution, not in certifying the validity of the facts submitted by the parties. Accordingly, when the facts of a case are undisputed, "the Court does not normally seek to reopen the issues of facts".[74] For instance, when, in a competition law case, a market analysis is required in order to assess the existence of a concerted practice within the meaning of Article 81 EC, the court may find that there is no need to commission an expert's report if the parties have agreed on the data necessary to appraise the functioning of the market.[75] Yet, the need for an expert opinion could arise when the parties agree on the relevant raw data, but disagree on its interpretation. Expert reports have also been commissioned in circumstances where parties agreed both on certain data which had to be taken into account and on an analytical method to process the data, but where the assessment of the relevant facts was fraught with difficulties because of the hypothetical nature of the facts in question (the revenues of milk producers had the damaging fact not occurred).[76]

2.3.3. *Costs and length of the procedure*

Commissioning an expert's report entails costs that must normally be borne by the losing party. Commissioning an expert's report may also encourage the parties to hire their own experts to understand and rebut the evidence, which also entails costs (that they will bear or not depending on whether they were necessary or not – see 3.1. *infra*). Finally, commissioning an expert's report can delay the proceedings, at least by a few months. Given that, for several

ing consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final, and binding legal judgment – often of great consequence – about a particular set of events in the past. We recognize that in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes." *Daubert* v. *Merrell Dow Pharmaceuticals* (92–102), 509 U.S. 579 (1993), 597.

74. Lasok, op. cit. *supra* note 7, p. 344 ("[t]he Court is not bound in any and every case to carry out a detailed investigation into every conceivable question of fact. Its duty to ensure that the law is observed is tempered by the need to ensure that cases are decided expeditiously so that justice is not denied by delay").

75. *SIV*, *supra* note 54, para 43. Conversely, an expert's report may be commissioned when the parties provide contradictory information concerning certain facts in issue (*Cdf Chimie et Fertilisants*, *supra* note 48).

76. *Mulder*, *supra* note 44, para 64 (on the hypothetical nature of the facts to be proven), para 67 (agreement on the principles which must govern the method of calculating loss of earnings) and para 73 (agreement on the sources of the relevant data and figures to be taken into account).

years, the EC courts have been striving to diminish the average length of the proceedings, this factor should not be underestimated.

2.3.4. *The margin of appreciation enjoyed by the EC institutions in certain fields of law*

In actions under Article 230 EC, the first determination and/or appreciation of the facts is normally made by the institution. When this step involves complex assessments, the EC courts generally rule that the EC institutions enjoy a certain margin of appreciation. This line of case law is very common as regards complex economic assessments, in particular those required for the application of competition law.[77] From time to time, the same principle is also applied to other kinds of technical assessments. In *Technische Universität Munchen*, the ECJ established a link between the technical nature of the assessment required and the margin of appreciation enjoyed by the institution: "since an administrative procedure entailing complex technical evaluations is involved, the Commission must have a power of appraisal in order to be able to fulfil its tasks".[78] The same line of reasoning was followed in *Pfizer*, in which the CFI found that "where a Community authority is required to make complex assessments in the performance of its duties, its discretion also applies, to some extent, to the establishment of the factual basis of its action".[79] The same link between technicality and discretion was repeated in the recent *Microsoft* case.[80]

When the EC courts have to deal with such complex assessments, they seem to fear that relying on expert evidence will lead them to substitute their appre-

77. Joined Cases C-204, 205, 211, 213, 217 & 219/00 P, *Aalborg Portland and Others* v. *Commission*, [2004] ECR I-123, para 279. To the same effect, see Case 42/84, *Remia and Others* v. *Commission*, [1985] ECR 2545, para 34, and Joined Cases 142 & 156/84, *BAT and Reynolds* v. *Commission*, [1987] ECR 4487, para 62.

78. *Technische Universität München*, *supra* note 10, para 13. See also Case C-120/97, *Upjohn*, [1999] ECR I-223, paras. 33 and 34 (complex assessments in the medico-pharmacological field).

79. *Pfizer Animal Health*, *supra* note 3, paras. 168 and 169.

80. Case T-201/04, *Microsoft* v. *Commission*, judgment of 17 Sept. 2007, nyr, para 88, citing Order in Case C-459/00 P(R), *Commission* v. *Trenker*, [2001] ECR I-2823, paras. 82 and 83 (complex appraisals in the medico-pharmacological sphere); *Upjohn*, *supra* note 78, para 34 (revocation of a marketing authorization for a medicinal product); Case T-179/00, *A. Menarini* v. *Commission*, [2002] ECR II-2879, paras. 44 and 45 (suggesting that a restriction on the scope of judicial review is justified if it calls for "particular expertise or technical knowledge") and *Pfizer Animal Health*, *supra* note 3, para 323 (complex assessment in the medico-pharmacological field). See also Order in Case C-471/00 P(R), *Commission* v. *Cambridge Healthcare Supplies*, [2001] ECR I-2865, paras. 95 and 96 (complex assessment in the medico-pharmacological field).

ciation to that of the institution. This fear was described in very clear terms by a CFI judge heard during the House of Lords' investigation on the possible establishment of an EU competition court.[81] Before that, the EC case law already made the courts' reluctance very apparent, as can be illustrated in the following three examples.

First, in the famous *Technische Universität München* case,[82] the ECJ was requested under Article 234 EC to assess the validity of a decision finding that a scanning electron microscope could not be imported free of Common Customs Tariff duties because apparatus of equivalent scientific value, capable of being used for the same purposes, was being manufactured in the Community, specifically an instrument produced by Philips. The *Bundesfinanzhof* was aware that the Court had taken a restrictive attitude as regards the extent to which it was willing to review the substance of a decision refusing to grant exemption from customs duties on the ground that equipment of equivalent scientific value is produced in the Community. Moreover, the *Bundesfinanzhof* did not put forward any specific ground for suggesting that the decision was invalid. However, it invited the Court to reconsider its previous case law and to depart from its practice of confining judicial review to the question whether the Commission's decision was vitiated by a manifest error of fact or law or misuse of power (noting *inter alia* that "[t]he more difficult the technical questions to be decided the more immune from challenge the Commission's decision would be").[83]

As is well known, the ECJ refused to depart from its previous case law and held that, since an administrative procedure entailing complex technical evaluations was involved, the Commission enjoyed a power of appraisal in order

81. House of Lords, European Union Committee, "An EU Competition Court", Report with evidence, Judge Cooke's Reply to Question 411 ("Under 'Measures of Inquiry' we have the possibility of appointing experts *ad hoc* for specific cases. In point of fact, it has been very rarely used. I remember some years ago, there was a period of time when we had an in-house economist on the staff of the Court. The idea was that reporting judges dealing with complex competition issues could consult the economist and get a view. In fact, it was very little used because many of the colleagues, particularly the continental colleagues, were very nervous about consulting outside the knowledge of the parties. There was doubt because in judicial review we are judging the legality of the Commission's decision as of the date it was taken and in accordance with the facts and arguments before the Commission at the time. There was something of a reticence amongst one's continental colleagues to introduce into the case file material which was not part of the Commission's case file. I think I am correct in saying it sort of withered away as an approach").

82. *Technische Universität München*, *supra* note 10.

83. Opinion of A.G. Jacobs in *Technische Universität München*, *supra* note 10, paras. 10 and 11.

to be able to fulfil its tasks.[84] Yet it held that where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance to allow the ECJ to verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.[85]

The ECJ therefore endorsed A.G. Jacobs' view that "[a] momentary glance at the documents placed before the Court in the present proceedings reveals questions that lie well beyond the ordinary capacities of a court of law. The Court of Justice is not, for example, the appropriate forum in which to determine whether the Philips PSEM 500 X possesses a back-scattered electron detector capable of distinguishing atomic number differences. Nor is the Court well placed to judge whether that machine's eucentric tilting specimen stage is capable of setting the surface of the specimen on the Rowland circle of the spectrometer faster and more accurately than the light microscope fitted to the JEOL JSM-35 C".[86] As noted by A.G. Jacobs, "[t]hose are questions that only a scientist can answer".[87] Yet the ECJ could have commissioned an expert's report precisely to help it reach a decision while still applying limited judicial review.[88] The ECJ's reluctance to do so therefore seems to reflect the fear that a deeper look with the help of an expert would prejudice the Commission's margin of appreciation. The ECJ made up for its "all or nothing" approach on the substantive side with improved procedural standards, on which it can have a control on its own.[89]

Second, in the *Pfizer* case, to support their respective arguments, the parties had, both during the written procedure and at the hearing, submitted for review by the Court numerous arguments of a scientific and technical nature, based on a large number of studies and scientific opinions from eminent scientists. In its judgment, the CFI highlighted that it was not in a position "to assess the merits of either of the scientific points of view argued before it and to substitute its assessment for that of the Community institutions, on which the Treaty confers

84. *Technische Universität München*, *supra* note 10, para 13.

85. Ibid., para 14. These guarantees include the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision.

86. Opinion of A.G. Jacobs in *Technische Universität München*, *supra* note 10, para 15.

87. Ibid.

88. According to A.G. Jacobs, such measure of inquiry is available in preliminary proceedings (Ibid., para 13).

89. The same kind of approach was taken in public staff cases for medical appraisals of medical committees, on the substance of which the EC courts exert no control in view of the institutional guarantees offered by such committees (ibid., para 49, citing Case 156/80, *Morbelli* v. *Commission*, [1981] ECR 1357, para 19, and Case 265/83, *Suss* v. *Commission*, [1984] ECR 4029, para 11).

sole responsibility in that regard".[90] Just as in *Technische Universität München*, the acknowledgement of special administrative duties (i.e., the application of the principles of excellence, independence and transparency to complex assessments) compensated for the Court's limited review.[91]

Third, in the *V.R.* case, a probationary official had been dismissed and had requested the Court to commission an expert's report on the quality of a scientific study prepared by him.[92] The Court dismissed the application because "only the administration has the power to assess the merits of officials. Its judgement cannot therefore be invalidated by expert's opinions on the scientific value of the study in question".[93]

These three examples reveal a paradox that was rightly highlighted by the *Bundesfinanzhof* in *Technische Universität München*: the EC courts seem to be reluctant to rely on an expert's report in the cases requiring technical assessments, even though it is mainly in these cases that the use of such a report would be legitimate. The EC courts generally prefer to limit their review and compensate the applicant with increased procedural guarantees, thereby avoiding the technical issue and imposing a rule the application of which they can control easily on their own.

Fundamentally, this line of case law seems to confuse the technical aspect of an issue and the margin of appreciation that must be left to the Commission in certain areas: the technical aspect of an issue simply means that it requires some training in a given discipline, whereas the existence of a margin of appreciation generally implies that several options are available to a reasonable and well-informed decision maker and/or that the institutional structure of the European Communities obliges the EC courts to restrain their judicial control.[94] In other words, the technical nature of an assessment is a matter of knowledge, whereas the margin of appreciation is ultimately a matter of allocation of powers. There is no automatic overlap between these two concepts: one may well think of situations in which the assessment of facts, while technical, may lead to one reasonable outcome only. It is probably more often the case for "hard sciences" (e.g., chemistry) than for soft sciences (e.g., econom-

90. *Pfizer Animal Health*, note 3 *supra*, para 393.

91. Ibid., paras. 157 to 159, 162, 165 and 268.

92. Case 75/85, *V.R.* v. *Commission*, [1986] ECR 2775.

93. Ibid., para 15. See also *Gallone*, *supra* note 63, paras. 24 and 27 to 29 (implicitly).

94. Sibony and Barbier de La Serre, "Charge de la preuve et théorie du contrôle en droit communautaire de la concurrence: pour un changement de perspective", 43 RTDE (2007), p. 205, at p. 245. A margin of appreciation can be found *inter alia* in the fields in which the Commission orients a specific policy (e.g., competition, agriculture). The EC courts' judicial restraint in this case is rightly imposed by the constitutional structure of the EC (Biondi and Harmer, "Scientific Evidence and the European Judiciary", in Biondi et al. (Eds), *Scientific Evidence in European Environmental Rule-Making* (Kluwer, 2003), p. 51).

ics). For instance, if the Commission is requested to identify a given chemical substance, it may have to carry out a technical assessment to that effect, but it may be that, once this technical assessment is carried out by experts, no reasonable doubt remains about the nature of the substance. In other words, the fact that an assessment is complex and technical does not always mean that it can lead to several outcomes and that, in the absence of appropriate constitutional reasons, a margin of appreciation should be left to the institutions, irrespective of the procedural guarantees available to the applicant.

In addition, even when technical assessments justify the existence of a margin of appreciation, the question remains whether judges rightly choose not to resort to expert evidence. It is tempting to try to justify this stance by the notion that judges are the human benchmark by reference to which the existence of a manifest error must be assessed. In other words, if the judges seized of the matter cannot see a manifest error without resorting to expert evidence, there is no such error. It is however submitted that it cannot be a legitimate justification for not resorting to such evidence: since, by definition, the EC courts do not master the technical discipline at issue, there could be no guarantee that their opinion on the existence of a manifest error is not purely arbitrary. It could also be argued that, in order for judicial control to fulfil its constitutional role of checking for administrative arbitrariness, the benchmark of a manifest error should not be the personal knowledge that judges have on a technical question, but the common knowledge of the community concerned by that decision, which can sometimes consist of sophisticated operators. In this sense, recourse to experts in cases where a technical assessment is in dispute could be seen as a condition for the credibility of judicial control.

The intrinsic value of expert evidence for limited judicial review has indeed been underlined in cases where the institution enjoyed a margin of appreciation. That was the case in particular in *Frederiksen*.[95] This case concerned the promotion of an official to the post of Language Adviser in the Danish Translation Division of the European Parliament. The CFI had to decide whether the Parliament had wrongly considered that the applicant fulfilled one of the requirements of the vacancy notice. The CFI had commissioned an expert's report and found that the applicant did not have the knowledge of data processing required by the vacancy notice. Accordingly, the CFI annulled the decision. In its appeal against this judgment, the Parliament alleged that in matters of promotion judicial review must be limited to considering whether the appointing authority committed a manifest error of assessment and that the alleged error committed by the Parliament could not be described as manifest since the Court had to appoint an expert to verify whether the skills of the

95. *Frederiksen*, *supra* note 46, paras. 73 to 75.

candidate in question corresponded to the qualifications required by the vacancy notice.

The ECJ brushed aside the argument. It found that "[t]he power to appoint an expert is one of the powers available to the Court in order to facilitate, in the discharge of its duties, a detailed examination of the facts of the disputes on which it must adjudicate. If that possibility were not available, the appointing authority could escape any judicial review whenever its power of appraisal was exercised in a technical field in which the Court did not have the appropriate knowledge to determine whether the appointing authority had exceeded the bounds of the legal framework imposed by the vacancy notice."[96] Accordingly, the CFI "did not contravene Community law by seeking the opinion of an expert in order to determine the scope of the condition in the vacancy notice concerning knowledge of data processing in management applications and by holding, in the light of that requirement, *as it should be interpreted objectively*, that in this case the appointing authority had clearly exceeded the bounds of its power of appraisal by promoting Mrs X, whose knowledge did not meet the conditions laid down in the vacancy notice."[97]

The same approach was followed in *Cdf Chimie et Fertilisants*, in which an independent expert's report allowed the ECJ to find no less than four errors of appreciation in a State aid case.[98] It seems therefore that a tension exists in the case law: while, in many cases, the EC courts have seemingly been reluctant to commission an expert's report for fear of substituting their appreciation for that of the Commission, in other cases, they have made such an order when the technical issues raised by the case prevented them from making a reasoned decision on the existence of a manifest error of appreciation. The first stance is dominant in the case law, but the second is, in our view, the correct one: obtaining technical assistance does not trigger *per se* a substitution of appreciation; it merely helps the judges to raise themselves to the level of understanding necessary to detect a manifest error *within* a given technical discipline.

2.3.5. *The EC courts' reliance on their own expertise*

One striking element of the EC procedural rules is the scarcity of the rules on the admissibility of evidence. This contrasts sharply with the U.S. rules of evidence, which include *inter alia* rules governing how U.S. courts can find (or "take judicial notice of") facts on the basis of their own knowledge and experience. Pursuant to the U.S. Federal Rules of Evidence, a judicially

96. Case C-35/92 P, *Parliament* v. *Frederiksen*, [1993] ECR I-991, para 19.
97. *Frederiksen*, *supra* note 46, para 20 (emphasis added).
98. *Cdf Chimie et Fertilisants*, *supra* note 48, paras. 28 to 51.

noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.[99] Neither the ECJ Rules of procedure nor the EC case law contain any comparable rules on judicial notice. As noted by Lasok, before the EC courts, "whether or not the proved facts are capable of supporting the existence of a particular fact is normally to be decided in the light of ordinary experience".[100] The EC courts therefore seem to enjoy a great discretion as to the amount of personal experience or knowledge they can put into their judgments in order to establish the factual background of the case. Judges do use this power and sometimes reach conclusions on the basis of their personal experience even though they concern issues of facts that could warrant additional fact-finding. The case law on trademarks is replete with such findings based on the EC judges' personal experience. Reference will be limited to five of the many examples.

First, in the *Unilever* Case, the CFI had to rule on the distinctive character of a trademark relating to "everyday consumer goods which are usually sold in packaging bearing the products' name and on which there are often word marks or figurative marks or other figurative features which may include a depiction of the product".[101] The CFI found that "[i]t may, as a general rule, be inferred from experience that the average consumer's level of attention with regard to products marketed in this way is not high".[102] Second, in *Mag Instrument*, the ECJ found that "[a]verage consumers are not in the habit of making assumptions about the origin of products on the basis of their shape or the shape of their packaging in the absence of any graphic or word element and it could therefore prove more difficult to establish distinctiveness in relation to such a three-dimensional mark than in relation to a word or figurative mark."[103] Third, in *Eden*, the CFI found that "the olfactory memory is probably the most reliable memory that humans possess".[104] Fourth, in two cases at least, the CFI found that "the consumer normally attaches more importance to the first part

99. Rule 201(b) of the Federal Rules of Evidence. On the "narrow confines" of judicial notice in EC law, see Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff Publishers, 1986), p. 434.

100. Lasok, op. cit. *supra* note 7, p. 437.

101. Case T-194/01, *Unilever* v. *OHIM*, [2003] ECR II-383, para 48.

102. Ibid., para 48. See also Case T-398/04, *Henkel* v. *OHIM*, unpublished, para 29.

103. Case C-136/02 P, *Mag Instrument*, *supra* note 58, para 30, citing *inter alia* Joined Cases C-456 & 457/01 P, *Henkel* v. *OHIM*, [2004] ECR I-5089, para 38. See also Case T-129/04, *Develey Holding* v. *OHIM*, [2005] ECR II-811, para 47.

104. Case T-305/04, *Eden* v. *OHIM*, [2005] ECR II-4705, para 25.

of words".[105] Fifth, in *SABEL*, the ECJ found that "[t]he average consumer normally perceives a mark as a whole and does not proceed to analyse its various details".[106]

While in another case the CFI qualified the scope of rules of experience,[107] in these five cases – and in many others – the Courts' findings were apparently based on the judges' personal experience and not on detailed and statistical surveys of the behaviour of the relevant groups of customers.[108] The Court acted as its own expert on marketing issues, in spite of their complexity.

The EC courts' temptation to resort to rules of experience in trademark law may be explained, to a certain extent, by the fact that the Board of Appeal of

105. Joined Cases T-183 & 184/02, *El Corte Inglés* v. *OHIM*, [2004] ECR II-965, para 81; Case T-15/05, *Castell del Remei* v. *OHIM*, unpublished, para 54.

106. Case C-251/95, *SABEL*, [1997] ECR I-6191, para 23.

107. Case T-97/05, *Rossi* v. *OHIM*, [2006] ECR II-73*, paras. 44 and 45 (stating that, as far as signs consisting of a first name and surname are concerned, perception can vary from country to country and it cannot be ruled out that, in some countries, consumers will remember the last name rather than the first name and vice versa. Interestingly, the court adds that this "general rule", which stems from experience cannot be applied in an automatic manner, without taking due account of specificity of the case at hand). On the notion of "rule of experience", see Rigaux, *La nature du contrôle de la Cour de cassation* (Bruylant, 1966), n° 75, p. 112.

108. Other examples can be found in the following cases: Case C-39/97, *Canon*, [1998] ECR I-5507, paras. 18 and 19 (a strong reputation increases the risk of confusion); Case C-342/97, *Lloyd Schuhfabrik Meyer*, [1999] ECR I-3819, para 26, and Case T-43/05, *Camper* v. *OHIM*, [2006] ECR II-95*, paras. 67 and 79 ("the Court confirms once again … that the members of the relevant public, composed of average Danish and Finnish consumers, usually understand English as well as Danish, Finnish and/or Swedish. Therefore, that public must be considered to understand the English meaning of the word 'brothers'") and para 91 ("the average consumer only rarely has the chance to make a direct comparison between the different marks but must place his trust in the imperfect picture of them that he has kept in his mind. [T]he average consumer's level of attention is likely to vary according to the category of goods or services in question"); Case T-334/03, *Deutsche Post EURO EXPRESS* v. *OHIM*, [2005] ECR II-65, para 36 ("origin is not an essential characteristic of goods and services relating to postal transport. The geographical origin of goods in Classes 16 and 20, which are, essentially, goods intended for packaging of items of all kinds, is manifestly not a characteristic which determines the consumer's choice, which will be made on the basis of factors such as the dimensions of the packaging or its durability"); Case T-286/03, *Gillette* v. *OHIM*, unpublished, para 60 (stating that, as far as cosmetics of the type at hand are concerned, clients usually choose products themselves in stores; accordingly, the visual perception of brands occurs before the purchase and therefore the visual aspect of a brand is more important in assessing the risk of confusion than the phonetic or conceptual aspects); Case T-147/03, *Devinlec* v. *OHIM* [2006] ECR II-11, para 77 ("in the large majority of cases the relevant public will be confronted with the mark applied for at the time of purchase of watches, and as a general rule the marks are represented on the faces of those watches") and para 82 ("the relevant public is made up of average French consumers, who cannot be presupposed to have knowledge of Latin and of pronunciation, which is in any case inconsistent, of Latin words"); Case T-278/04, *Jabones Pardo* v. *OHIM*, [2006] ECR II-90*, para 56 (stating that, nowadays, cosmetics serve several functions relating inextricably to hygiene, aesthetics and pleasantness of touch or smell).

the OHIM is itself entitled to base its analysis on facts arising from practical experience generally acquired from the marketing of general consumer goods[109] or, even more generally, on "facts which are well known, that is, which are likely to be known by anyone or which may be learnt from generally accessible sources".[110] However, this rule cannot justify any kind of unsubstantiated statement about general experience. In any case, rules of experience are also applied in other types of proceedings: findings based on the Court's own experience include the fact that working documents at the Commission are, in general, drafted in German, English and French;[111] or the probability that French farmers' spouses participate in the running of the farms.[112] The EC courts can even rely on their personal experience and/or expertise for the settlement of much more complex issues, e.g., some economic issues raised by the application of competition rules. David Gerber has shown that in the three famous merger judgments delivered by the CFI in 2002, the Court on some occasions had played the role of an economic expert.[113] In these three cases, the CFI at times made decisions about economics relying on the superiority of its expertise in this field. Likewise, in *United Brands*, the ECJ relied both on the main characteristics of bananas as apprehended by common experience and on its own appreciation of the relative number of consumers experiencing difficulties to either peel or chew fruits.[114]

2.3.6. *The use of neutral experts as actual assessors*

Finally, the EC courts' reluctance to commission an expert's report may be explained by the fact that they do not want to relinquish their powers to external experts.[115] A rationalization based on an economic argument, namely, mar-

109. *Develey*, *supra* note 103, para 19.

110. Case T-185/02, *Ruiz-Picasso and Others* v. *OHIM*, [ECR] 2004 II-1739, para 29; Case C-25/05 P, *Storck* v. *OHIM*, [2005] ECR I-5719, para 51 ("Whilst it is in principle the task of [the competent bodies of OHIM] to establish in their decisions the accuracy of such facts, such is not the case where they allege facts which are well known").

111. Case T-259/02, *Raiffeisen Zentralbank Österreich* v. *Commission*, [2006] ECR II-5169, para 87.

112. Case T-217/03, *FNCBV* v. *Commission*, [2006] ECR II-4987, para 55.

113. Gerber, "Courts as economic experts in European Merger Law", in Hawk (Ed), *International Antitrust Law & Policy* (Fordham Corp. L. Inst., 2003), p. 475, referring to *Airtours*, *supra* note 55; Case T-310/01, *Schneider Electric* v. *Commission*, [2002] ECR II-4071; and *Tetra Laval*, *supra* note 2.

114. Case 27/76, *United Brands* v. *Commission*, [1978] ECR 207. Sibony, *Le juge et le raisonnement économique en droit de la concurrence* (LGDJ, 2008), n° 544 and 545.

115. This argument is also put forward by Alemanno, "Science and EU risk regulation: The role of experts in decision-making and judicial review", in Vos, *European risk governance: its science*, *its inclusiveness and its effectiveness* (Connex report series, 2008), p. 64. The author also mentions two other reasons for the reluctance of EC courts to appoint experts. One is spe-

ket failure in the market for experts, has been suggested for this attitude.[116] The argument runs as follows: because it is difficult for a court to assess the quality of an expert and because party-appointed experts have an incentive to build *ad hoc* models to suit the parties' interests, courts will as a rule be prejudiced against experts. In turn, this prejudice will drive good scientists from the market for expertise as they do not want to risk their good name in an ill-considered activity. The result of these dynamics is, it is argued, a "race to the bottom", where low-quality experts flood the "market" just as low-quality goods will prevail on a market where quality cannot be observed.[117] While there may be an element of explanation in this argument, it is of limited value since there are, fortunately, ways for scientists to preserve their reputation while acting as experts, including adversarial discussion with the expert of the opposing party, who may be of equal reputation.[118]

This economic explanation for scarcity of expertise therefore does not override the more traditional one, based on fear of judges to delegate adjudication. Indeed, it is a fact that, once the EC courts have decided to rely on an expert's report, they rarely question its conclusions. The experts are therefore used as actual assessors. This is illustrated by most of the cases in which a report was commissioned, medical reports in particular,[119] but also reports concerning other types of findings.[120] A very significant example is *Wood-*

cific to cases in which the decision under review is based on the scientific advice of an EC committee or agency. In this case, Alemanno explains that the courts may refrain from appointing experts because they do not want to appear critical of the institutional or scientific legitimacy of those committees or agencies. The other reason mentioned by this author is more general as it relates to judicial tradition: in the Court, a judge rapporteur who were to propose the appointment of an expert might appear excessively innovative.

116. Gutiérrez, "Expert Economic Testimony, Economic Evidence and Asymmetry of Information in Antitrust Cases" (October 2007). Available at SSRN ssrn.com/abstract=1023494 [last visited 30 March 2008].

117. Ibid. at 4.2.1. This problem is know in economics as "adverse selection" and is traditionally exemplified, by the market for used cars (or "lemons") after a classic article: Akerlof, "The Market for 'Lemons': Quality uncertainty and the market mechanism", 84 QJE (1970), 488.

118. For a discussion of possible improvements relating to quality signalling mechanisms (in the academic community of economists), see Gutiérrez, op. cit. *supra* note 116, at 4.4.3.

119. *X*. v. *Audit Board*, *supra* note 43, paras. 2 to 5 (whether at the time of the acts which gave rise to the disciplinary decision, the official was mentally disturbed to such an extent as to exclude responsibility for his conduct); *Nijmann*, *supra* note 43, paras. 37 to 39; *Grifoni*, *supra* note 21, para 4 (degree of permanent invalidity not challenged by the parties); *Gill*, *supra* note 43, paras. 36–37; *R* v. *Commission*, *supra* note 43.

120. *Mirossevich*, *supra* note 49 (quality of a translation for the purpose of proving the authenticity of a document); *Chambre syndicale de la sidérurgie de l'est de la France*, *supra* note 50 (characteristics of competition between two modes of transport); *ICI*, *supra* note 52 (in relation to market analysis, compare the summary of the expert's report by A.G. Mayras, at 674,

pulp.[121] In this case, A.G.Darmon expressed strong doubts concerning the experts' conclusions.[122] In spite of these reservations, the Court relied extensively on the experts' report to find *inter alia* that the parallel conduct alleged by the Commission could be explained otherwise than by concertation[123] and to ascertain whether the documents gathered by the Commission in the investigation and, consequently, prior to the statement of objections, justified the conclusion drawn by the Commission that the prices charged by the producers were the same as those they had announced.[124] In its judgment, the Court did not even mention the substantial objections raised by the Commission against the conclusions of the experts' reports.[125]

The cases in which an expert's report is successfully challenged are exceptional. In two cases, the ECJ approved the expert's report only partially. First, in a 1965 case, for the assessment of the damage allegedly suffered by the applicants, the Court took into account the factors that the experts had considered relevant, but it also approved one objection raised by one party against

and paras. 69 to 79 of the judgment; in relation to the conclusion according to which "one cannot explain the uniform price increases introduced during the period at issue *by reference to the characteristics of the market alone*", compare the summary of the expert's report by A.G. Mayras, at 676, and paras. 107 to 109 of the judgment); *Pizziolo*, *supra* note 47, paras. 8 and 9 (whether the applicant had the required qualifications and the necessary ability to carry out the duties contemplated by several vacancy reports in a scientific field); *Commission* v. *Royal belge*, *supra* note 45, paras. 10 to 25 (conclusions that an airman ought to have deduced from weather information); Case 318/81, *Commission* v. *CO.DE.MI.*, [1985] ECR 3693, paras. 13, 32 and 34 to 56 (assessment of the liability incurred with regard to certain breaches of contract and assessment of the damage alleged to have been suffered by each of the parties); Joined Cases T-32 & 39/89, *Marcopoulos* v. *Court of Justice*, [1990] ECR II-281, paras. 12 and 35 to 37 (legal rules and practice adopted by national, international and Community institutions regarding the structure, composition and proceedings of selection boards appointed to conduct tests for the recruitment of interpreters as well as other questions concerning the skills required from a member of a selection board to determine a candidate's competence as an interpreter); *Cdf Chimie et Fertilisants*, *supra* note 48, paras. 22, 28–51 (effects of a gas tariff system); *Frederiksen*, *supra* note 46, paras. 73–78 (a public official's knowledge in computerization).

121. *Ahlström*, *supra* note 25.

122. Opinion of A.G. Darmon in *Ahlström*, *supra* note 25, paras. 432–433. His reservations are expressed *inter alia* at paras. 358, 363, 397.

123. *Ahlström*, *supra* note 25, paras. 74–127 (see especially paras. 82, 101, 126). Lasok explains that it was a case where the expert evidence "was used largely to cast sufficient doubts on the findings made by the Commission to justify dismissing these findings, as opposed to setting up a positive case contradicting the Commission's findings". See Lasok, op. cit. *supra* note 7, p. 435.

124. *Ahlström*, *supra* note 25, paras. 136 and 137. See also A.G. Darmon's Opinion at paras. 116–120.

125. These objections are mentioned in the Opinion of A.G. Darmon in *Ahlström*, *supra* note 25, paras. 333, 335–337, 354, 365, 366, 379, 391, 397 and 405. Compare with the judgment at para 101.

the expert's report.[126] Second, in *Mulder*, the ECJ approved many of the expert's conclusions assessing the loss of earnings suffered by each of the applicants and the determination of the various factors to be applied in calculating the damage.[127] The ECJ noted that "because of the essentially hypothetical nature of the evaluation of loss of earnings, the expert's report plays a leading role where none of the parties is able to prove the accuracy of the data or figures on which that party relies and those data or figures are contested".[128] The ECJ relied on many conclusions made by the experts and seemingly restrained itself to control whether they were "logical", "persuasive", "plausible", "adequate", "fair" and "reasonable".[129] However, the ECJ was not deferential to all the conclusions: the Court brushed aside several elements presented in the expert's reports that concerned certain details of the assessment of the damage suffered by the applicants.[130]

This approach, however, remains exceptional. It can therefore be concluded that expert's reports are rarely commissioned, but that, once an order is made to that effect, there is a strong presumption in favour of the conclusions put forward by the expert. It seems quite natural, as in many cases it would be difficult for the courts to make credible objections against purely technical assessments. This probably explains, along with the other elements mentioned above, the EC courts' reluctance to commission an expert's report. The EC courts have shown a strong inclination to keep as much control as they can on the adjudication of purely technical matters. There is, however, another type of expert evidence on the submission of which they have no control: it is the expert evidence adduced by the parties themselves.

3. Partisan expert evidence

Expert knowledge is often adduced by the parties themselves, in which case they appoint their own experts and decide what elements will be brought to the courts' attention. These experts may be called "biased" or (in a slightly more

126. *Laminoirs de la Providence*, *supra* note 44, 911, 939 and 940.

127. *Mulder*, *supra* note 44.

128. Ibid., para 84.

129. Ibid., paras. 96, 100–149, 192–198, 201, 214–221, 273–286, 292–296, 297–306, 308–323, 324–330, 331–339.

130. Ibid., paras. 150–166, paras. 187, 191 ("[t]he calculation method used by the expert appears to be reasonable and persuasive, save as regards the deduction of the rate of inflation"), and paras. 202–213 (para 207: "[t]he Court is not convinced of the validity of [the] method, which involves taking into account, when calculating loss of earnings, the value of assistance rendered by the members of the farmer's family").

neutral way) "partisan" experts. Under EC law, their situation is the reverse of that of neutral experts: while their status is unclear (3.1.), they play an important role in EC litigation (3.2.).

3.1. *The unclear status of partisan expert evidence*

The procedure for hearing partisan experts is in most cases informal.[131] Partisan expert evidence may be presented to the courts either through the submission of an expert's report annexed to the party's written pleadings or through an oral presentation during the hearing. As noted by Lasok, partisan expert evidence is not, strictly speaking, "expert evidence" within the meaning of the Statute and the Rules of Procedure: when the evidence is filed with the written pleadings, "the evidence tendered by the party is documentary" and when a partisan expert intervenes during the hearing, "it is either testimony or a parole plea as to the facts".[132]

While there are many examples of cases in which the parties' experts put forward explanations during the hearing,[133] especially in the field of competition law,[134] the Rules of Procedure do not expressly allow partisan experts to speak at the hearing: a party may address the EC courts only through his "agent, adviser or lawyer" at the CFI and the ECJ and through its "representative" at the CST. [135] However, in practice, the EC courts often allow non-lawyers to address the Court at the hearing "in the presence and under the supervision of the lawyer".[136] In any case, when they intervene at the hearing, partisan experts are normally not examined by the opposing party. It has been noted that the courts may allow such examination,[137] but in practice such questioning is extremely rare and, in any case, could not compare with actual cross-examination.

131. MacLennan, op. cit. *supra* note 7, p. 281.

132. Lasok, op. cit. *supra* note 7, p. 398.

133. Case 215/85, *BALM* v. *Raiffeisen Hauptgenossenschaft*, [1987] ECR 1279, para 15; *Pfizer Animal Health*, *supra* note 3, paras. 338; Joined Cases T-74, 76, 83, 84, 85, 132, 137 & 141/00, *Artegodan and Others* v. *Commission*, [2002] ECR II-4945, paras. 83, 164, 167.

134. See e.g. Case T-29/92, *SPO and Others* v. *Commission*, [1995] ECR II-289, para 42; *Tetra Laval*, *supra* note 2; Order in Case T-201/04 R, *Microsoft* v. *Commission*, [2004] ECR II-4463.

135. Art. 58 of the ECJ RoP, Art. 59 of the CFI RoP and Art. 51(3) of the CST RoP. The notion of "adviser", which is also used in Art. 19 of the Statute of the ECJ, does not cover experts.

136. See e.g. for a *Patentanwalt*, Case T-315/03, *Wilfer* v. *OHIM*, [2005] ECR II-1981, para 11.

137. MacLennan, op. cit. *supra* note 7, p. 281.

As to costs, pursuant to the Rules of Procedure, expenses "necessarily incurred" by the parties for the purpose of the proceedings, "in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers" (at the ECJ and the CFI) and "representative" (at the CST) shall be regarded as recoverable costs.[138] It includes costs incurred by partisan experts provided that their submissions were "necessary",[139] a requirement that the CFI has recently specified as covering only the costs that were "objectively necessary", which may be so, for instance, (i) when the presentation of partisan evidence obviated the need for a court-appointed expert;[140] or (ii) in exceptional cases, when the expert report was indispensable for the defence of the party's rights.[141] The second test is satisfied only to the extent that the expert's report was indispensable to expose the grounds of the illegality of the decision and to adduce, if need be, *prima facie* evidence justifying the appointment of an expert by the court.[142]

3.2. *How is partisan expert evidence used?*

A quick look at the case law suffices to understand that partisan experts play an increasing role in EC litigation. Examples of cases in which partisan expert evidence was adduced include competition cases;[143] State aid cases;[144] cases

138. Art. 73(b) of the ECJ RoP, Art. 91(b) of the CFI RoP and Art. 91(b) of the CST RoP.

139. Experts' costs were considered as (at least partly) recoverable in Order in Case C-104/89 DEP, *Mulder and Others* v. *Council and Commission*, [2004] ECR I-1, para 78 (holding that the assistance of external advisors was necessarily incurred to calculate the amounts of the compensation requested by the applicants); Order in Case T-342/99 DEP, *Airtours* v. *Commission*, [2004] ECR II-1785, paras. 55, 67 and 70; Orders of 29 Oct. 2004 in Case T-310/01 DEP, *Schneider Electric* v. *Commission*, unpublished, paras. 54–61, and in Case T-77/02 DEP, *Schneider Electric* v. *Commission*, unpublished, paras. 69–72. Experts' costs were considered as non-recoverable in Orders in Case T-85/94 DEP and Case T-85/94 OP-DEP, *Branco* v. *Commission*, [1998] ECR II-2667, para 27; Case T-271/94 DEP, *Branco* v. *Commission*, [1998] ECR II-3761, para 21 (economist in European Social Fund cases); Order in Case T-65/96 DEP, *Kish Glass* v. *Commission*, [2001] ECR II-3261, paras. 26–27.

140. *WestLB*, *supra* note 62, para 78.

141. Ibid., para 80.

142. Ibid., paras. 84, 87–90 and 93.

143. See e.g. Case T-141/94, *Thyssen Stahl* v. *Commission*, [1999] ECR II-347, paras. 276 and 632 (report alleging to prove that the practices at issue in this case did not have any appreciable bearing on the level of competition); Case T-25/99, *Roberts* v. *Commission*, [2001] ECR II-1881, para 51 (report on market analysis); *Tetra Laval*, *supra* note 2; *Schneider Electric*, *supra* note 113.

144. Order in Joined Cases T-195 & 207/01 R, *Government of Gibraltar* v. *Commission*, [2001] ECR II-3915, para 86 (report on the effects of the suspension of the measures).

raising engineering or manufacturing issues,[145] accountancy and/or financial issues,[146] environment issues,[147] or ornithological issues;[148] as well as a trademark cases for the assessment of the distinctive character of the trademark at issue.[149]

Partisan expert evidence sometimes has a great bearing on the issue before the court. Examples of assessments on which the courts relied heavily include assessments of the effects on wine when transported in bulk;[150] feasibility according to a specialist in the phosphoric acid industry of a change in a production process;[151] the financial health of a company;[152] the possibility of avoiding negative effects on the corncrake population by specific measures and thereby ensure its continuation;[153] characteristics and objective properties of milk products;[154] rates of losses incurred in the manufacture of beer in different breweries and different countries;[155] certain characteristics of cereals;[156] and pharmaceutical issues.[157]

Of course, it does not mean that partisan experts' arguments are always successful. It has been noted that the ECJ sometimes showed reluctance to even

145. Case T-5/97, *Industrie des poudres sphériques* v. *Commission*, [2000] ECR II-3755, para 130 (on how a lime problem and a problem of compactness of calcium metal were dealt with and on the existence of a method for measuring oxygen content); Case C-153/89, *Commission* v. *Belgium*, [1991] ECR I-3171, paras. 17–19 (rates of losses incurred in the manufacture of beer in different breweries and different countries); *Microsoft*, *supra* note 134, paras. 261–262 (computer science).

146. Case T-231/99, *Joynson* v. *Commission*, [2002] ECR II-2085, para 128; Order in Case T-198/01 R, *Technische Glaswerke Ilmenau* v. *Commission*, [2002] ECR II-2153, paras. 20, 35, 39, 44 and 45.

147. Order in Case T-37/04 R, *Região autónoma dos Açores* v. *Council*, [2004] ECR II-2153, paras. 149 and 177; Case C-209/02, *Commission* v. *Austria*, [2004] ECR I-1211, para 25.

148. Case C-202/94, *Criminal proceedings against Godefridus van der Feesten*, [1996] ECR I-355 (see Opinion of A.G. Fenelly, paras. 17, 38 and 59).

149. Case T-88/00, *Mag Instrument* v. *OHIM*, [2002] ECR II-467, para 18; Case C-136/02 P, *Mag Instrument*, *supra* note 58, para 10.

150. Case C-388/95, *Belgium* v. *Spain*, [2000] ECR I-3123, para 62 (the finding of the Court derives directly from the experts' opinion, see Opinion of A.G. Saggio, para 26).

151. Case T-73/98, *Prayon-Rupel* v. *Commission*, [2001] ECR II-867, paras. 78 and 79.

152. *Technische Glaswerke Ilmenau*, *supra* note 146, paras. 100–107; Order in Case T-198/01 R II, *Technische Glaswerke Ilmenau* v. *Commission*, [2003] ECR II-2895, paras. 51–54; Order in Case T-198/01 R III, *Technische Glaswerke Ilmenau* v. *Commission*, [2004] ECR II-1471, paras. 48–52.

153. Case C-209/02, *Commission* v. *Austria*, [2004] ECR I-1211, paras. 25 and 26.

154. Case 40/88, *Weber* v. *Milchwerke Paderborn-Rimbeck*, [1989] ECR I-1395, para 22.

155. *Commission* v. *Belgium*, *supra* note 145, paras. 20 and 25 (the experts' reports were deemed sufficient in the absence of any evidence to the contrary).

156. *BALM*, *supra* note 133, para 15

157. *Pfizer Animal Health*, *supra* note 3, paras. 338, 361, 363, 366, 373, 375.

look at the voluminous documents submitted by the parties.[158] In addition, the EC courts are obviously not bound to agree with the expert's opinion and they are entitled to undertake their own appraisal of the factual question, which they often do.[159] There are many examples of cases in which the EC courts have not mentioned the experts' report when assessing the case or found the expert's report irrelevant (in particular because it focused on irrelevant facts).[160] There are also many examples of cases in which the conclusions of the expert's reports were not irrelevant but were questioned and/or judged unfounded (e.g., when the other party submitted an expert report that contradicted the findings of the other report;[161] the report did not put forward "the slightest evidence" supporting its conclusions;[162] the expert's conclusions were based on complex premises which in view of their number and complexity did not permit sufficiently definite conclusions;[163] the experts' qualifications did not correspond to the factual issues at stake;[164] and the report was based on incomplete knowledge of the facts[165]). Strong objections may be raised even when the questions dealt with in the report are very technical.[166] The EC courts sometimes use quite harsh words to dismiss a report as unreliable.[167]

4. Is there room for improvements?

4.1. *Should the use of expert evidence be encouraged?*

One may legitimately wonder whether the use of expert evidence should be encouraged. After all, the EC courts' function is not to find the truth but to resolve a dispute. Absence or imperfection of expert evidence submitted to the

158. MacLennan, op. cit. *supra* note 7, p. 282, citing Case C-84/94, *United Kingdom* v. *Council*, [1996] ECR I-5755.

159. See e.g. Case C-136/02 P, *Mag Instrument*, *supra* note 58, para 67.

160. See e.g. Case T-4/89, *BASF* v. *Commission*, [1991] ECR II-1523, para 287; Case T-17/93, *Matra Hachette* v. *Commission*, [1994] ECR II-595, para 152; *Euroagri*, *supra* note 12, para 174.

161. Case T-2/95, *Industrie des poudres sphériques* v. *Council*, [1998] ECR II-3939, para 259.

162. *Industrie des poudres sphériques*, *supra* note 145, para 113.

163. *Joynson*, *supra* note 146, para 136.

164. *Skibsvaerftsforeningen*, note 62 *supra*, para 187.

165. Ibid., para 187.

166. *Industrie des poudres sphériques*, *supra* note 145, para 130.

167. Case T-464/04, *Impala* v. *Commission*, [2006] ECR II-2289, para 345 ("the data prepared by the economic advisers to the parties to the concentration, quite apart from the fact that it is impossible to see how they might permit the conclusion which the Commission draws from them, are unclear and do not appear to be reliable.").

courts does not necessarily prejudice their ability to find a solution. In addition, "the ability of the judges to rule on the issues involved is not necessarily enhanced by the production of detailed academic submissions by the parties and a 'battle of experts' taking place in the oral hearing".[168] It is therefore not surprising that the members of the EC courts sometimes express some kind of distrust *vis-à-vis* expert evidence.[169] However, one can think of four main reasons why the submission of valuable expert evidence should be encouraged.

First, the mere existence of technical issues does not imply that the institution controlled enjoys unlimited discretion. The assistance of experts, which is permissible and legitimate even within the strict framework of limited judicial review, can be highly valuable to detect manifest errors or errors of facts.[170]

Second, the technical correctness of judicial decisions complements their procedural legitimacy. Science is without doubt the result of a process made up of errors,[171] and technical experts can of course disagree on complex issues even after a thorough examination. However, while scientific legitimacy is not a sufficient basis for the exercise of public authority,[172] technical legitimacy remains a valuable component thereof.[173] The legitimacy of the courts' decisions does not derive *only* from procedure: their technical accuracy reinforces their procedural legitimacy.[174]

168. MacLennan, op. cit. *supra* note 7, p. 283, referring to the interim measures proceedings in Case T-13/99 R, *Pfizer Animal Health* v. *Council*, [1999] ECR II-1961, the hearing of which attracted 169 microbiologists, epidemiologists and professors of medicine.

169. See e.g. the Joined Opinions of Judge Vesterdorf acting as A.G. in Cases T-1/89, *Rhône-Poulenc* v. *Commission*, T-2/89, *Petrofina* v. *Commission*, T-3/89, *Atochem* v. *Commission*, T-4/89, *BASF* v. *Commission*, T-6/89, *Enichem Anic* v. *Commission*, T-7/89, *Hercules Chemicals* v. *Commission*, T-8/89, *DSM* v. *Commission*, T-9/89, *Hüls* v. *Commission*, T-10/89, *Hoechst* v. *Commission*, T-11/89, *Shell International Chemical Company Ltd* v. *Commission*, T-12/89, *Solvay & Cie* v. *Commission*, T-13/89, *Imperial Chemical Industries* v. *Commission*, T-14/89, *Montedipe* v. *Commission* and T-15/89, *Chemie Linz* v. *Commission*, [1991] ECR II-867, 957 ("the findings of economic experts cannot take the place of legal assessment and adjudication. Thus, when Professor Albach makes his observations about what target prices might be in an economic context, it must be emphasized that his views are not, and cannot form, a legal assessment.… It is for the Court to consider what is prohibited under Article 85(1) and the evidence for the commitment of prohibited acts, and not for economic theorists.").

170. See 2.3.4. *supra*.

171. *Daubert* v. *Merrell Dow Pharmaceuticals*, *supra* note 73, 597.

172. *Pfizer Animal Health*, *supra* note 3, para 169.

173. See e.g. Brewer, who notes that "[w]ere a legal system to set its rules of procedure and evidence – the rules guiding 'legal epistemology' – so as to insist on only *knowledge* (with truth as a necessary condition) the law would vastly deprive itself of counsel it *needs* to make legal decisions sufficiently *epistemically* legitimate to be *legally* legitimate". Brewer, op. cit. *supra* note 3, p. 1601 (emphasis in the original).

174. See Dalbignat-Deharo, op. cit. *supra* note 5, p. 188.

Third, the expert evidence submitted in one given case is sometimes crystallized into legal standards that are applied in subsequent cases. While there is no rule of precedent as such before the EC courts,[175] in most cases the general rules set out in a final judicial decision are there to stay. As a consequence, the expert evidence submitted in one case can be decisive in many others. For instance, in competition law, the EC courts may create substantive sub-tests[176] or design general rules on the basis of economic evidence adduced to them in one specific case. In *Airtours*, the CFI interpreted Article 2(3) of the former Merger Regulation[177] with regard to the concept of "collective dominance". It is on the basis of the economic surveys provided by the parties that it held that economic theory regards volatility of demand as something which renders the creation of a collective dominant position more difficult.[178]

Fourth, the EC courts do not enjoy unfettered discretion as regards measures of inquiry: they may be obliged to order such measures when a party adduces *prima facie* evidence of the existence of elements material to the outcome of the case.[179] As a consequence, measures of inquiry, even though they are rarely used, are an important device for EC litigation that should be as efficient as possible.

It is therefore important to encourage the submission and use of valuable expert evidence. Admittedly, the more judges rely on expert evidence, the less they decide: there is always in this case an irreducible transfer of judicial power to the expert.[180] This is precisely the reason why the ECtHR imposed certain procedural guarantees relating to expert evidence in the *Mantonavelli* case.[181] It is submitted however that resorting to expert evidence is preferable to potentially undue limitation of judicial review (see 2.3.4. *supra*) and/or potentially undue reliance on personal experience in a technical field (see 2.3.5. *supra*). Not resorting to expert evidence will not make the judges more knowledge-

175. Arnull, "Owning up to fallibility: Precedent and the Court of Justice", 30 CML Rev. (1993), 247.

176. Vesterdorf, "Economics in Court: reflections on the role of judges in assessing economic theories and evidence in the modernised competition regime", in Johansson, Wahl, Bernitz (Eds.), *Liber amicorum in honour of Sven Norberg* (Bruylant, 2006), p. 505.

177. Council Reg. (EEC) No 4064/89/EEC of 21 Dec. 1989 on the control of concentrations between undertakings (O.J. 1989 L 395/1, corrected version in O.J. 1990, L 257/13), now replaced by Council Reg. (EC) No 139/2004 of 20 Jan. 2004 on the control of concentrations between undertakings (O.J. 2004, L 24/1).

178. *Airtours*, *supra* note 55, para 139.

179. *WestLB*, *supra* note 62, para 87 (referring to Case C-119/97 P, *Ufex and Others* v. *Commission*, [1999] ECR I-1341, paras. 110 and 111).

180. Brewer, op. cit. *supra* note 3, p. 1679.

181. *Mantonavelli*, *supra* note 31.

able in scientific matters. The purpose of the remainder of this section is therefore to explore how the use of expert evidence can be improved.

Neutral expert evidence and partisan expert evidence are both useful and complementary. However, one striking feature of the EC law of expert evidence is that it does not offer guarantees that are comparable to those traditionally associated with each type of expert evidence in the legal system in which it is the most commonly used (i.e., on the one hand, institutionalized *a priori* control of neutral experts in continental systems, for instance through the establishment of official lists, and, on the other hand, assessment of the quality of partisan expert evidence during the trial in common law systems, for instance through strict admissibility rules). Many potential improvements could therefore help increase the quality of expert evidence: neutral experts should probably be appointed more often than they currently are (4.2); the status of partisan expert evidence should be clarified (4.3); it would be useful to foster the control of the reliability of the evidence (4.4) and to explore the possibility of setting up official lists of experts (4.5). Finally, one could think of more structural changes leading to the integration of expertise *within* the courts (4.6).

4.2. *Increase the use of neutral experts*

It is an important principle of EC law that the parties must adduce the evidence necessary to support the facts they rely upon. However, "systematically combining the use of 'unilateral' party-requested experts supplemented by a 'neutral' court appointed (with the approval of the parties) expert(s) whose findings are not binding on the Court might well mean that cases with complex technical facts are subjected to a more effective analysis of the facts so that ultimately, a better judgment can be reached by the body ultimately responsible: the court".[182] It is indeed significant that, in the U.S., which has a strong tradition of hearing partisan experts, the use of neutral experts has attracted increasing interest.[183] The EC courts should consequently not rule out the commissioning of an expert's report as often as they currently do. One can think of four main reasons, some of which have been highlighted by the CFI itself.[184]

First, neutral experts have no incentive to be partisan, therefore the evidence they submit is *prima facie* more reliable than the evidence submitted by

182. MacLennan, op. cit. *supra* note 7, p. 288.

183. See e.g. Hovenkamp, "Book review, The Rationalization of Antitrust", 116 Harv. L. Rev. (2003), 917, at 943 and 944; "Developments in the Law", op. cit. *supra* note 6, 1589–1591.

184. *WestLB*, *supra* note 62, para 86 (in substance: the expert's independence and the court's control on the necessity and relevance of its intervention and on the costs).

partisan experts. Of course, neutral experts are not necessarily more competent than partisan experts[185] and they are not always without bias.[186] Indeed, the expert's neutrality is not firmly guaranteed by the ECHR.[187] However, the principle remains that neutral experts are independent from the parties. In A.G. Darmon's words, "[t]he expert must … reflect the independence of the judge".[188] Moreover, bias issues must be nuanced if the expert can be properly examined or at least if the parties can submit observations on his findings, which is the case in EC law.[189] These guarantees are probably the most obvious advantage of neutral expert evidence.

Second, when a neutral expert is appointed, the courts will often feel less constrained to choose between the opinions of two opposing experts. In *Dyestuff*, the parties submitted reports the conclusions of which were diametrically opposed. The commissioning of an expert's report precisely allowed the Court to make an informed choice.[190] Likewise, it seems that the submission of complex and contradictory reports is what prompted the commissioning of an expert's report in *Woodpulp*.[191]

Third, commissioning an expert's report does not always entail more costs than not doing so. Admittedly, the costs incurred by commissioning an expert's report are part of the recoverable costs,[192] but the same is true for the submission of partisan expert evidence, depending on whether it was necessary or not, as illustrated by the *Airtours* and *Schneider* cases.[193] As a consequence, it is far from certain that the commissioning of an expert's report is always more expensive than letting the parties rely on their own experts. On the contrary, the courts probably enjoy more control over the fees in the case

185. In *Woodpulp* for instance, the experts' reports managed to explain the existence of a fact that was untrue. See Opinion of A.G. Darmon, para 384 ("the fact that two conflicting explanations [by the Commission's expert and by the Court's experts] could be given for data that is incorrect justifies a cautious approach to what may be deduced with any certainty from what is shown by the economic arguments").

186. Howard, "The neutral expert: A plausible threat to justice", (1991) *Criminal Law Review*, 98, at 101 ("[i]t is slightly mysterious that it should be thought that experts are venal mountebanks when engaged by the parties but transformed into paragons of objectivity when employed by the court").

187. ECtHR, Judgment of 28 Aug. 1991, *Brandstetter* v. *Austria*, Series A, No. 211, paras. 41–45.

188. Opinion by A.G. Darmon in Case C-236/92, *Comitato di coordinamento per la difesa della Cava and Others* v. *Regione Lombardia and Others*, [1994] ECR I-483, para 50.

189. See 2.1. *supra*.

190. Opinion of A.G. Mayras in *ICI (Dyestuff)*, *supra* note 52, p. 675.

191. Opinion of A.G. Darmon in *Ahlström*, *supra* note 25, para 333.

192. Art. 51 and 73 of the ECJ RoP, Art. 74 and 91(a) of the CFI RoP and Art. 66 and 91(a) of the CST RoP.

193. See text at note 139 *supra*.

of court-ordered reports. Of course, the commissioning of an expert's report does not prevent the parties from appointing their own experts. However, if the evidence that they submit relates to the same topic as that adduced by the court-appointed expert, the costs incurred by the parties will rarely be considered as necessary and therefore will not be included in the recoverable costs.

Fourth, it is also uncertain whether the commissioning of an expert's report will always unduly delay the proceedings. While the production of a report may take several months, it may sometimes not be too high a price to pay for proper and informed adjudication.

There are therefore good reasons to believe that, at least in certain circumstances, resorting to court-appointed experts would be a valuable option and that the EC courts should be more open to this measure of inquiry than they currently are.

4.3. *Clarify the status of partisan expert evidence*

Partisan expert evidence raises three main problems. The first problem relates to the experts' competence. This article certainly does not submit that partisan experts appearing before the EC courts are generally incompetent. It is argued however that the EC courts can rarely perform a full review of their qualifications. Like any other judge, they can be inclined to rely on the experts' credentials. The risk therefore exists that judges will trust them too much. Such risk is reinforced by the absence of any right for a party to object to an expert on the ground that he is not competent, whereas such a possibility exists for neutral experts.[194] Of course, the opposing parties are allowed to challenge the partisan expert's opinion on the substance, which they usually do. In addition, the judges are obviously allowed to assess the probative value of the evidence adduced by the biased expert. But is a judge always qualified to do so? It could therefore be useful to impose on any partisan expert the obligation to provide the court with at least some elements capable of demonstrating *prima facie* that he has enough qualifications and experience to make submissions on the specific topic at issue.

A second problem with partisan experts concerns reliability: they normally provide evidence and opinions that support their client's case.[195] Of course, it is tempting to argue that the parties' lawyers too are biased. However, biased experts are not sworn in, whereas a lawyer must be member of a bar and has

194. Art. 50 of the ECJ RoP, Art. 73 of the CFI RoP and Art. 65 of the CST RoP.

195. Posner contends that "[t]here is hardly anything, not palpably absurd on its face, that cannot be proved by some so-called 'experts'", See *Chaulk* v. *Volkswagen of Am*., Inc., 808 F.2d 639, 644 (7th Cir. 1986) (Posner, J., dissenting).

certain duties to the courts that prevent him or her from knowingly providing them with false information.[196] At least for the sake of symbolism, it could be useful to require from all partisan experts that they commit not to mislead the court or even to impose on them the duty imposed on neutral experts (i.e., swear that they have conscientiously and impartially carried out their task).[197]

Third, the use of partisan experts raises issues of procedural fairness. Pursuant to the EC courts' current Rules of Procedure, partisan experts are neither experts nor witnesses. As noted above, partisan experts are strictly speaking not authorized to speak at the hearing but, in practice, the EC courts often allow unqualified people to address them "in the presence and under the supervision of the lawyer".[198] This possibility should remain but it should be clarified in the Rules of Procedure.

More importantly, partisan experts generally cannot be cross-examined by the opposing party.[199] It is true that opposing experts can rebut partisan experts' contentions, but this possibility does not compare to actual cross-examination, which allows a much closer examination of the experts' opinion. Neither can judges be deemed to be competent in all cases to rebut the biased experts' opinions. The Rules of Procedure should therefore allow any party representative to cross-examine – or at least clarify the right to put questions to – the partisan experts appointed by the opposing party.

4.4. *Foster the control of the reliability of expert evidence*

There are very few rules on the admissibility of evidence before the EC courts, let alone rules on the admissibility of expert evidence. In the *Polypropylene* cases, Judge Vesterdorf acting as A.G. stated that "the activity of the ECJ and … the CFI is governed by the principle of unfettered evaluation of evidence, unconstrained by the various rules laid down in the national legal systems. Apart from the exceptions laid down in the Communities' own legal order, it is only the reliability of the evidence before the Court which is decisive when it comes to its evaluation".[200] As noted by Lasok, except in limited circum-

196. Art. 4.4 of the CCBE Code of conduct: "[a] lawyer shall never knowingly give false or misleading information to the court".

197. Except if he is exempted from taking the oath by the Court. Art. 49(6) of the ECJ RoP, Art. 70(6) of the CFI RoP and Art. 62(6) of the CST RoP.

198. See e.g. for a *Patentanwalt*, *Wilfer*, *supra* note 136, para 11.

199. By contrast with court-appointed experts (see *supra* note 36). However, according to one commentator, "examination of court appointed expert witnesses is a rather more kid gloved endeavour than full cross-examination in an Anglo-Saxon style court room." (MacLennan, op. cit. *supra* note 7, 285).

200. Joined Opinions in *Polypropylene*, note 169 *supra*, p. 954.

stances, "the only criterion, the only golden rule, is the credibility of evidence".[201]

However, assessing the credibility of expert evidence can be a daunting task, especially when it comes to evaluating the scientific nature and the rigour of the methodology used by the expert. To the knowledge of the authors, there are very few examples of the EC courts being tempted to embark on a scientific appraisal of the experts' conclusions. By contrast, this delicate task is regularly carried out by U.S. courts on the basis of the principles established in *Daubert* v. *Merrell Dow Pharmaceuticals*.[202] *Daubert* sets out "gatekeeping principles" for the admission of expert evidence. They are designed as rules of admissibility of expert testimony based on the reliability of the methodology used by the expert; in theory they do not concern the probative value of the outcome reached once the methodology was applied.

Under the *Daubert* rules, four factors must be taken into account before the evidence will be declared admissible: (i) the ability to test the theory or technique used; (ii) subjection of the theory or technique to peer review and publication; (iii) the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation; and (iv) its level of acceptance by the scientific community. As the Supreme Court later made clear in *Kumho Tire Co.* v. *Carmichael*, the *Daubert* rule does not apply only to scientific testimony but more generally to all expert testimony (i.e. also testimony involving "technical" issues, e.g. engineers' testimony).[203] The test is flexible: these factors do not constitute a definitive checklist and some factors are more relevant than others depending on the cases.[204] This is nonetheless a very stringent test, as judges examine very closely the reliability of the methods used.[205] A survey on the effects of *Daubert* on the U.S. federal courts showed that the closer scrutiny given to expert evidence caused an increase in the proportion of challenged evidence excluded.[206]

Admittedly, *Daubert* was designed for a system in which the trier of facts is generally a jury (composed of laymen) and not a judge. In the EC system, the fact finder is the Court itself. The need for such evidentiary rules is therefore less obvious. However, there is little reason to think that judges will necessarily be more knowledgeable than laymen in extremely complex technical fields,

201. Lasok, op. cit. *supra* note 7, p. 431.

202. *Daubert* v. *Merrell Dow Pharmaceuticals*, *supra* note 73. See also Rule 702 of the Federal Rules of Evidence.

203. *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999).

204. Ibid.

205. See e.g. the analysis carried out in *General Elec.* v. *Joiner*, 522 U.S. 136 (1997).

206. Dixon and Gil, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision* (Rand Institute for Civil Justice, 2001), p. xvi.

like chemistry or genetics. Judges are certainly less impressed than a jury by the mere appearance of an "expert" and his credentials.[207] Yet, in highly technical matters, they can be swayed like all laymen. At first glance, one could therefore believe that the *Daubert* criteria are of interest to EC litigation. However, there are also strong reasons to believe that it is not worth making an exception to the traditional principle of the unfettered evaluation of evidence: first, the *Daubert* rules create additional risks of protracted litigation; and, second, they are abundantly criticized for not allowing judges to distinguish "junk science" from good science.[208] There is in fact no reason to believe that judges always have the competence to do so.[209] In the U.S., *Daubert* challenges sometimes result in "the judge wash[ing] his hands of the matter and giv[ing] it to the jury, thus passing the issue off to an even less qualified decision maker".[210] The risk therefore remains that reliable evidence will be excluded because it is difficult to understand, while unreliable evidence could be admitted because the courts do not understand a flaw in the expert's argument.[211]

In view of all these reservations, there is not a strong case for the adoption of such rules by the EC courts. However, the EC courts could certainly draw inspiration from the spirit of *Daubert* and engage in deeper analysis of the reliability of the expert evidence adduced before them, for instance by being much more receptive to scientific evidence that allows them to examine for

207. "Developments in the Law", op. cit. *supra* note 6, 1586.

208. *Daubert* v. *Merrell Dow Pharms.*, *Inc.*, 43 F.3d 1311 (9th Cir. 1995) at 1315–1316 (on remand): "[a]s we read the Supreme court's teaching in Daubert, … though we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing, it is our responsibility to determine whether those experts' proposed testimony amounts to 'scientific knowledge', constitutes 'good science', and was 'derived by the scientific method.'" See also Justice Breyer in *General Elec.* v. *Joiner*, *supra* note 205 (Breyer, J. concurring): "This requirement will sometimes ask judges to make subtle and sophisticated determinations about scientific methodology and its relation to the conclusions an expert witness seeks to offer – particularly when a case arises in an area where the science itself is tentative or uncertain, or where testimony about general risk levels in human beings or animals is offered to prove individual causation. Yet … judges are not scientists and do not have the scientific training that can facilitate the making of such decisions". See also "Developments in the Law", op. cit. *supra* note 6, 1516. Compare with the anonymous note "Reliable Evaluation of Expert Testimony", 116 Harv. L. Rev. (2003), 2142, at 2150, (stating that under *Daubert*, "judges need not be amateur scientists, technicians or specialists", but "must know enough about a subject to identify indicia of reliability and to apply them competently", "the judiciary's expertise [being] in deconstructing an argument").

209. "Developments in the Law", op. cit. *supra* note 6, 1513; Brewer, op. cit. *supra* note 3, p. 1617.

210. Hovenkamp, op. cit. *supra* note 183, 942.

211. Dixon and Gil, op. cit. *supra* note 206, p. xx.

themselves the basic facts from which the expert's conclusions were drawn.[212]

4.5. *Set up lists of experts?*

As noted above, one of the main problems of partisan expert evidence is its reliability. The same problem exists to a lesser extent for neutral experts: while their credibility is increased by their independence and by the fact that the courts chose them, there is no formal guarantee that they will be competent. When the EC courts commission an expert's report, they quite often request the parties to agree on the name of one or several experts.[213] The fact that the experts were chosen by the parties does not guarantee that they are the most competent.

Several Member States have tried to solve this problem by setting up official lists of expert specialists in nearly all the disciplines requiring technical knowledge. This is the case for instance in France, even though the appointment of an expert chosen from a list remains a mere option for the courts.[214] This system therefore appears to be an intermediary between the common law systems (in which the parties generally choose their experts) and the German system (in which experts are agents of the State).[215] One may note that applying this idea in the EC system would not be a complete breakthrough, as the possibility of setting up lists of experts was already provided for by ECSC Statute annexed to the ECSC Treaty.[216] This option was never implemented, which does not mean that it should be left aside. In fact, at the time of writing,

212. "Developments in the Law", op. cit. *supra* note 6, p. 1502. Werden, "Making Economics More Useful in Competition Cases: Procedural Rules Governing Expert Opinions", in Hawk (Ed.), *International Antitrust Law & Policy* (Fordham Corp. L. Inst., 2005), p. 601, at p. 607.

213. See *Marcopoulos*, *supra* note 120.

214. Curtil, "Le droit des experts judiciaires tels qu'issu de la loi du 11 février 2004: statut et discipline", *Petites affiches*, 13 Sept. 2004, No. 183, p. 3. In France, there are two types of lists of experts: those drawn up by each Court of appeal and a national list, drawn up by the *Cour de cassation*. Experts are now subject to an initial probation period of 5 years. An expert can only be admitted onto the national list if he or she has been on a court of appeals list for at least 3 consecutive years (Art. 2 of law 71–498 as modified).

215. Ibid.

216. Art. 25 ECSC ("[t]he Court may at any time entrust any individual, body, authority, committee or other organization it chooses the task of holding an inquiry or giving an expert opinion; to this end, it may compile a list of individuals or bodies approved as experts"). See also Lasok, op. cit. *supra* note 7, p. 397. The adoption of such a list was recommended by Olivier, "L'expertise devant les juridictions communautaires", *Gazette du palais*, 10 March 1994, 291.

the Council was contemplating this option for the cases heard by the future Community patent courts.[217]

The main advantage of these lists is that they allow better monitoring of the experts' competence.[218] Such experts are in essence repeat players who have a very strong incentive, if they want to remain on the list, to abide by the strictest standards of quality. However, there are some risks associated to such lists. "There is at any rate a danger that only those with safe or popular views would be appointed as neutral experts to assist the court".[219] In addition, the process of selecting the experts may require as much scientific knowledge as in the previous case, and relying merely on their credentials is not a satisfactory solution.[220] As cases before the EC courts can be brought in 23 different languages, it may also be difficult to list experts competent in all technical fields and all languages with which the EC courts could have to deal. Translation is of course possible but creates additional delays and risks. Finally, such lists lose much of their interest if it is not possible to sanction an expert who acted inappropriately by other means than his mere withdrawal of the list. At this stage, there does not seem to be any legal basis allowing the EC courts to impose stricter sanctions than mere "naming and shaming". For all these reasons, it is probably satisfactory to maintain a flexible system in which the courts may choose experts on the basis of an *ad hoc* list narrowly tailored to the specificities of each case, provided that the experts' qualifications are closely scrutinized.

4.6. *Structural options: Specialized courts and Assistant Rapporteurs?*

The options examined above are no more than cosmetic surgery: they merely try to compensate for the fact that judges lack the expert knowledge required to solve the technical issues presented to them. A more radical way of solving this problem consists in trying to integrate expert knowledge *within* the courts. This can be done through two main options: either through the creation of specialized courts or specialized chambers (4.6.1) or through the appointment of Assistant Rapporteurs (4.6.2.).

217. Council documents Nos. 7001/08, 7728/08 and 9124/08.

218. The Commission proposal for the establishment of a Community Patent Court (COM(2003)828 final) indirectly acknowledges the usefulness of such lists for the adjudication of very technical issues: a reference to the list maintained by the European Patent Office for the purpose of legal representation before it is supposed to ensure appropriate and uniform standards for qualifying persons which must be met for efficient proceedings. See Art. 4 of the proposal .

219. Howard, op. cit. *supra* note 186, 103.

220. Brewer, op. cit. *supra* note 3, pp. 1624–1634.

4.6.1. *Specialized courts or specialized chambers*

Specialized courts or specialized chambers have two main advantages: first, they can be composed of specialized judges who can have proper training in the technical field dealt with by the court; second, as they are specialized, the judges are quickly confronted with a substantial number of cases. As a consequence, they enjoy a steep learning curve. One may add that having judges trained in a technical discipline is in practice the only way of ensuring that they remain the actual adjudicators.

There are several examples of such courts in the Member States. One of the most famous is the Competition Appeals Tribunal in the UK, which is a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy. Cases are heard by a panel of three members: either the President or a member of the panel of chairmen and two ordinary members. The members of the panel of chairmen are judges of the Chancery Division of the High Court and other senior lawyers. The ordinary members have expertise in law and/or related fields.[221]

There is also one specialized court in the EC system since the Civil Service Tribunal was created on the basis of Articles 220(2) and 225a EC.[222] However, this court was created to lighten the CFI's caseload and not to cope with technical or scientific issues. To the knowledge of the authors, at this stage the creation of courts or chambers specialized in dealing with cases requiring technical knowledge was contemplated and surveyed at least twice.

First, in 2006, the House of Lords opened a public debate about the possible creation of a specialized competition court or specialized chambers within the CFI.[223] While this option was eventually not recommended by the House of Lords, several witnesses heard during the preparation of its report underlined the advantages of specialization in competition law.[224] The specialization of EC judges in certain technical matters would indeed have great advantages. It remains however that, as evidenced by the discussions before the House of Lords, such a move raises many issues (e.g., the potential isolation of the field of law from the rest of EC law) and should therefore be considered with caution.[225]

221. See www.catribunal.org.uk/about/default.asp#howappeal [last visited 30 March 2008].

222. Council Dec. of 2 Nov. 2004 establishing the European Union Civil Service Tribunal (O.J. 2004, L 333/7).

223. House of Lords report, *supra* note 81.

224. Ibid., para 120 and Q98. See also Gerber, op. cit. *supra* note 113, p. 493.

225. House of Lords report, *supra* note 81, paras. 65–84 and 122. It can also raise budgetary issues.

Second, in late 2003, the Commission put before the Council a proposal for a Council decision containing a conferral of jurisdiction on the ECJ with regard to the Community patent[226] together with a proposal for a Council decision (i) to establish a judicial panel to be called "Community Patent Court" which would within the ECJ exercise at first instance jurisdiction in disputes relating to the Community patent and (ii) to accommodate the new function of the CFI as instance for appeals against decisions of the Community Patent Court.[227] The Commission proposed *inter alia* to set up a special patent appeal chamber within the CFI with three judges "having a high level of legal expertise in patent law providing the legal experience required for the highly specialized field of patent litigation".[228]

However, these proposals remain blocked at this stage. Consequently, in 2007 the Commission proposed the adoption of a slightly different structure comprising (i) a first instance with "local and regional divisions" as well as one "central division"; (ii) a second instance; and (iii) a Registry.[229] The Commission envisioned that the panels hearing the cases at first and second instances should include both legally and technically qualified judges. At the time of writing, it was planned that the first and second instances would be separate from the CFI and the ECJ. However, it may be noted that, in its opinion on the Commission's proposal of 2003, the ECJ considered that "providing in a specific article, separate from the general provisions applicable to the [CFI], for the creation of a separate specialist chamber of the [CFI] and laying down specific rules on the appointment of the judges of that chamber entails the risk of compromising the structure and integrity of that court".[230] It shows the ECJ's preference for not imposing mandatory technical specialization of CFI judges.

226. Proposal for a Council decision conferring jurisdiction on the Court of Justice in disputes relating to the Community patent, COM(2003)807 final, 23 Dec. 2003. Art. 229a EC allows the Council to adopt provisions to confer jurisdiction, to the extent that it shall determine, on the ECJ in disputes relating to the application of acts, adopted on the basis of the Treaty, that create Community industrial rights.

227. Proposal for a Council decision establishing the Community Patent Court and concerning appeals before the Court of First Instance, COM(2003)828 final.

228. Ibid., p. 9 and 34.

229. Communication from the Commission to the European Parliament and the Council, Enhancing the patent system in Europe, COM(2007)165 final; see also Council documents Nos. 7001/08, 7728/08 and 9124/08.

230. Proposal for a Council Decision establishing the Community Patent Court and concerning appeals before the Court of First Instance − Opinion of the Court of Justice of the European Communities, para 37.

4.6.2. *Assistant Rapporteurs*

Since it was adopted in 1957, the ECJ Statute has contained an interesting provision allowing the appointment of specialized "Assistant Rapporteurs" who can help the EC courts to adjudicate technical matters: Article 13 of the ECJ Statute now provides that: "[o]n a proposal from the Court, the Council may, acting unanimously, provide for the appointment of Assistant Rapporteurs and lay down the rules governing their service. The Assistant Rapporteurs may be required, under conditions laid down in the Rules of Procedure, to participate in preparatory inquiries in cases pending before the Court and to cooperate with the Judge who acts as Rapporteur. The Assistant Rapporteurs shall be chosen from persons whose independence is beyond doubt and who possess the necessary legal qualifications; they shall be appointed by the Council. They shall take an oath before the Court to perform their duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court".[231] It is thus tempting to think that the provisions relating to Assistant Rapporteurs would allow the appointment of assistants who would compare with U.S. "special masters", who "can help a decision maker come to an informed judgment about complex issues that otherwise would be outside the range of the fact finder's knowledge".[232]

At the time of writing, no Assistant Rapporteur has ever been appointed in the EC courts, but the CFI has applied a comparable solution, as for several years it was assisted by an in-house economist. The CFI thereby followed the example of a U.S. court in a famous antitrust case: in *U.S.* v. *United Shoe Machinery Company*, an economist was appointed as clerk and apparently played an important role in the adjudication of the case.[233] By contrast, at the CFI, the experience proved inconclusive.[234]

There is still, however, some life in this idea. The Commission's proposal of 2003 for the establishment of a Community Patent Court (which now seems to be definitively replaced by the proposal of 2007)[235] included plans for the judges to be assisted in their work throughout the handling of the case by technical experts.[236] To that end, Assistant Rapporteurs as foreseen in Article 13 of

231. See also Art. 16 of the ECSC Statute.

232. "Developments in the Law", op. cit. *supra* note 6, 1593.

233. *U.S.* v. *United Shoe Machinery*, 110 F. Supp. 29S; aff'md, *per curiam* 347 U.S. 251. Kaysen, "An Economist as the Judge's Law Clerk in Sherman Act Cases", 25 Antitrust L.J. (1958), p. 43; Webster and Hogeland, "The Economist in Chambers and in Court", 25 Antitrust L.J. (1958), 51.

234. House of Lords report *supra* note 81, Reply by Judge Cooke and President Vesterdorf to Question 411. See also Vesterdorf, foreword to Sibony, *Le juge et le raisonnement économique en droit de la concurrence*, op. cit. *supra* note 114.

235. COM(2007)165 final. See also Council Doc. No. 9124/08.

236. COM(2003)828 final, Art. 4 of the proposal.

the ECJ Statute would have been used. It means that they would have been appointed by the Council, acting unanimously, on a proposal from the ECJ. Assistant Rapporteurs would have participated in the preparation, the hearing and the deliberation of a case, without having a right to vote on the decision to take.[237]

The objective of this measure was "to provide the bench with technical expertise of a general kind". It was therefore planned that a limited number of Assistant Rapporteurs covering the basic divisions of technology would have been appointed, "such as one for each of the following seven fields …: inorganic chemistry and materials science, organic and polymer chemistry, biochemistry and biotechnology, general physics, mechanical engineering, information and communication technology, electrical engineering",[238] which would have covered more than 70 fields of technology.[239] The CFI judges hearing appeals would also have been assisted by technical experts throughout the handling of the case.[240] These Assistant Rapporteurs would have been required to participate in the preparation, the hearing and the deliberation of the case.[241] It was planned that three assistants would be appointed in the fields of chemistry, physics and mechanics.[242]

The Commission underlined that the Assistant Rapporteurs' role was not supposed "to make the use of experts entirely superfluous but to enable the court as a whole to understand the technical aspects of the case quickly and accurately which is relevant for an efficient handling of a case and for a legally sound decision".[243] Articles 25 to 30 and 32 of the Statute relating to the taking of evidence of witnesses and expert opinions would have applied to the Community Patent Court.[244]

At first glance, the appointment of such Assistant Rapporteurs seems to be a very valuable idea, as it integrates expert knowledge within the EC courts and therefore allows them to be assisted all along the proceedings. One could even imagine that the Assistant Rapporteurs of the Patent Court could have assisted the CFI – informally or not – on technical issues raised by cases not dealing with patents. It must be noted, however, that the possibility of appointing such Assistant Rapporteurs could prove quite limited in practice: in its opinion on the Commission's proposal, the ECJ suggested deleting the refer-

237. Ibid.
238. Ibid., p. 18.
239. Ibid., p. 52
240. Ibid., Art. 6 of the proposal.
241. Ibid., p. 8.
242. Ibid., p. 52.
243. Ibid., p. 8 and 18.
244. Ibid., p. 21.

ence to Article 13 of the Statute of the ECJ "since the qualifications and experience required of the Assistant Rapporteurs …, who are in essence technical experts, appear very different from those required of the Assistant Rapporteurs mentioned in that article of the Statute, who must possess the necessary legal qualifications".[245] It seems therefore that the ECJ will promote a literal interpretation of Article 13 of its Statute and that in-house technical experts not possessing legal qualifications would have to be appointed on another basis.

In any case, this option raises delicate issues of fairness and should therefore be considered with caution: as explained by an economist acting as a clerk (indeed as an assessor) in a famous U.S. antitrust case: "[t]o inject into [the judicial] process an expert in a particular class of facts and to allow him private access to the judge, protected from the scrutiny of examination by the parties, undermines to some extent the adversary character of the proceeding."[246] This statement by the clerk was not contradicted by the judge he assisted, who expressed legitimate fears about relinquishing too much power to his assistant: "[a]nother doubt is whether a man … who by intellectual quality and professional experience is so far superior to the judge in the understanding of economic aspects of an anti-trust case may not have more influence than is appropriate upon the judge with whom he is associated".[247] For this reason, it is welcome that, in its proposal of 2007 for the establishment of a Community patent judiciary, the Commission does not mention Assistant Rapporteurs: instead, it proposes that, in addition to legally qualified judges, the new courts should include "technically qualified judges", who would therefore be actual judges and not mere assistants exempted from public scrutiny.

5. Conclusion

A generally applicable principle of law states *jura novit curia:* it is for the Court to know the law. However, no general principle can be found to support the view that Courts must know everything. Indeed, such a view is contradicted by common sense. It is therefore legitimate for a Court of law in general and for EC courts in particular to call on experts to report to them on technical and complex issues of facts.

245. Proposal for a Council Decision establishing the Community Patent Court and concerning appeals before the Court of First Instance − Opinion of the Court of Justice of the European Communities, para 9.

246. Kaysen, op. cit. *supra* note 233, p. 46. Howard, op. cit. *supra* note 186, 103–104.

247. Letter by Judge Wyzanski, copied in the Appendix to Webster and Hogeland, op. cit. *supra* note 236. See also "Developments in the Law", op. cit. *supra* note 6, 1594.

However, it is striking that the EC Courts only rarely hear expert evidence despite the fact that they often deal with complex technical issues. It is even more striking that the type of expert evidence for which rules of procedure do exist under EC law, i.e. evidence adduced by court appointed impartial experts, is the least frequently used, while partial expert testimony, adduced by the parties, is more frequent but operates outside a clear procedural framework.

This situation is not wholly satisfactory. It is submitted that improvements to the current law and practice of expert evidence before the EC courts should be guided by a principle expressed by the U.S. Supreme Court in *Kumho*: "the expert must employ in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Unfortunately, current EC law does not guarantee a systematic, meaningful scrutiny of reliability of scientific evidence by the EC courts. Instead, the EC courts have developed avoidance strategies: they have tended to refrain from assessing technical issues and emphasize procedural rights of parties (e.g. through the principle of sound administration). In recent years, however, they have shown a greater readiness to confront technical issues.[248] It may be argued that this evolution should be welcome, primarily because there is no convincing justification for self-restraint over technical issues. Discretionary powers of EU institutions relating to technical decisions is often presented as such as justification, but this is, it is argued, an unconvincing justification, because it amounts to inferring discretion from technicality. It is submitted that such an inference relies on the misconceived assumption that a constitutional choice as to the amount of discretion left to an institution is always closely connected with the greater or lesser technicality of the decisions it has to take. It is difficult to find reason why it should always be so.

This welcome evolution towards greater control of the EC courts over scientific evidence should furthermore be supported by an improved legal and organizational framework relating to expert evidence. In building this new framework, one should bear in mind that the EC courts – with the exception of the Civil Service Tribunal – are not specialized courts and that they often perform a limited review. Nevertheless, it should be stressed that neither the generalist character of the EC courts nor the existence of some discretion on the part of the EC institutions, whose acts are subject to review, obviate the need for both expert evidence and judicial control over the quality of that evidence. On the contrary, it is precisely judges with no technical expertise who need expert advice to hand down credible judgments and credibility would be altered if expert evidence were not sufficiently scrutinized.

248. Biondi and Harmer, op. cit. *supra* note 94, pp. 54–56.

It was argued in this article that the building blocks for an improved framework already exist. They not only relate to minor modifications of existing rules, but also to more radical changes, such as appointment of judges with relevant technical training. Whether these changes will occur is ultimately a political question. It is about the balance that must be struck between the technical correctness of court rulings and the preservation of the power of appointed EC judges to rule on the issues submitted to the courts. In this regard, it should not be overlooked that not changing anything to the current state of the law and to the current practice would also be a political stance. It would mean that formal legitimacy is, to a large extent, favoured over technical legitimacy. Of course, finding the right balance between both types of legitimacy is difficult, but at a time when the REACH regulation[249] has entered into force, expert evidence will only be needed more frequently. It is therefore crucial that the EC courts be better equipped to deal with challenges of much needed reliable expert evidence.

249. Reg. 1907/2006 on Registration, Evaluation, Authorisation and Restriction of Chemicals, O.J. 2006, L 396.