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Rules for Expert Institutes' Work Procedures Ensuring Proper Performance of Expert Activities

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Abstract

Act No. 254/2019 Coll., on experts, expert offices and expert institutes, came into force on 1 January 2021. The new legislation brought, among other things, changes to the conditions for the performance of expert activities by expert entities, meaning expert offices and expert institutes. One particular new feature is the duty to have rules for work procedures ensuring the proper performance of expert activities and the duty to have internal regulations that set out the way in which an expert report is to be “acknowledged”. The purpose of this article is to familiarise the reader with the new duties and to clarify their meaning. However, the article is not only focused on theory; one of its tasks is also to provide the affected entities with at least a rough guide as to what areas can or should be included in the aforementioned materials so that they can be incorporated into existing or newly created internal documents.

Keywords: expert institute, Experts Act, rules of activity for expert institutes, expert report

Introduction

Act No. 254/2019 Coll., on experts, expert offices and expert institutes (hereinafter the “Experts Act”), came into force on 1 January 2021. The new legislation brought a whole number of changes, the majority of which concern the conditions for the performance of expert activities by expert entities.

First of all, it should be pointed out that while the old provisions in Act No. 36/1967 Coll., on experts and interpreters, (hereinafter the “1967 Experts Act”) used a hierarchical structure of expert entities divided into experts, expert institutes registered

in Section I of the list of expert institutes and expert institutes registered in Section II of the list of expert institutes, the new provisions in the Experts Act hierarchically differentiate between experts, expert offices and expert institutes. To put it very simply for the reader's better orientation, while experts (natural persons) remained experts in the new legislation, expert institutes entered in Section I of the list of expert institutes (in terms of type mainly limited liability companies and general partnerships) were transformed into expert offices, and the former expert institutes entered in Section II of the list of expert institutes (typically hospitals, research institutes and universities) are the only genuine expert institutes in the new legislation.

This article will further deal with selected conditions for the performance of expert activities by expert institutes. Specifically, it will deal with the interpretation and description of the condition set out in Section 7(1)(f) of the Experts Act, according to which expert institutes must have rules for work procedures ensuring the proper performance of expert activities, and the interpretation and description of the condition set out in Section 7(1)(g) of the Experts Act, according to which they must have internal regulations setting out the procedure by which an expert report is "acknowledged". This is an area that has not yet been more significantly addressed by doctrine, although, as can be seen from the following text, the issue was recently examined by the Constitutional Court of the Czech Republic.

Relevant legislative provisions:

"Section 7 of the Experts Act

Conditions for Performance of Expert Activities by Expert Institute

(1) An expert institute may be an entity that

...

(f) has rules for work procedures ensuring the proper performance of expert activities;

(g) has a procedure set out by its internal regulations for acknowledging expert reports in accordance with Section 28(4), ...".

"Section 28 of the Experts Act

Requisites of Expert Report

(1).....

(4) In the event an expert report was prepared by an expert institute, it must be signed by the expert or the person stated in Section 7(1)(c) or 7(2), and the expert report must also state who contributed to its preparation and who is obliged to certify the expert report in person, supplement it or explain its contents in more detail at the request of a public authority. An expert report prepared by an expert institute must be acknowledged through the procedure laid down in the internal regulations of that expert institute. Information on

the acknowledgement of an expert report will be stated therein, including the date and signature of the responsible person."

Methods and Data

With regard to the article's objectives, a combined form of sources was chosen. Primarily, the source is the existing Czech literature dealing with the issue of expert institutes and especially the issue of internal rules for their activities. This primarily concerns publications (Ševčík et al., 2023; Hanák, 2021; Dörfl et al., 2021). From the viewpoint of the number of possible literary sources, it should be pointed out that the issue has not yet been taken up in terms of theory and the quantity of appropriate literature is therefore very small. Another source of knowledge is the decisions handed down by the Constitutional Court of the Czech Republic, although with regard to the relatively short period of the new legislation's effectiveness it is practically only one decision, which is analysed in more detail (Judgement of the Constitutional Court of the Czech Republic of 22 February 2023, file no. II. ÚS 3602/2022). The normative acts of individual expert institutes are an essential source of knowledge: (I) Dean's Ordinance 8/2019 of the Faculty of Physical Education and Sport of Charles University; (II) Dean's Decision No. 58/2022 of the Brno University of Technology, Faculty of Electrical Engineering and Communication Technology; (III) Rules for Work Procedures for Performance of Expert Activities of the Expert Institute of Health and Safety; (IV) Guidelines No. 2/2023 of the Institute of Technology and Business in České Budějovice.

Results

Rules for Expert Institutes' Work Procedures Ensuring Proper Performance of Expert Activities

The main questions that need to be answered are what the rules for expert institutes' work procedures are supposed to do, what their nature is and what they should contain.

According to the explanatory memorandum, work procedures mean, in particular, the organisation of an expert institute, control mechanisms and a clear definition of responsibility relationships at the relevant institution (cf. the explanatory memorandum for the Experts Act).

Work procedures are not intended primarily for the needs of the lay or professional public to check an expert institute's activities, but, on the contrary, they should primarily serve an expert institute itself; through the rules it sets the internal method of its operation that should ensure the proper preparation of expert reports. It should primarily be ensured that an expert report is prepared in accordance with *lege artis* procedures and by persons properly qualified to do so with the other properties that the law requires, i.e. primarily by persons who are not biased.

The character of the rules for work procedures is not entirely evident from the language itself, but in terms of content they are clearly intended to be in the form of an internal regulation. This conclusion is confirmed by the wording of Section 7(1)(g) of the Experts Act, which sets out the feature of “acknowledging an expert report”, but in practice this is often part of the rules for work procedures themselves. An internal regulation can also be synonymously considered to be an intra-organisational regulation, internal guideline, directive, instruction, internal normative act, internal management act, etc. An internal regulation (and therefore also rules for work procedures) is binding only on the parties to the particular relationship the regulation relates (Gerloch, 2004). It therefore does not have an unlimited scope, but has an effect internally on the entity that issues the regulation, in this case on persons that participate in any way in the preparation of an expert report, whether in scientific or organisational form.

With regard to the language of Section 7(1)(f) and Section 11(3) of the Experts Act, it is clear that rules for work procedures must be prepared in written form, as their documentation is a condition for registration of an expert institute in the list. Logically, however, rules’ entry into force is linked to the moment of an expert institute’s entry in the list of experts. Visinger correctly states that the Act should really use the term “draft rules”, when it is only at the moment of entry in the list of experts that they are actually recognised by the Ministry of Justice, as the administrative body that decides on an applicant’s entry (Dörfl et al., 2021).

It is not quite clear whether only the first – initial – version of the rules, which serves only for registration, is to be submitted to the Ministry of Justice, or whether expert institutes are obliged to provide the ministry with amended versions in ongoing fashion. In accordance with Section 16(5) of the Experts Act, “an expert is obliged to notify the Ministry of a change to data entered in the list of experts within 10 business days of the date on which the change occurred”. However, it is not quite clear from this provision whether a change to rules for work procedures is a change to which the provision is intended to apply. However, it can be assumed that, when adopting the new legislation on experts, legislators considered it important for expert institutes to have rules prepared. For this purpose, it also carries out a formal check on them, at least, at the time an expert institute is entered into the system. However, if it is concluded that it is no longer necessary to again provide additional versions of work procedures to the Ministry in accordance with the aforementioned Section 16(5) of the Experts Act, a situation could in fact arise that immediately after an expert institute’s entry in the system the rules are cancelled or significantly narrowed, which would mean they quite cease to perform their task. Therefore, one can clearly come to the conclusion that even amended versions of rules for work procedures should be sent by expert institutes to the Ministry of Justice, at least for recording purposes. *De lege ferenda* it is clearly recommended to legislators that the duty to provide new versions of work procedures be contained in any amendment to the Experts Act, as the existing legislation is not entirely clear in this regard.

Content Requisites for Rules for Work Procedures

Neither the Act nor implementing legal regulations stipulate precisely what the requisites and content of the rules for work procedures should be. The content of the rules is therefore up to the individual assessment and needs of each expert institute (Ševčík et al., 2023). It is evident that each expert institute may and clearly will have different rules, taking into account the differences in institutional and personnel operation of an institute and the individual scope of expert authorisations. It can therefore be assumed that, for example, a hospital carrying out expert activities in healthcare will have one type of rules, a faculty carrying out expert activities in information and communication technologies will have another type of rules and an office for testing weapons and ammunition operating in the field of pyrotechnics, ammunition and explosives will have yet another type of rules.

However, the rules for work procedures may not contradict the law, in particular expert standards. They must be accessible to the relevant persons and they must be informed of their existence. The rules are binding not only on the standard's addressees, but also on their publisher. Publication of the rules for work procedures for the public is not necessary, but it is also not prohibited.

When taking into consideration each entity's individual needs, it is appropriate to think about setting out the following areas:

- A. *Title page* - designation of the expert entity, document name, file reference or other identifier under which the document is kept, document version, preparer of the document, date of approval and entry into force including changes, number of pages and annexes to the document, periodicity of checks on standard, responsible person's signature.
- B. *Subject and purpose of rules* - taking into account the individual nature of each expert institute (preamble or general provisions).
- C. *Setting out the process prior to an agreement to prepare an expert report* (the stage of negotiation on an agreement to prepare an expert report with a private contracting entity or public authority pursuant to Section 25 of the Experts Act) – (i) in what way orders for expert reports are accepted by the institute, how they are recorded internally, (ii) who assesses the possibility of preparing an expert report, especially with regard to the scope of an expert institute's expert authorisation, the required time for the preparation of an expert report, an institute's capacity and personnel options, taking into account the necessary equipment for preparing a specific report and, if appropriate, who is entitled to refuse to prepare an expert report on behalf of an expert institute (cf. Section 19 of the Experts Act), (iii) who ensures communication with the contracting entity for the expert report – in particular on the issue of the specific nature of the assignment for the expert report, the provision of the necessary documents, the ascertaining of its future use and whether an expert report can be submitted in electronic form with the contracting entity's consent [cf. Section 27(1) of the

Experts Act], (iv) who verifies the possible bias of the institution as such or the individuals participating in an expert examination [cf. Section 18(2) of the Experts Act], (v) who decides whether it is necessary to hire a consultant and who requests consent to hire a consultant on an expert institute's behalf in relation to public authorities or other contracting entities [cf. Section 23 of the Experts Act], (vi) who prepares and who is entitled to communicate the preliminary calculation of the expert's fee - the expert quote [cf. Section 25(1) of the Experts Act], (vii) who is entitled to negotiate on the content of a contract on inspection activities (Ševčík et al., 2023 and Hulmák et al., 2014) and who is entitled to conclude one for an expert institute, (viii) after the conclusion of a contract on inspection activities or delivery of a resolution on appointment in a specific matter from a public authority, who arranges entry of data in the records of expert reports (cf. Section 29 of the Experts Act).

- D. Procedure after acceptance of preparation by expert institute* – (i) setting out the procedure for the selection of the persons who will physically carry out the expert activities; whether the expert report will be prepared by only one person or an expert team, in which case the person who will lead the expert team and manage its activities will be stated; definition of the competences and tasks of the expert team members, including determination of the authority to inspect court or other files, e.g. in accordance with Section 127a of the Code of Civil Procedure and Section 110a of the Criminal Code, (ii) determining the person that ensures advice on the duty of confidentiality before the start of expert activities themselves [Cf. Section 20 of the Experts Act], (iii) determining the person that sets the deadline for the submission of a final concept for an expert report for an opponent check at an institute while taking into account the handover date for the expert report, (iv) determining the mechanism for an opponent check and selection of specific opponents, (v) method of dealing with criticisms from the opponent check in relation to an expert report; resolution mechanism for disputes between an expert team and opponents, (vi) stating the procedure and person or body that will acknowledge the final version of an expert report in accordance with Section 28(4) of the Experts Act [cf. next Chapter] (vii) determining the person entitled to ask a public authority for the expert institute to put back the deadline for the preparation of an expert report [cf. Section 25(1) of the Experts Act], (vii) determining the person responsible for a final check on the requisites of an expert report before it is sent to the contracting entity (cf. Section 28), (viii) determining the person authorised to attach a qualified electronic signature or electronic seal to an expert report [cf. Section 27(2) of the Experts Act], (ix) determining the person or unit responsible for preparing a statement of account for an expert report or costs related to its defence [cf. Section 28(6) of the Experts Act]; determining the mechanism for records of individually performed expert acts or costs related to the preparation of a specific expert report, (x) determining the person authorised to send an expert report; (xi) determining the person responsible for making an entry in the

records of expert reports after sending a report, (xii) determining the person responsible for acts leading to the archiving of an expert report [cf. Section 27(3) of the Experts Act].

- E. Organisational functioning of expert institute* – (i) designation of the person responsible for ensuring permanent performance of scientific research activities by the expert institute in the relevant field, industry or specialisation [cf. Section 7(1)(b) of the Experts Act], (ii) designation of the person responsible for ensuring the institute's staffing, where there must always be at least one registered expert or a person carrying out scientific research activities within the scope of the expert authorisation in the expert institute [cf. Section 7(1)(c) of the Experts Act], (iii) designation of the person responsible for permanent provision of material and technical facilities, personnel, instrumentation and equipment at the expert institute, (v) identification of the person entitled to submit a request for the expert institute for the suspension of expert activities [cf. Section 13(1)(b) of the Experts Act], (vi) identification of the person authorised to act for the expert institute in situations not covered by the rules for work procedures, (vii) identification of the person authorised to communicate for the expert institute with the Ministry of Justice [for example, in matters of re-accreditation, administrative proceedings conducted by the ministry, documentation of insurance, notification of a change to facts pursuant to Section 16(5) of the Experts Act], (viii) solution for reporting duty of the expert institute's employees in the event of independent performance of expert activities, if the expert institute's equipment and facilities are used [cf. Section 2(2) of the Experts Act].

Acknowledging an Expert Report

A brand new feature in the new expert legislation is the “acknowledgement” of an expert report before its submission to a public authority or handover to a private contracting entity. As stated above, the issue is dealt with primarily by Section 7(1)(g) of the Experts Act, as well as Section 28(4) of the Experts Act.

Acknowledging an expert report primarily means:

- a) familiarisation of the responsible body with the final text of the expert report to be submitted by the expert institute;
- b) familiarisation of the responsible body with the text of any opponent opinions or comments;
- c) familiarisation of the responsible body with the incorporation of opponent comments or refusal to incorporate them by the preparer(s) of the expert report;
- d) making an entry in an expert report on acknowledgement in accordance with Section 28(4) of the Experts Act specifying the person's name and position, as well as the date of acknowledgement;
- e) making an internal record of acknowledgement for possible future resolution by the supervisory authority.

However, with regard to the aforementioned list, it should be pointed out that this is a model situation assuming that the rules for work activities by an expert institute include an opponent checks mechanism, which, however, is not a legal duty, so acknowledgement can consist of only the steps stated under a), d) and e).

As already indicated in the explanation of the rules for work activities by an expert institute, the acknowledgement procedure must be set out by an expert institute's internal regulation, and it is submitted to the Ministry of Justice when entering the expert institute in the list of experts as one of the conditions. Two types of regulatory solutions can be encountered in practice. Some expert institutes set out the acknowledgement procedure in a separate internal regulation, some expert institutes set out the procedure together with the rules for work procedures in one standard. Both solutions are evidently possible; the Act does not rule out either option.

The phrase “the procedure by which an expert report is acknowledged” is significant for a correct understanding of the matter. The above indicates that an internal standard should not be limited to determining the person or body that will acknowledge an expert report, but should set out the entire acknowledgement procedure. This is particularly important in that a procedure set out transparently in advance enables the various situations that may arise in everyday reality to be resolved. A comprehensive procedure for the new acknowledgement feature by an institute should primarily answer the following questions:

- a) how to proceed if the person or entity that is to acknowledge an expert report has reservations about the expert report and refuses to continue to cooperate;
- b) in what way can reservations communicated be dealt with and whether, subject to certain conditions, acknowledgement can be enforced or whether acknowledgement can be replaced by another person or group of persons;
- c) whether the person acknowledging an expert report may be a person who made a direct contribution to the expert report or was an opponent or member of the opponent team;
- d) in what timeframe is acknowledgement expected after the time it is submitted for the performance of an action, etc.

The Act does not stipulate whether an acknowledgement is to be made by just one person (e.g. dean of a faculty, director of an institute), whether it must be by a collective body (e.g. expert collegium or board) or whether there must be a joint signing by, for example, multiple persons (director of an institute, head of an expert collegium). Evidently all options are possible, as they clearly fulfil the main purpose of the feature intended by legislators, i.e. demonstrable familiarisation of the management of an institute or authorised body with an expert report before its submission.

Compliance with the condition of acknowledgement of an expert report occurs on the last page of an expert report by a person or group of persons authorised to do so, who

are clearly identified therein and who add their signature and date to the words, “The expert report was acknowledged on”. The Constitutional Court of the Czech Republic recently dealt with a case in which an expert report was called into question and one of the defects criticised was the fact that the acknowledgement was not linked to a reference to an internal regulation governing the acknowledgement procedure. The Constitutional Court, however, reached the quite correct conclusion when it stated that such reference does not have to be specified, as expert legislation does not require it (Judgement of the Constitutional Court of the Czech Republic dated 22 February 2023, file ref. II. ÚS 3602/2022). However, it can be deduced from the judgement that the institute’s internal document was evidently contained in the file documentation, so expert institutes must take into account that, in addition to the supervisory authority, they may be called on by the courts or other public authorities to produce such documents at any time, and the procedure for the preparation of a specific expert report will be compared with the content of the rules. There is, however, the question of whether a breach of or deviation from the general rules for work procedures must necessarily lead to the conclusion that an expert report was not prepared in accordance with procedures *lege artis*, especially in a situation where the content of the rules is, in reality, optional.

Conclusion

The above can be summarised in the following significant conclusions:

- (I) Work procedures mean, in particular, the organisation of an expert institute, control mechanisms and a clear definition of responsibility relationships at the relevant institution.
- (II) Work procedures are not intended primarily for the needs of the lay or professional public to check an expert institute’s activities, but, on the contrary, they should primarily serve an expert institute itself; through the rules it sets the internal method of its operation that should ensure the proper preparation of expert reports.
- (III) The rules for work procedures should have the form of an internal regulation. An internal regulation (and therefore rules for work procedures) is binding only on a person who is a party to a certain relationship to which the regulation relates. It therefore does not have an unlimited scope, but has an effect internally on the entity that issues the regulation, in this case on persons that participate in any way in the preparation of an expert report, whether in scientific or organisational form.
- (IV) The rules for work procedures must be prepared in written form, as their provision is a condition for entry of an expert institute in the list of expert institutes.
- (V) Neither the Act nor implementing legal regulations stipulate precisely what the requisites and content of the rules for work procedures should be. The

content of the rules is therefore up to the individual assessment and needs of each expert institute.

- (VI) However, the rules for work procedures may not contradict the law, in particular expert standards.
- (VII) “Acknowledgement” is a quite new feature in Czech expert legislation. The procedure for acknowledgement must be set out by an expert institute’s internal regulation. The phrase “the procedure by which an expert report is acknowledged” is significant for a correct understanding of the matter. The above indicates that an internal standard should not be limited to determining the person or body that will acknowledge an expert report, but should set out the entire acknowledgement procedure.

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Rules for Work Procedures for Performance of Expert Activities of the Expert Institute of Health and Safety

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