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DEFINING THE FACTS BEFORE STARTING THE PREPARATION OF AN EXPERT OPINION IN CIVIL PROCEEDINGS

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Abstract

Expert evidence in the form of expert opinions is often referred to—particularly in civil proceedings – as the "corona probatiorum" as it frequently plays a decisive role in shaping both the factual and legal conclusions of the court. This article addresses a relatively narrow, yet practically significant issue: namely, the delineation of the initial factual framework prior to the commencement of expert evidence in civil proceedings, as well as the scope and limits of an expert's own evidentiary initiative. Civil proceedings are specific in this regard due to their dependence on the observance of other procedural institutions, particularly the proper allocation of the burden of proof among the parties, and on the consistent adherence to the principle of adversariality. The aim of the article is first to explain the general nature of the issue to the reader within the context of civil procedure and then, through a comparative method, to analyse the approaches of three selected legal systems—Slovak, Czech, and German. These three jurisdictions have been chosen not only because of their geographical and historical proximity, but also due to their differing approaches to the regulation of expert activity in civil procedure, including different understandings of the expert's role as a means of proof. The central question is whether these legal frameworks address the matter with a sufficient degree of legal certainty and responsibility, or whether they leave its resolution to judicial discretion or the actions of the parties within the specific context of individual proceedings, without firm legislative anchoring. The results of this comparison aim to contribute not only to a deeper theoretical understanding of the problem, but also to propose potential systemic improvements with a meaningful impact on legal practice and the day-to-day functioning of the courts.

Keywords: expert opinion, expert, Civil Procedure Code, taking of evidence, civil procedure, civil law.

Introduction

In civil proceedings, expert opinion frequently assumes a pivotal role in the evidence presented. As early as the turn of the 19th and 20th centuries, the American judge Learned Hand articulated the notion that the law ought to utilise expertise when it can electively assist in resolving disputes (Hand, 1901 quoted from Fryšták, 2021). However, such evidence is characterised by a high degree of specificity within the context of civil proceedings, arising from the inherent nature of these proceedings, which are predicated

on the principles of dispositive and adversarial proceedings. A notable distinction between these two procedural frameworks emerges with regard to the taking of evidence by an expert opinion. In civil proceedings, the parties involved and the court itself must accord more significant attention to delineating the initial facts on which the expert's opinion is to be founded.

In many civil proceedings, it may be assumed that the preparation of an expert report is utilised solely as the final piece of evidence, i.e., the so-called corona probatiorum. Nonetheless, even this approach has its own set of potential challenges. Previous case-law of the Supreme Court of the Czechoslovak Republic, for example, in Cpj 41/79, stated, inter alia, that "*Article 14 of the Directive of the Ministry of Justice of the Czechoslovak Republic No. 10/73 of 15 February 1973 on the organisation, management, and control of expert and interpreting activities states that, in the interests of the continuity and economy of court proceedings, the court shall appoint an expert only after all the factual evidence necessary for the performance of the expert's task have been collected. The courts are, therefore, to take all the evidence necessary to clarify the relevant facts in all respects and to obtain the documentary evidence necessary for the submission of the opinion.*" In contrast, Czech legislation, as outlined in Act No. 99/1963 Coll., the Code of Civil Procedure (hereinafter referred to as the "Code of Civil Procedure"), operates under a different assumption. Section 114a(2)(d) of the Code of Civil Procedure stipulates that, in instances where the conditions outlined in Section 127 of the Code of Civil Procedure are met, the court is obligated to appoint an expert at the stage of preparing the hearing. However, a mixed approach is also permitted under Czech law. For instance, Dörfl states that, in theory, an expert report can be commissioned so that it is available for the first hearing in the case. However, the necessity to commission an expert opinion may only become apparent after the preparatory hearing or at the first hearing in the case. The court shall, therefore, commission the expert report when the need for it becomes apparent in the proceedings, and the necessary supporting documentation is available (cf. Dörfl, 2020) Slovak legal practice continues to adhere to a conventional approach, as evidenced by Gešková's assertion that, in the interest of procedural continuity and efficiency, it is prudent to appoint an expert only after the facts pertinent to the expert evidence have been elucidated (cf. Gešková in Števček, et al., 2016).

It is imperative that, at the time of the appointment of the expert, the court possesses a fundamental understanding of the factual situation on which the expert is to base their opinion. The court is obliged to communicate this factual situation to the expert, and the expert is expected to adhere to such initial factual conditions while presenting expert evidence. In this respect, Dörfl concurs with the assertion that the appointment of an expert is undertaken in situations where it is evident to the court, based on the factual allegations of the parties involved, which aspects are contested as a decisive fact, i.e., which elements are the subject of the evidence. The appointment of an expert in the proceedings is, therefore, directly related to the quality of the factual allegations that the court has managed to gather from the parties (in contested proceedings) or on its initiative (in uncontested proceedings) (Dörfl, 2020; Concerning the credibility of the data source, further recommendation is extended to the following publication Dufek, 2023). Should the expert fail to respect the initial factual situation given by the court, it would, in fact, devalue the results of the proceedings to date, i.e. the evidence carried out thus far, as well as the existence of the so-called burdens of proof. Furthermore, it is imperative to exercise meticulous oversight to ensure that the expert does not, through their actions, surreptitiously introduce new facts into the proceedings that have not been alleged or proven by any of the parties involved. The role of a court-appointed expert is not that of an assistant to one of the parties but rather that of a court assistant, whose function is to assist the court in elucidating a technical issue contested in the proceedings (Similarly, e.g., Křístek, 2013).

Thus, the present article seeks to address whether the Slovak, Czech and German legal systems approach this matter through legislative means, whether they provide a satisfactory solution, or if they leave the resolution to the court or individual parties involved in the proceedings. To this end, a comprehensive examination of the relevant legal systems, along with relevant foreign literature and case law, is imperative. The Slovak and Czech civil procedural legislation has been selected for the study due to the common historical roots of the two nations and the fact that a significant proportion of the older case law that will be referenced hereafter was adopted during the period of the common state. Additionally, the article will introduce the reader to the legislation of the Federal Republic of Germany. The selection of this legislation was not arbitrary; instead, it was deliberate, as evidenced by its widespread recognition as a model of excellence in the field, a reputation shared with the Austrian legislation. However, the article also employs the perspectives of other foreign authors.

Czech and Slovak legislation

Slovak legislation

Slovak legislation on expert evidence is governed by Act No. 160/2015 Coll., the Civil Procedure Code (hereinafter referred to as the "Civil Procedure Code"). The issue of expert evidence is specifically regulated by the provisions of Sections 206 et seq., whereby the provision of Section 207 of the Civil Procedure Code is of particular importance, as it provides as follows:

(1) The court shall, upon application, order the taking of expert evidence and appoint an expert if the decision depends on the assessment of facts requiring scientific expertise and the procedure under Section 206 is insufficient for the complexity of the issues to be considered. If the court appointed several experts, they might draw a joint opinion.
(2) The expert shall answer the questions posed to them in the written opinion; they shall not express an opinion on the legal assessment.
(3) A request to appoint a review body is permitted only for severe matters requiring special scientific assessment or if there is an apparent contradiction in the experts' conclusions.

From the above, it is evident that there is no explicit legislative instruction on how the court should determine the initial facts prior to the expert's report. The law stipulates in paragraph 2 that the expert must answer the questions posed in the expert's report and that legal questions must not be answered.

In addition, it is worth considering the professional regulation, i.e., Act No. 382/2004 Coll. on Experts, Interpreters and Translators and on Amendments and Supplements to Certain Acts. In this respect, the provisions of Section 16(7) are relevant, which stipulate that

"The commissioning authority, being a court or other public authority, shall, prior to the appointment of the expert, ascertain the possibilities of performing the expert activity promptly, make clear to the expert the content and scope of the expert opinion, discuss the nature of the expert activity, ascertain the expected amount of the expert's fee and discuss the application of the claim for advance payment under Section 2(8)(a). In a complex case, the expert shall be consulted before being appointed on the correctness of the tasks to be performed and shall receive the necessary explanations concerning the judicial file and the facts relevant to the assessment thereof."

The aforementioned wording of the professional regulation makes it clear that the commissioning authority is obliged, inter alia, to disclose the content and scope of the expert opinion to the expert. In addition, if the case is complex, the expert is to be consulted on the correctness of the tasks assigned and is to be provided with the necessary explanations of the court files and facts relevant to the assessment involved in the case. It should be remembered that the professional regulation of the Expert Act is a general legal professional regulation affecting all proceedings in which an expert opinion is given (Dankovčik, et al., 2020). Nevertheless, it is doubtful whether the wording '*content and scope of the expert's report' or 'to provide them with the necessary explanations from the court file and the facts relevant to the assessment thereof'* includes a realistic definition of the initial factual situation. The definition of the facts can be understood as a situation wherein the court informs the expert which facts it considers to have been proven in the proceedings so far and which have not, or indicates to the expert that specific facts may or may not be taken into account, thus requiring, for example, the preparation of a variant conclusion of the expert's report taking into account the disputed facts. The probabilistic conclusion alone shall not call into question its evidential value (Richter, & Púry, 2020; The same line of reasoning can be found in Křístek, et al., 2021). In this respect, the Slovak legislation remains vague and cannot be attributed to any real effects. Nor does it address the potential overstepping of the expert opinion. Similarly, Decree No. 543/2005 Coll. on the Administrative and Practice Rules for District, Regional, Special, and Military Courts, which in the provisions of Section 51a(2) contains virtually identical wording to that of Section 16(7) of the Expert Act cited above, does not provide any further clarification.

Section 51(2) of the above-mentioned Decree reads as follows: *"Prior to the appointment of an expert, it is essential to determine whether the expert's task can be carried out promptly, to clarify the content and scope of the expert's report and to determine the expected amount of the expert's fee. Where possible, an appropriate advance on the costs of the expert's report should always be requested. If the case is complex, the expert shall be consulted prior to the appointment concerning the appropriateness of the tasks to be carried out and shall be provided with the necessary explanations concerning the court file and the facts*

relevant to the assessment of the case. It must be borne in mind that the expert's task is not to evaluate the evidence or to resolve legal issues."

To sum up, it can be concluded that the Slovak legislation does not contain rules for the initial definition of the initial facts prior to the consideration of expert evidence in civil proceedings, nor does it define the limits of expert evidence, and is primarily based on previous Czechoslovak case-law addressing this issue (for further details, see subchapter II).

Czech legislation

The Czech legal regulation of expert opinions in civil proceedings is governed by Sections 127 et seq. of Act No. 99/1963 Coll., the Civil Procedure Code (for more details, see Ševčík, & Ullrich, 2015).

This provision reads as follows:

(1) If the decision depends on the appraisal of facts requiring expert knowledge, the court shall request an expert opinion from a public authority. If such a procedure is inadequate due to the complexity of the matter under consideration or if there is doubt about the correctness of the opinion, the court shall appoint an expert. The court shall hear the expert; it may also require the expert to write a report. If several experts are appointed, they may submit a joint report. In justified cases, the court may be satisfied with the expert's written opinion instead of hearing the expert.

(2) If there is any doubt as to the accuracy of the expert's report or if the report is unclear or incomplete, the expert must be asked for clarification. If this fails, the court shall order the opinion to be examined by another expert.

(3) In exceptional, challenging cases which require a special scientific assessment, the court may appoint a state body, a research institute, a university or an institution specialising in expert activities to give an expert opinion or to examine the expert's opinion.

(4) The President of the Chamber may order a party or, as the case may be, another person to appear before the expert, to produce the necessary objects, to give the necessary explanations, to submit to a medical examination or, as the case may be, to a blood test, or to perform or endure something, if this is necessary for the submission of the expert's opinion.

(5) An expert opinion, as referred to in paragraph 1, shall be subject to financial remuneration if a special regulation is provided.

Similarly to the Slovak legislation, it has to be concluded that the Civil Procedure Code does not explicitly instruct how the court should proceed when determining the initial facts prior to an expert's opinion or how to limit the expert's research. Furthermore, it is worth considering the professional legislation, i.e., the Act No. 254/2019 Coll. on Experts, Expert Offices and Expert Institutes (hereinafter referred to as the "ZZZ" in Czech). In this respect, the provisions of Section 25(1) addresses the topic, providing as follows:

Unless circumstances prevent it, the public authority shall appoint an expert with a domicile or contact address in the district court's jurisdiction where the public authority has its domicile or workplace. The authority shall discuss the assignment of the expert opinion with the expert in advance and the deadline for submitting the expert opinion. At the request of the expert, the deadline may exceptionally be extended in justified cases; the deadline may be extended several times for reasons deserving special consideration. At the request of the public authority, the expert is obliged to draw up a preliminary estimate of the estimated expert's fee required to execute the act.

However, the foregoing indicates that the provision in question deals only with the 'discussion' of the commissioning of the expert opinion. As in the Slovak legislation, the provision is rather vague and cannot be given any real effect. Section 40 of Decree No. 503/2020 Coll. on the Performance of Expert Activities, which specifies the requirements for commissioning an expert opinion, also partially addresses the issue. However, even the following wording does not indicate that the legislator requires the courts to define the initial state of the facts for an expert opinion. The obligation to disclose facts which could affect the expert's report's accuracy is aimed at disclosing facts which, in the opinion of the party commissioning the expert's report, are relevant to the expert's assessment but not at clarifying the initial situation (The Czech commentary bibliography is rather partial on this issue. For example, Dörfl states that "the assignment of an expert opinion shall always include a definition of the expert's task. In terms of evidence, it is essential that the questions asked provide an answer to the factual question that is the subject of the evidence. The court should, therefore, be able to determine at the time of the instruction what is to be established." Cf. Dörfl, et al.2021. Another opinion is expressed in, for example, Ševčík, et al., 2023).

The latter provision reads as follows:

(1) The assignment of an expert report shall include:

(a) The technical question posed by the commissioning authority of the expert report,

(b) The purpose of the opinion

(c) The facts brought to the attention of the commissioning authority, which, in their opinion, may affect the accuracy of the conclusions of the expert opinion.

(2) If the commissioning authority has not disclosed facts to the expert that may affect the correctness of the conclusion of their opinion, the expert shall indicate them in the instruction for the expert opinion.

For instance, Hanák notes that in real estate valuation, most questions and documents are based on a clear factual situation, so there is no need to specify anything. However, there may be cases where, for example, the exact area of the property to be valued is not known (the geometric plan is to be drawn up later), the date of construction is not known, and it is not even possible to inspect the interior of the building. More facts must be specified in other areas of the expert's activities. This is particularly the case when assessing a condition that can no longer be inspected on-site but must be based on photographs, reports or testimony (Hanák, 2021).

The definition of the expert's tasks, i.e., the determination of the facts, is addressed in more detail in the opinion of the Supreme Court of 23 December 1980, case No. Cpj 161/79 [R 1/1981 civ.], which states, inter alia, that *"in defining the expert's task, the circumstances of the particular case must be taken into account. In some cases, therefore, the expert's task can be defined only in general terms, while in other cases, it is necessary to define the requirement more precisely, and in other cases, it is necessary to define the task in the form of precisely defined questions. The expert's task must always be defined in terms of the facts on which the expert is to base their task, what they are to take into account and what they are to consider. If the evidence to date does not support the existence or non-existence of a particular fact, the expert is asked to opine on, and if the final conclusion can only be reached in the decision in the case, the expert may be asked to give an alternative opinion that takes both possibilities into account. Otherwise, the expert would evaluate the evidence and draw conclusions regarding which facts are proven and which are not. However, this can only be done by the court on the grounds of the decision in the case (Article 157(2) of the Civil Procedure Code)."*

In addition, it is appropriate to refer, for example, to the judgment of the Supreme Court of the Czech Republic of 6 August 2009, case No. 30 Cdo 352/2008, which provides in its reasoning, inter alia, that *"in connection with securing the evidence for the expert opinion, it is incumbent on the court to identify those means of evidence among the given set of evidence which, in the given procedural situation, are considered relevant and usable for the preparation of an expert opinion, taking into account the principle of directness and orality, the persuasiveness of witnesses, etc."*

The idea of adopting a new code of civil procedure has been in the air in the Czech Republic for the last couple of years. A substantive draft of the Civil Procedure Code (hereinafter referred to as the "CPC") has already been completed and submitted by the Ministry of Justice of the Czech Republic for public expert discussion. The submitted draft apparently recognises the need to address this issue. According to sections 231 and 232 of the draft, *"the court shall provide the expert with the objects, files and aids required to prepare the expert's opinion. The expert may propose to the court that the parties be heard, that witnesses be heard, or that documents or objects be produced or placed at the court's disposal to draft their opinion. The expert may directly question witnesses and parties, subject to the court's approval. The court may, at the request of the expert, order the parties or third parties to attend the expert, produce the necessary items, give the necessary explanations, submit to a medical examination or, where appropriate, a blood test, or do or submit to anything that is required for the preparation of the expert's opinion. In the case of an expert's examination, the court may also order an examination without the court's presence; it may also, for serious reasons, order that the parties may not be present during the expert's examination."*

With regard to the expert's excessive evidentiary activity, the proposed amendment links any further securing of evidence to the expert's cooperation with the court, which will always have the discretion to allow or not allow the extended collection of evidence. In applying the above, the crucial question is under what circumstances the court should grant the expert's requests to extend the evidence and when it should not. In the first instance, the court should, prior to appointing the expert, gather all the information that the expert needs to carry out their task in analogous cases. If, even in such a case, the expert asks the court for additional documents, the temporal proportionality of the proposed measures can be considered as one of the additional criteria. If the collection of documents requested by the expert could substantially clarify the facts and, for example, exclude one of the alternatives to the expert's opinion, such evidence may be admitted, but only

on condition that it does not unduly prolong the proceedings. The second criterion for admissibility should include the requirement that the expert's investigation of the facts must not, under any circumstances, fall below the necessary use of expert knowledge. Unfortunately, the draft does not deal comprehensively with the court's duty to disclose the initial facts to the expert.

German Legislation

One of the most notable international models for amendments is the German civil procedure law (As Bělohlávek asserts, Germany constitutes a nation with a continental legal system, a system analogous to those predominant within Eastern and Central Europe. Indeed, numerous legal systems in these countries are, in essence, derived from or have been influenced by the German legal system, with a significant number also adopting elements of the Austrian system. However, historical affiliations and other traditions often result in adopting significant components of the French legal system in several countries. Cf. Bělohlávek, & Hótová, 2011) which regulates the matter in Section 404a of ZPOd (Zivilprozessordnung Deutschland), stipulating the following:

(1) The court is empowered to exercise its authority over experts' activities, including providing instructions on the manner and scope of their operations.

(2) In cases necessitating such action, the court is further obliged to question the expert prior to the preparation of evidence, assign tasks to the expert, and, upon request, provide an explanation of the task to the expert.

(3) In cases where the facts are contested, the court is responsible for determining the facts on which the expert is to base their opinion.

(4) Furthermore, if deemed necessary, the court shall determine the extent to which the expert is entitled to clarify the disputed issue, the extent to which he may associate with the parties involved, and when the expert may permit the parties to participate in the investigation.

(5) Instructions issued to the expert are to be communicated to the parties, and in instances where a specific date has been designated for the provision of instructions to the expert, the parties are to be permitted to attend.

Several experts have also interpreted the aforementioned legislation; for example, Gottwald (Rosenberg et al., 2010) asserts that when providing expert evidence, it is pertinent to consider whether the expert has personally determined the initial facts or whether their expert report is based on the facts determined by the judge. There is no difficulty when the court has communicated the facts under consideration to the expert in a manner consistent with the judge's instructions. This is because the expert does not need to consider other possible outcomes. However, if the facts are not given, the expert must render an opinion on every possible way of assessing the facts, not only the possibility that the expert deems to be correct or most probable. In evaluating the opinion, the judge must focus primarily on whether the expert has relied on facts that the judge himself considers to be true. The expert does not have the right to clarify further or supplement the facts. Instead, the onus falls on the court to do so. Consequently, in circumstances where there is a dispute regarding the facts, it is the court's responsibility to determine the facts on which the expert is to base their assessment [see Section 404a(3) of ZPOd].

In cases where clarification of the facts is deemed necessary, the court may authorise the expert to do so (Jäckel, 2014). In such instances, the court is required to specify the extent to which the expert is authorised to clarify the facts, the degree to which he may contact the parties involved for this purpose, and the circumstances under which the parties may participate in his examination, as outlined in Section 404a(4) of ZPOd. However, it is essential to note that the clarification of facts by an expert is permissible only in exceptional cases where the expert's unique expertise is required (so-called *facts necessarily considered by the expert*). The expert must explain to the court and the parties how the facts necessarily assessed by the expert were clarified and which were the basis for the expert's conclusion so that it can be reviewed. If the opinion does not meet this condition, it cannot be used in the proceedings. If the expert uncovers additional knowledge (the so-called *additional facts*) while establishing the facts necessary for their expertise, they are considered witnesses. The onus falls upon the parties to ensure that the expert has access to the facts necessary for their assessment, including but not limited to excavation, sampling, removal of building components, and discovery of wiring.

In addition, Zimmermann (in Rauscher, et al., 2012) also asserts a crucial aspect of the judicial process, namely that the facts on which an opinion is to be founded, termed 'facts for establishment', must be investigated by the court itself. The principle of immediacy underscores the necessity for the court to actively engage with these facts instead of delegating this responsibility to the expert. In instances where a case is

contested, mere reliance on the court's existing documentation is insufficient. The court must explicitly articulate the foundation underlying the expert's opinion. This communication should be made within the context of an order, wherein the court should identify the issues on which the expert report must be based. If such identification has not been undertaken, the court may issue a special order under paragraph 5. In cases where evidence has already been collected, such as witness testimony, the court is obligated to inform the expert of the facts upon which it is satisfied. The court may instruct the expert to prepare alternative reports and to communicate various facts for reference. However, if the expert deems the material on the facts insufficient for formulating an opinion and if the expert's investigation is not feasible, the court must inform the expert of the facts on which the expert's opinion is to be based, per the rules of the burden of proof.

Paragraph 4 of ZPOd stipulates that the court must specify in a particular case the extent to which the expert shall or must clarify the facts on which their opinion relies. However, it is essential to interpret this provision as not granting the court the discretion to determine the extent to which the expert is to clarify the facts. The court and the expert shall be bound by the boundaries of the expert's assessment, and such boundaries are to be clearly defined for the expert in the individual case. As a general rule, the expert may only be tasked with investigating the facts if the observed state of affairs can be discerned due to a unique factual situation.

In accordance with the aforementioned perspectives of German authors, it is the prevailing norm for the court to delineate the facts in the order from which the expert is precluded from deviating. In such circumstances, the question of any variant opinion or the expert's investigation of the facts is rendered moot. Should the court find the facts to be unclear, it is required to mandate the expert to formulate expert alternatives that comprehensively encompass all the factual possibilities. The expert should adopt a similar approach even if the court does not mandate the presentation of alternative solutions, but the ambiguity of the facts can give rise to divergent conclusions. As such, the expert should refrain from preparing a variant that appears most probable regarding factual conclusions. Furthermore, the court may authorise the expert to conduct their factual investigation, provided that it does not 'fall below' the threshold of the necessary use of expert knowledge. As Gottwald asserts, this would be 'below the facts necessarily examined by the expert'. Should the expert investigate beyond the facts ordered by the court or beyond the scope of the mandate, this could constitute illegal evidence. Such circumstances may arise, for instance, if the expert exceeds their authority by posing impermissible questions about the medical record, requesting documentation from other physicians, or using official information, etc. Consequently, in instances where the expert lacks supporting documentation to supplement the evidence (e.g., questioning of a party, examination of the case), the court should obtain these documents based on information provided by the expert. (In the Czech expert publications, for example, Dörfl states that "*an expert should not gather information that does not directly result from the usual procedure of investigation or examination. If it is an independent source of information relevant to the proceedings, it is subject to the rules of evidence before the court*". Cf Dörfl, 2009.)

While there are particular merits in the aforementioned conclusions of the German authors, it is submitted that they should be considered with a degree of reservation. Firstly, it should not automatically result in illegal evidence for an expert to go beyond the court's examination. This approach appears to be at odds with the progressive evolution of the hearsay principle, which has evolved to align more closely with the investigative principle. This shift has been marked by the introduction of obligations related to truthfulness, completeness, and material guidance. Concurrently, the investigative principle has transitioned towards the hearsay principle, which emphasises the requisite actions of the involved parties stemming from their collaborative efforts (Lavický, 2017). Consequently, the insistence on a strictly admissible and non-transcendent approach to the court's terms of reference from the expert's perspective may not be beneficial to the expert. Conversely, if an expert reasonably takes into account additional facts not yet presented in the proceedings, and this does not unduly extend the duration of their expert investigation given the economics and length of the proceedings, it would be appropriate for them to disclose these facts and leave the evaluation of these facts to the discretion of the court. The Swiss author Annette Dolge (in Spühler, et al, 2013) adopts a congruent stance on this issue, asserting that proceedings guided by the investigative principle encompass evidentiary outcomes that extend beyond the parties' submissions. In proceedings governed by the inquiry principle, Dolge contends that substantive truth should precede 'procedural carelessness' despite the absence of uniformity in practice across Swiss cantons. The deliberative principle is intended to avoid protracted legal proceedings; however, taking into account the unconfirmed facts established by the opinion does not further prolong the trial, thus clearly overriding the interest

in substantive truth over the expediency of the trial that can be achieved by the deliberative principle and the responsibility of the parties.

The second exception pertains to the admissibility of a separate expert examination conducted without the presence of the court and the parties involved. Svoboda, for instance, delineates a scenario wherein, in principle, the court should initiate a local investigation to ascertain the property condition. Instead, the court appoints an expert who is directly instructed to evaluate the value and quality of the work undertaken. The expert has no option but to conduct their investigation and establish the facts in situ, drawing upon the file contents and the factual knowledge acquired through their extra-legal examination without the court's assistance. Svoboda's position on this matter is that such a procedure can be tolerated for practical reasons (Svoboda, 2009) a point with which one can agree, as the mandatory participation of the parties and the court in the expert examination may result in the prolongation of the proceedings. This is because the court's participation, the expert and the parties, is assumed instead of a separate examination by the expert, which is significantly more flexible in terms of time.

The Czech Constitutional Court also addressed the issue of the 'admissibility of a separate expert examination' in its resolution of 29 May 2012, case No I. ÚS 2405/11. The complainant argued that the expert should have allowed her to participate in the examination of the subject matter and, where appropriate, invited her to provide her cooperation, stating that the opposite procedure was contrary to the principle of equality. In response, the Constitutional Court articulated the following: "*The examination of the subject matter by an expert does not constitute an on-the-spot examination, i.e., taking evidence, as recognised in the Civil Procedure Code (Article 130(2) of the Civil Procedure Code; the term "on-the-spot examination" is not recognised in the Code of Civil Procedure). An on-the-spot examination is a means of evidence which enables the court, not the expert, to obtain knowledge of the facts perceived by its senses. All those who are otherwise summoned to the hearing must be summoned to the examination, i.e., to the taking of evidence. However, in the case of an expert's examination, an essential component in preparing an expert opinion as a further means of proof, such a necessity does not arise. This is due to the fact that no evidence is taken (that is, only the examination of the expert or the submission of the expert report before the court, where the party has the right to comment thereon). In such a scenario, the expert's approach cannot be equated with an examination conducted under Section 130 of the Civil Procedure Code. The presence of individuals during the expert's examination of the item (or its examination) is, in principle, of no consequence. One may recall an adequate situation where the expert takes blood samples for blood analysis, e.g., in determining paternity. It is evident that the absence of either the mother or the designated conflict guardian does not constitute a breach of the fundamental principles of equality of arms or a fair trial, given that no activity on the part of the concerned parties could exert any influence on the ultimate outcome of the expert's opinion.*"

Conclusion

1. In light of the aforementioned comparison of Slovak, Czech and German legislation on expert evidence in civil court proceedings, it can be concluded that neither Slovak nor Czech legislation exhaustively addresses the issue. This indicates that both sets of legislation omit the two primary domains. The initial domain encompasses the court's obligation to apprise experts of the preliminary factual state before the evidence is submitted. The subsequent domain pertains to establishing constraints that experts should not transgress without substantial interference with apportioning the burden of proof in civil proceedings. In practice, the responsibility for defending rights in a given trial often falls upon the judge or the parties themselves, who can invoke the historical case law of the Supreme Court of the Czechoslovak Republic to do so. As the references cited above clarify, the absence of clearly defined legislative obligations concerning defining the initial facts is a pressing and not marginal problem. Conversely, it constitutes a significant legislative inadequacy with the potential to influence the outcomes of individual civil proceedings.

2. The current draft of the Czech Civil Procedure Code does not comprehensively address the issue, nor does it regulate the improper expansion of expert evidence. Instead, it only regulates the latter and does not address the issue of defining the initial facts. It is, therefore, recommended that the court be under legal obligation to define in its expert assignment the facts on which the expert is to base their opinion, or alternatively, to stipulate that the expert is expected to prepare a variant expert opinion, which would cover the existence or non-existence of all the facts under consideration.

3. The German legislation outlined above has the potential to serve as a model for future legislation, as it comprehensively addresses the issue. However, it is essential to note that specific corrections are

necessary, particularly in the context of contemporary trends in civil procedure. Any instance of an expert's examination exceeding the scope defined by the court, albeit by a small margin, should not automatically exclude evidence. This approach would likely be at odds with the progressive development of the adversarial principle, where the actual application of the adversarial principle, as evidenced by the introduction of the obligation of truthfulness and completeness as well as material guidance, has evolved closer to the investigative principle. Conversely, the investigative principle has evolved towards the adversarial principle by emphasising the necessary activity of the parties resulting from their cooperation.

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Conflict of Interest. None

Reference:

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