

KU LEUVEN



EIO

Challenges and improvements

FAIR TRIALS

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OUTLINE

1. The MEIOR Project

- Focus on EIO and structures of control
 - Approach to look analytically into EIO
- Guidelines
 - Basis for reflection, practical and legal improvements and future training

2. Discussion of guidelines on basis of 3 basic scenarios (different moments of control)

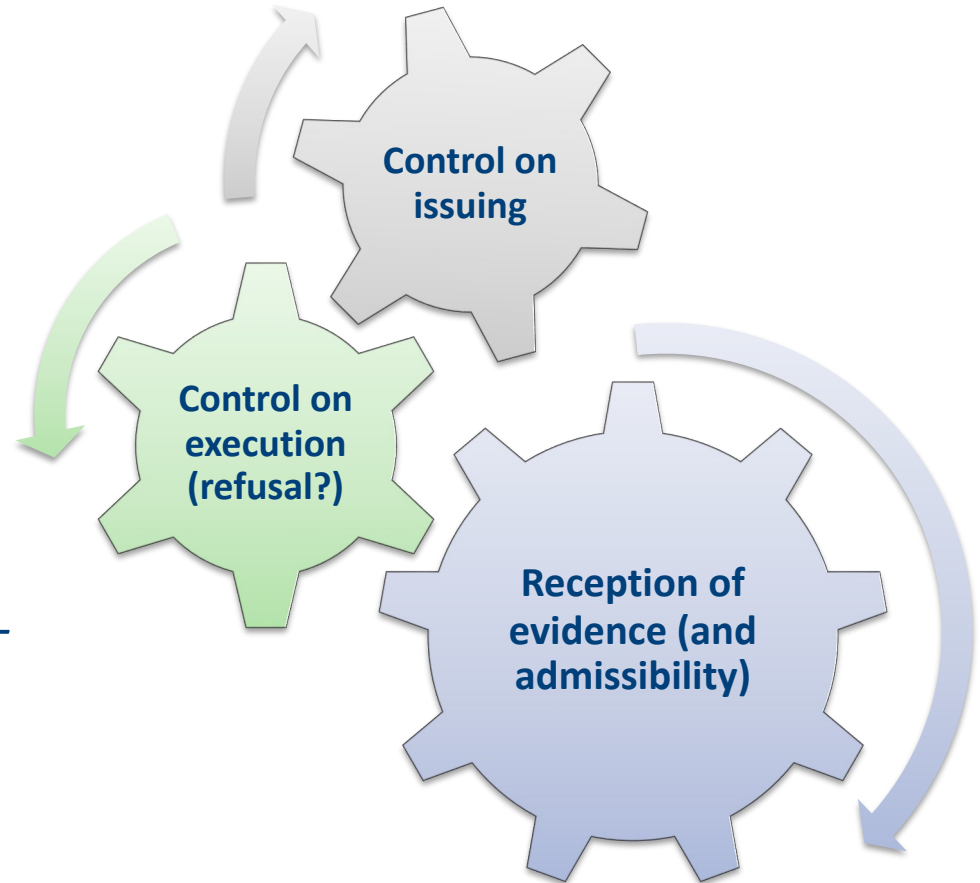
- Identify challenges
- Discuss possible improvements

The working of the EIO

- **“EIO works well”!**
 - EIO proceedings generally function quite smoothly
 - in relation w/ classic MLA instruments
- **Practical issues are, however:**
 - Dialogue does oftentimes not work: no direct connection
 - Timing is often problematic: takes very long, no updates
 - Language, incomprehension
- **Judicial cooperation with different speeds**
 - Serious/High profile cases v low profile/minor cases
 - Specialised authorities v not specialised (or less specialised) authorities
- **Concerns from defence lawyers– marginal role**

STRUCTURES OF CONTROLS

- **3 MOMENTS OF CONTROL**
- **Issuing phase – Strong control**
- **Executing phase – MR control**
- **Reception phase (not in EAW) - Admissibility/Lawfulness control**



GUIDELINES

- Based on legal and empirical findings
- **SET of 10 Guidelines**
 - With amendments to applicable (internal and European rules) and proposed adjustments in practice
- **Goals**
 - To facilitate cooperation by easing contact between competent authorities
 - To ensure effective judicial protection through a clearer division of tasks in matters of judicial scrutiny
 - To establish basis for future training and legal amendments
- **Audience**
 - Guidelines for practitioners and/or policy makers and/or legislature

*Challenges and
improvements –
The Guidelines*

Scenario 1

- **Окръжен прокурор София (District Prosecutor Sofia)**
 - Investigations on drug trafficking
 - Wants to file EIO for search of premises and search of digital devices of colleagues of suspect in Italy
- Question 1: What should prosecutor assess?
- Question 2: How can she do it?
- Question 3: Who does she contact?

Scenario 1 – Q1

- Question 1: What should prosecutor assess?
 - Measure available at domestic level for that case and internal competence of the authority
 - Proportionality of measure
 - How? Criteria?
 - Existence of adequate legal remedies
 - Against EIO or against investigative measures?
 - Urgent – and secret?

Scenario 1 – Q2

- Question 2: How can prosecutor do it?
 - Fill out the form! Annex A

SECTION G: Grounds for issuing the EIO

1. Summary of the facts

Set out the reasons why the EIO is issued, including a summary of the underlying facts, a description of offences charged or under investigation, the stage the investigation has reached, the reasons for any risk factors and any other relevant information.

.....
.....
.....

2. Nature and legal classification of the offence(s) for which the EIO is issued and the applicable statutory provision/code:

.....
.....
.....

3. Is the offence for which the EIO is issued punishable in the issuing State by a custodial sentence or detention order of a maximum of at least three years as defined by the law of the issuing State and included in the list of offences set out below? (please tick the relevant box)

- participation in a criminal organisation
- terrorism
- trafficking in human beings
- sexual exploitation of children and child pornography
- illicit trafficking in narcotic drugs and psychotropic substances
- illicit trafficking in weapons, munitions and explosives

.....
AND indicate, if applicable, if it is

.....
.....
.....
.....
.....
.....
.....
.....

possession of the executing authority
or judicial authorities

.....
d phone number or IP address

Temporary transfer of a person held in custody to the issuing State

Scenario 1 – Q3

- Question 3: Who do they contact?
 - Need to find counterpart in Italy – how?
 - Fiches Belges: https://www.ejn-crimjust.europa.eu/ejn/EJN_DynamicPage/EN/35

HOME / FICHES BELGES / FICHES BELGES DETAIL

FICHES BELGES

< Judicial cooperation measure

▼ Select another measure

for

A. EIO/ MLA MEASURES

Securing evidence (A.30 – A.32)

A.30 Search and seizure



ITALY

Measure Implementation

Legal Framework

Competent Authority

Accepted languages

Execution deadline

Concise legal practical information

MEASURE IMPLEMENTATION

Is this measure possible in your Member State under International Judicial Cooperation?

First of all, it is worth highlighting that when there is well-founded reason to believe that the body of evidence or, anyway, things pertaining to the crime are in a specific place or that the arrest of the accused or the escaped person can be carried out there, a local search is ordered by the Judicial Authority (the Public Prosecutor, during the investigations, and the Judge, during the trial phase), with a reasoned decree. The Judicial Authority can proceed personally or arrange for the act to be carried out by judicial police officers delegated with the same decree.

< Judicial cooperation measure

▼ Select another measure

for

A. EIO/ MLA MEASURES

Securing evidence (A.30 – A.32)

A.30 Search and seizure



BULGARIA

Measure Implementation

Legal Framework

Competent Authority

Accepted languages

Execution deadline

MEASURE IMPLEMENTATION

Is this measure possible in your Member State under International Judicial Cooperation?

Search and seizure is a method for collecting and verification of evidence that represents inspection and survey of places and premises for the purpose of finding and seizing hidden papers, objects, or computer information systems, which are of significance for the case.

Authorities

- **CHALLENGES:** uncertainty on authorities
 - Status issuing authorities
 - Identification of executing counterparts
- **G1: Clearer indications needed to identify competent authorities in other Member States (MS)**
 - Annex A some indications, but still insufficient
 - Sometimes not fully completed
 - Simplify identification competent counterpart in executing MS
 - Improve update fiches Belges on EJM ATLAS
 - Also with indication of territorial competence – in countries where relevant
 - **G1.1: amend Annex A**
 - to include website of issuing authority and reference to EJM website (for identification executing authority)

Proportionality

- **CHALLENGE:** uncertainty/confusion over elements of control of proportionality
- **G2: Proportionality check should be streamlined**
 - Difference between internal proportionality (adoption of measures) and cross-border proportionality (issuing EIO)
 - Clarify elements to be factored in both assessments
 - Cross-border proportionality:
 - relevance of 'costs' and delays in proceedings to be detailed on the basis of clear evidence (cost of measure and cooperation higher than average; earlier cases of delays in cooperation with countries, etc.)

Issuing phase

- **CHALLENGE:** defence frustrated when requesting issuing EIO for collection evidence abroad
- **G3: strengthen rules on EIO requested by the defence**
 - Proposal: clarify legitimate grounds for refusals of EIO requested by defence
 - in light of proportionality (*see guideline 2*)
 - decision (by the prosecutor) on whether to grant EIO must include an evaluation of costs and benefits, but rejections must be limited to cases:
 - of manifest irrelevance, or
 - in which the ratio costs-relevance is particularly low

Scenario 2

- Imagine now that the District Prosecutor in Sofia has managed (also thanks to EJM) to identify the counterpart in Italy
 - Prosecutor in Milan receives EIO with measures requested
- **Question: What should Prosecutor do and what controls should the prosecutor run?**
 - Check type of investigative measure requested
 - Check existence of measure at national level
 - Check availability of measure in a similar domestic case (**how strict?**)
 - Check refusal grounds (**how strict?**)
 - Check internal competence/procedure
 - **Check existence of internal legal remedies?** (ECJ, GavanozovII, C-852/19)
 - **Check competence of natl. authority?** (HP, C-724/19)
 - **Inform suspect or other interested people?**

Control on legal remedies in issuing State

- **CHALLENGE:** *Gavanozov I & II (!)*
 - EIO possible only if adequate internal remedies – yet completion of the EIO form on adequate remedies not necessary
 - CJEU (*Gavanozov I*) does not impose to complete part J of annex A (indication of internal remedies)
 - But *ad hoc adequate* legal remedy must be present (*Gavanozov II*)
 - Before end of the investigation the measures should be amenable to scrutiny
 - What if uncertainty on adequate internal remedies?
- **G4: Issuing authorities should indicate legal remedy in Section J where feasible but in any case, affirm under their responsibility that that domestic remedies against measures existent and effective**

Proposed heading Annex A

ANNEX A

EUROPEAN INVESTIGATION ORDER (EIO)

This EIO has been issued by a competent authority. The issuing authority certifies that the issuing of this EIO is necessary and proportionate for the purpose of the proceedings specified within it taking into account the rights of the suspected or accused person and that the investigative measures requested could have been ordered under the same conditions in a similar domestic case. ~~I request that the investigative measure or measures specified below be carried out taking due account of the confidentiality of the investigation and that the evidence obtained as a result of the execution of the EIO be transferred.~~

The issuing authority also certifies that the issuing State provides for adequate judicial remedies against the requested measure, in full compliance with European Union Law.

For the drafting of the form and for the identification of the authority in the requesting State, the issuing authority can find all relevant information at the website of the European Judicial Network: <https://www.ejn-crimjust.europa.eu/ejn2021/Home/EN>.

SECTION A

Issuing State:.....

Control for recognition

- **CHALLENGE:** unclear depth of control at recognition level
- **G7: Establish 'light' but clear control at the moment of recognition**
 - Requested measure (or alternative measure allowing to reach the same result) available according to principle of equivalence
 - With a broad understanding of what 'similar domestic case' entails
 - Remedy (i.e. appeals) required if execution interferes with fundamental rights
 - And only against execution of the measure!

Informing suspects and secrecy

- **CHALLENGE:** unclear whether proceedings are secret in issuing State and whether secrecy/confidentiality should be (should not be, could not be) safeguarded at the stage of execution
- **G5: Clarify whether proceedings are secret and ought to remain (wholly or partly) secret during execution phase**
 - **G5.1: Amend Annex A to include section on confidentiality of proceedings**
- Issuing authorities should indicate state of confidentiality of file and whether suspect can be informed of EIO even when suspect is not the person affected by the requested measure

Scenario 3

- The Prosecutor in France has collected evidence on behalf of an EIO filed by the *Procureur du Roi* in Brussels on a case of fraud and tax evasion
 - Evidence requested and collected is:
 - Questioning of French witness B.
 - Documents obtained from public administration
 - Evidence already collected in internal French proceedings concerning telephone chats of suspects with foreign colleagues (foreign colleagues under investigations in France for criminal association and corruption)
- Question 1: How is evidence to be transmitted and what does the Prosecutor in Brussel receive?
- Question 2: What kind of control should the Prosecutor in Brussels carry out?

Scenario 3 – Q1

- Question 1: How is evidence to be transmitted and what does the Prosecutor in Brussel receive?
 - Directive does not clarify
 - Annex?
 - In practice either via mail (mostly) or via post
 - Sometimes via officer of issuing State who attended collection of evidence in executing State
 - Translation is clearly necessary
 - Other points remain uncertain
 - should all evidence be transmitted or only relevant one?
 - should accompanying information be provided?
 - In practice: transmission of raw results translated

Transmission of results

- **CHALLENGE:**
 - Large differences in way evidence sent back and received
 - Uncertainty about what has happened in executing country
 - Uncertainty about whether all results – or only some results – transmitted
- **G9: Response of the executing authority should be streamlined into a standardised response form to give issuing authority the necessary information to evaluate the evidence transmitted**
 - Proposal to introduce **ANNEX E**

RESPONSE FORM – ANNEX E

- Explain applicable legal basis for investigative measure (with translation)
 - Standardised form with pre-written indication per type measure can help simplify work
- Brief indication of investigative steps taken (what was done and how)
 - With clarifications if all documents have been sent or only some
- (Optional) Specific mention of the applicable procedural safeguards and of the manner in which they were granted
 - If requested by issuing State
- Report (minutes) of measure attached + translation
 - form as ‘explanation’ for issuing MS of context (and content?) of minutes
- Possible exceptions
 - Simplified form for execution of EIO simply seeking the collection of information already in police data bases or other data bases accessible to the executing authorities (simplified form)

ANNEX E

EUROPEAN INVESTIGATION ORDER (EIO)

This EIO has been executed by the requested competent authority. The executing authority certifies that they have executed the requested measures to the best of their abilities and in a loyal manner.

SECTION A

Executing State:.....

Requesting State:

EIO number/reference/date

SECTION B

Executing authority

Tick the type of authority which executed (or supervised the execution of) the EIO:

- judicial authority
- *any other competent authority as defined by the law of the issuing State

Name of representative/contact point:

.....

Address:

Tel. No: (country code) (area/city code)

Fax No: (country code) (area/city code)

E-mail:.....

Signature of the executing authority and/or its representative certifying the content of the EIO as accurate and correct:

Name:.....

Post held (title/grade):.....

Date:.....

Official stamp (if available):

SECTION C: Executed Measure(s)

Please indicate here below the measures that have been executed, providing also indications as to departures from the requested formalities

- Obtaining information or evidence which is already in the possession of the executing authority**

Internal name of executed measure (original and translated)

.....
Legal basis/bases
.....
.....

.....
Translation of national provision or website where translated provision can be found
.....
.....
.....

.....
Brief description of activity carried out (with indication if all results transmitted or only selection)
.....
.....
.....

- Obtaining information contained in databases held by police or judicial authorities**

Internal name of executed measure (original and translated)
.....

.....
Legal basis/bases
.....
.....

.....
Translation of national provision or website where translated provision can be found
.....
.....
.....

.....
Brief description of activity carried out (with indication if all results transmitted or only selection)
.....
.....
.....

- Hearing**
 - witness
 - expert

Annex E

SECTION C: Executed Measure(s)

Please indicate here below the measures that have been executed, providing also indications as to departures from the requested formalities

- Obtaining information or evidence already in the possession of the executing authority**

Please indicate how/when the evidence was initially collected (type of investigative measure, type of crime(s) investigated, other relevant circumstance)

.....
.....
.....

Indication of number of national file (where possible)

.....

- Judicial authorisation or supervision? Name of authority.....

.....

- Obtaining information contained in databases held by police or judicial authorities**

Internal name of executed measure (original and translated)

.....

Legal basis/bases. Please indicate the relevant provision(s) of the law

.....

.....

Translation of national provision or website where translated provision can be found

.....

.....

- Judicial authorisation or supervision? Name of authority.....

.....

Indication of database

Annex sections D, E, F

D – Non-executed measures

E – Confidentiality

F – Legal remedies (pending)

SECTION D: Non-executed measures

Indicate whether some of the requested measures have not been executed and explain briefly why

.....
.....
.....
.....

SECTION E: Secrecy/confidentiality

Indicate whether the execution has taken place safeguarding confidentiality of the proceedings or not

- fully secret/confidential
- partly secret/confidential – information given to (witness/victim/lawyer/ suspect)
-
- not confidential

Further information if needed

.....

SECTION F: Legal remedies

1. Please indicate if a legal remedy has been filed against the issuing of an EIO, and if so please provide further details (description of the legal remedy, including necessary steps to take and deadlines):

.....
.....

2. Authority in the executing State which can supply further information on procedures for seeking legal remedies in the executing State:

Name:

Contact person (if applicable):

Address:

Tel. No: (country code) (area/city code)

Fax No: (country code) (area/city code)

E-mail: (country code) (area/city code)

Scenario 3 – Q2

• Question 2: What kind of control should the Prosecutor in Brussels carry out on the evidence received?

○ Directive remains silent

- Assessment of evidence issue of natl. law
- But ... ECJ, C-670/22, M.N.
- Risks for fairness, fundamental rights and proportionality?
 - E.g. internet and telephone chats already collected in

○ Landscape of solutions in natl. law differs

- Assessment on the basis of internal standards (compliance w *lex fori*)
- Assessment on the basis of foreign standards (compliance w *lex loci*)
- Assessment on the basis of general (ECHR) standards
- Mixed solutions
- Belgium: compliance with *lex loci* + control on reliability and general fairness
- In practice: “mutual trust” (!)

○ **Problem: how can scrutiny be carried out?**

Control on the receiving end

- **CHALLENGE:** difficult assessment of lawfulness foreign evidence on basis of foreign law
 - Judge issuing country no guardian of legality in the executing MS
 - Minimum level of control necessary to ensure standard of fundamental rights protection as set out at international level
- **G10: ensure adequate control on lawfulness (but not control of foreign evidence on the basis of foreign law)**
 - Wvaluation to be made at least on the basis of common European standards
 - On the basis of information included in the response form outlined above (and further elements produced by parties)
 - **G.10.1 Apply/introduce principle of specialty – evidence to be used only for proceedings of similar magnitude to those in which it was collected**

The Guidelines

GUIDELINES

- **G1: Improve indications in order to identify competent authorities in other Member States (MS)**
- **G2: Proportionality check should be streamlined**
- **G3: Strengthen rules on EIO requested by the defence**
- **G4: Issuing authorities should indicate legal remedy in section J but in any case affirm under their responsibility that that domestic remedies against measures existent and effective**
- **G5: Clarify whether proceedings are secret and ought to remain (wholly or partly) secret during execution phase**

GUIDELINES

- **G6: Establish that the expiry of deadlines of directives for reception of order and for sending materials is equivalent to refusal** (unless executing authority has requested extension, or at least informed of difficulties)
- **G7: Establish 'light' but clear control at the moment of recognition**
- **G8: Clarify check on legal remedies in the issuing state**
- **G9: Response of the executing authority should be streamlined into a standardised response form to give issuing authority the necessary information to evaluate the evidence transmitted = INTRODUCTION ANNEX E**
- **G10: Move away from control of foreign evidence on the basis of foreign law**

Thank you for your attention!

The MEIOR Team!

www.meior.org