



# MEIOR Belgium

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# EIO in Belgium

- Law 22 May 2017
  - Implementation in separate law rather than through incorporation in the law on mutual legal assistance (law 9 December 2004) or in the law on mutual recognition (law 5 August 2006)
- Minimal changes compared to text of directive (“copy-paste” style of implementation) – “*vlakke omzetting*”
- E.g. Art. 5 EIO law: issuing authority
  - a judge, court, investigating judge or member of the prosecution service of the issuing State competent for the case
  - Any other competent authority in the issuing State on condition that it is validated by a judge, court, investigating judge or member of the prosecution service of the issuing State
- Eg. art. 12: refusal grounds

# Competent authorities in BE

- Division of labour between prosecutors and investigating judges (and possibly courts)
- Art. 24 Belgian law EIO - active
  - Public prosecutor or **investigating judge**
    - Division of labour mirrors internal division of labour (=for equivalent national cases)
- Art. 14 Belgian law EIO – passive
  - Reception- public prosecutor, federal prosecutor, Central office for customs and excise duties(COCE)
  - Execution - Public prosecutor (or COCE) or **investigating judge**
    - Division of labour mirrors internal division of labour (=for equivalent national cases)

# Judicial control EIO - ACTIVE

- Active procedure – issuing phase
- No special rule on judicial remedies
- Judicial remedies applicable against domestic measure
  - Insofar as available
    - E.g. “kort geding” - “*summary interim proceedings*”
    - (Art. 28sexies §§ 1-5, 7; Art. 61quater §§ 1-6, 8)
- General rule: no separate appeal against decision to undertake investigative measures
  - Control of legality at the end of the judicial investigation
    - Or in judicial investigations when Indictment Chamber requested/empowered to intervene
  - Trial challenges (also on evidence) and system of appeals

# Judicial control EIO - PASSIVE

- Passive procedure – execution phase
- Person informed unless risk for the secrecy of the investigations
  - *“behoudens indien de geheimhouding van een onderzoek in het gedrang zou komen”/“Sauf si cela nuit à la confidentialité d'une enquête”*
- 2 options for remedies (none applicable in procedures led by the COCE)
  1. *“Kort geding”* (when a person suffered damage with regard to own property)
    - Art. 28sexies §§ 1-5, 7 (in prosecutorial enquiries)
    - Art. 61quater §§ 1-6, 8 (in judicial investigations)
    - Only for reasons other than substantive reasons (*materiële gronden/les motifs de fond*)
  2. Opposition against the transferring of seized assets before the Council Chamber (*Raadkamer*) – art. 22 EIO law

# Uneven/fragmented experience in practice

- Very different experience from office to office particularly within public prosecution
  - From many cases per day to limited cases per year
  - From high specialization to low specialization (on passive/execution phase)
- Execution phase
  - Offices working exclusively on EIO
  - Offices with internal for
- Active phase
  - Diffuse competence
- Border areas v other areas

# Overall elements stemming from practice

- EIO works smooth
  - “Overall it works well”
  - “Overall no problem”
  - Some problems w/ some countries (slow, no answer)
- Active and passive EIO: almost no refusals
  - (active) Contacts w/ authority instead of refusals
  - (passive) Silence/reaction instead of refusals
    - Not too frequent request of additional safeguards
- Points coming up from the practice as problematic
  - Videoconference – violation FR
  - Secrecy protection

# Controls

- **ACTIVE - ISSUING**

- Issuing phase (public prosecutor or investigating judge)
- Proportionality of measures
  - Division of views between judges/prosecutors and lawyers
  - Ordinary control v no control
- No appeals against EIO
  - limited appeals against domestic measures (mostly against seizures)

- **PASSIVE - EXECUTING**

- Control on issuing authority – very light
- Control on refusal grounds and possibility to carry out measures in BE
  - No check on proportionality – Check on refusal grounds vary in intensity between practitioners
- Limited possibility to file remedy v/ execution



# Gavanozov II problems?

- Two reactions to the judgement
- 1) specialized group of officers
  - defuse Gavanozov II
    - Presumption existence of remedies in issuing State
- 2) other officers
  - unaware of Gavanozov II
    - “I will read it with attention”

# Receipt of results

- No language problems
- No streamlined way of providing results
  - Each country sends own records (according to own rules/practice)
- No difficulty of reading results (=evidence)
- But difficult to understand/see what procedural steps taken in execution
- And unable to say if entirety of results sent
- Difficulty (impossibility?) of controlling results

# Evidence admissibility

- Art. 29

*“In the context of criminal proceedings conducted in Belgium, no use may be made of evidence:*

*1° that has been collected irregularly in the executing State if the irregularity:*

- *follows, under the law of the executing State, from the violation of a prescribed form requirement under penalty of nullity;*
- *affects the reliability of the evidence; or*

*2° the use of which constitutes a violation of the right to a fair trial.*

- Repeats similar provision of law on international cooperation

# Evidence admissibility

- Control on foreign law very difficult
  - Still doable with regarding to neighbouring countries
  - Not with other countries
  - Always uncomfortable
  - No cases of evidence excluded
- Control on violation right to fair trial
  - very unlikely to lead to exclusion (similarly to internal evidence)
  - Underlying presumption of trust on foreign authority
  - Ultimately lighter approach

# Conclusions

- General impression everything works well
  - Yet: sometimes impression bureaucratic approach
- Fragmented picture of controls – sometimes lack in-depth controls
  - Active side – Issuing moment
    - Uncertainty on proportionality
  - Passive side - Executing moment
    - EIO's “*zo maar passeren*”/”EIOs just go through”
    - Defence normally absent (and otherwise defence passive -often little interest)
    - Few possibility to file appeals (eg. against seizure)
  - Active side – control on evidence at reception phase
    - Difficulty/impossibility to control and presumption of compliance – “mutual trust”

*Thank you for your attention!*