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# Mould EIO Review MEIOR

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## Mould EIO Review



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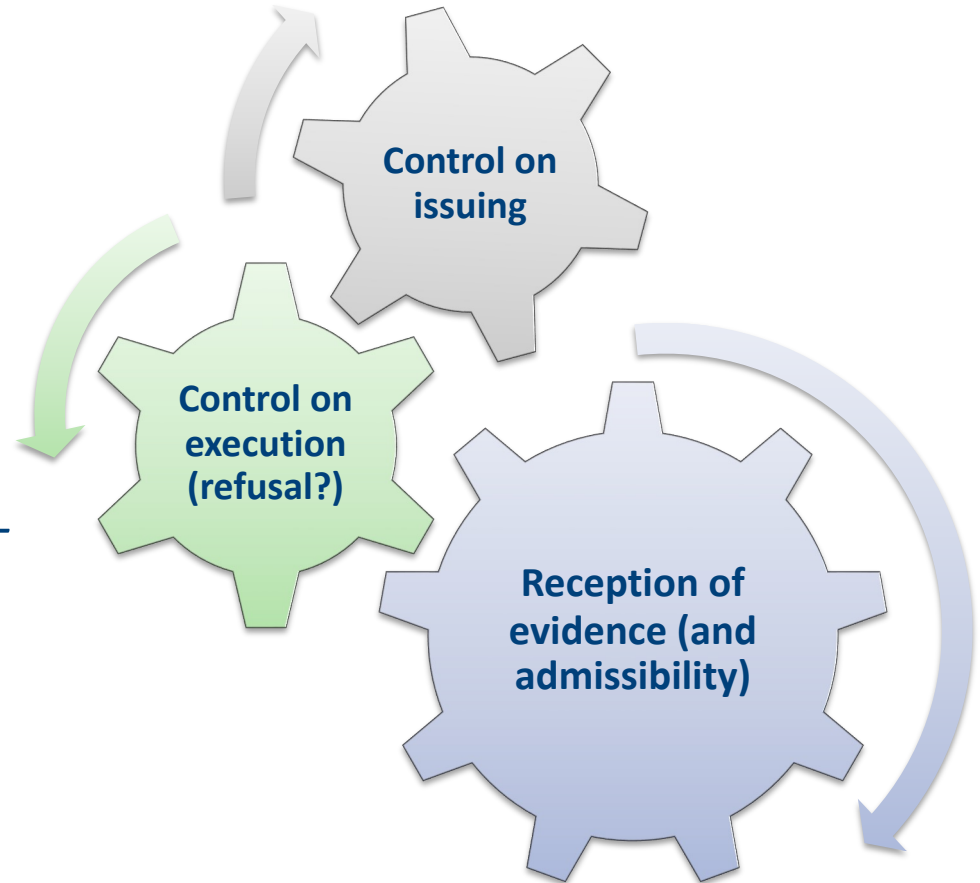
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# OUTLINE

1. Preliminary findings
2. Structure of controls
3. Draft Guidelines

# STRUCTURE OF CONTROLS

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



# EMPIRICAL FINDINGS

- Gavanozov II judgement does not seem to have impacted the everyday practice of judicial cooperation
  - Reliance on mutual trust
- Lack of thorough controls (particularly at executing and receiving phase)
  - It is though questionable whether executing authority is *de facto* in the position to assess more than macroscopic defects in the EIO
- From prosecution perspective → EIO proceedings generally function quite smoothly, practical issues are, however:
  - Dialogue does oftentimes not work: no direct connection
  - Timing is often problematic: takes very long, no updates
  - Language, incomprehension
  - Control on evidence admissibility: impractical
  - Defence left out

# GUIDELINES

- Based on interviews with Belgian stakeholders and problems highlighted
- Set of **10 Guidelines** (for now!) that propose amendments to the applicable rules (some aspects) and suggest adjustments in practice
  - 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
- Guidelines for practitioners and/or policy makers and/or legislature
- Some national/some Europeans
  - Need to consider also findings of other national empirical studies conducted in this project (comparative perspective)

# *Proposal of Guidelines*

# General guidelines

- **PROBLEM:** uncertainty on issuing authorities
- **G1: Clear indications needed to identify competent authorities in other Member States (MS)**
  - Who is the contact point in the executing MS (to avoid loss of time/ensure that decision on recognition/execution of EIO can be taken as quickly as possible)
  - Which authorities were involved (who did what) in the executing MS to allow for later possibility for issuing authority to contact to answer questions and clarify doubts
  - During the EIO procedure: ‘traceability’ of the activities so that issuing authority knows who is dealing with the order and is able to stay in contact and provide, if needed, additional information



# Issuing phase

- **PROBLEM:** uncertainty/confusion over elements of control of proportionality
- **G2: Proportionality check should be streamlined**
  - Clarify elements to be factored in the assessment
  - Clarify a consideration of the 'costs' inherent in triggering a procedure of judicial cooperation in criminal matters
  - Clarify relevance – if any – of expected time/rapidity of the execution of the measure
    - Should not normally be relevant
  - Clarify relevance of active reaction of requested MS
- Clarifications should be done either in law or in soft

# Issuing phase (II)

- **PROBLEM:** defence frustrated by passive
- **G3: strengthen rules on EIO requested by the defence**
  - 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
- Proposal: clarify legitimate grounds for refusals

# Issuing phase (III)

- **PROBLEM: Gavanozov!**
  - Completion of the EIO form with regard to Gavanozov judgments
    - CJEU (Gavanozov I) does not impose to complete whole form, but it also states (Gavanozov II) that national laws that do not provide for legal remedy (even for non-coercive measures) are not in line with EU law and authorities from such jurisdictions may not issue an EIO
    - Does not have to be *ad hoc* legal remedy, but before end of the investigation the measures should be amenable to scrutiny
    - Thus: issuing state should refrain to file EIO if remedies not unavailable, but if it does section J (about the available legal remedies) need not be completed
- **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**

# Issuing phase

- Some open issues
  - Should issuing State clarify in EIO if investigations is secret/confidential? (or clarify non-secret/non-confidential?)
  - Should case-file in the issuing country give evidence of request filed?

# Between issuing and executing phase

- **PROBLEM:** lengthy procedures with some States and of no responses
  - State of uncertainty detrimental to mutual trust and investigations/proceedings
- **G5.1: 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)
- **G5.2: make communication to Eurojust mandatory also in above cases**

# Executing phase

- **PROBLEM:** unclear depth of control at recognition level
- **G6: Establish 'light' but clear control at the moment of recognition**
  - National ordre public not infringed
  - Requested measure (or alternative measure allowing to reach the same result) available according to principle of equivalence
    - With a broad understanding of what a 'similar domestic case' is
  - No grounds for refusal apply
  - Necessary information provided

# Executing phase ... recognition

- **PROBLEM:** scarce to no control on issuing authority
- **G7: Improve check on issuing authority**
  - Competent?
    - C-16/22 Staatsanwaltschaft Graz!
  - Also from executive perspective: crucial that competent authorities are easily identifiable
  - Fiches Belges on the EJN ATLAS can be a useful tool, however:
    - Not all competent authorities are aware of them/use them
    - Not for every country they have been completed accurately
    - Even where they have been completed, they do not seem to indicate territorial competence – which can be problematic especially in larger EU MS

# Executing phase ... recognition

- **PROBLEM:** unclear situations as to controls on remedies in issuing State
- **G8: Clarify check on legal remedies in the issuing state**
  - Where indications as to the available legal remedies in the issuing MS is missing, executing authority must, in case of manifest doubt as to the applicable remedy, ask the issuing authority to clarify
  - after Gavanozov II there can be no reliance on (blind) mutual trust on this aspect
- Is the legal remedy effective?
  - Issuing authority affirms under their responsibility that the indicated legal remedy (ad hoc or not) is effective and that it corresponds to the level of protection afforded in similar domestic cases



# Between Execution and Reception

- **PROBLEMS:**
  - 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**
  - = INTRODUCTION 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
- Exceptions
  - Simplified form for execution of EIO seeking the collection of information already in police data bases or other data bases accessible to the executing authorities (simplified form?)

# Control on the receiving end

- **PROBLEM:** 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: move away from control of foreign evidence on the basis of foreign law**
  - evaluation to be made on the basis of minimum European standards (EU law and ECtHR, where available)
    - Control to be done based on the basis of information included in the response form outlined above and on the information and argumentation included in defence memorials/oppositions/legal remedies advanced by defence

# Further open issues

- Case-file in the issuing country must contain all documents pertaining to the EIO procedure?
- Guidelines on remedies (=appeals) in executing phase?

*Thank you for your attention!*

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