



Mould EIO Review MEIOR

Leuven, 25 March 2024

Michele Panzavolta
Michele.Panzavolta@KU Leuven

KU LEUVEN



UNIVERSIDAD
COMPLUTENSE
MADRID

1222 · 2022
800
ANNI



UNIVERSITÀ
DEGLI STUDI
DI PADOVA

MEIOR

Mould EIO Review



UPPSALA
UNIVERSITET



Uniwersytet
Gdański



Związek
Uczelni
Fahrenheita



Funded by the
Justice Programme (JUST) (2021-2027)
of the European Union
Project ID: 101046446

KU LEUVEN

OUTLINE

1. Findings

- Peculiar traits of the EIO
- Moments of control
- Working of the EIO
- Judicial controls

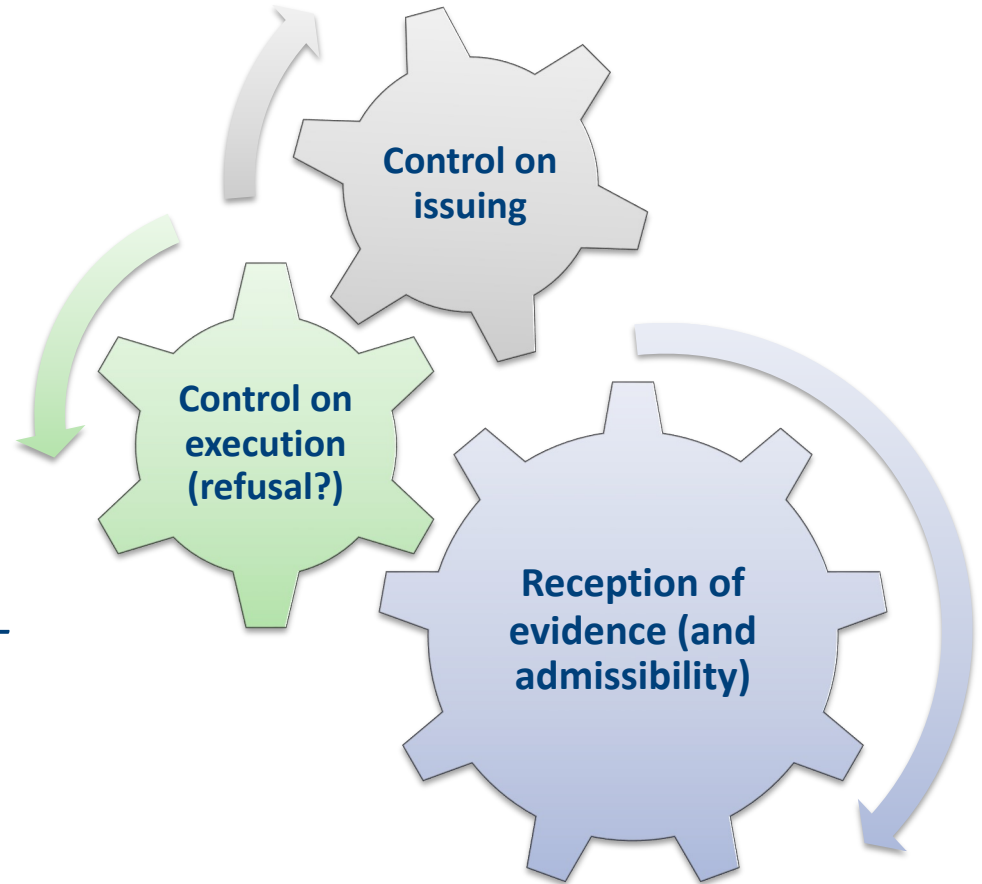
2. Guidelines

EIO is not EAW

- Peculiarities of EIO – emerge in comparison w/ EAW
 - In general, less coercive/intrusive/afflictive than EAW
 - Lower-level concept of independence in issuing (and executing) authority
 - No (clearly established) double-layer of protection
 - More complex architecture of judicial controls
 - With also at times more complex form of judicial scrutiny (e.g. in executing phase and reception phase)

STRUCTURE OF CONTROLS

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



The working of the EIO

- **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
- **Marginal role for defence**
 - At the moment of issuing, but also when executing and even in reception phase

JUDICIAL CONTROLS

- No clear common concept of judicial control and/or remedy in functioning of EIO
 - Issues worked out at national level
 - Where sometimes conceptual differences emerge countries
 - Procedural autonomy?
- Lack of thorough controls (particularly at executing and receiving phase) – *see following slide*
 - It is though questionable whether executing authority is *de facto* in the position to assess more than macroscopic defects in the EIO
- Gavanozov II judgement does not seem to have impacted the everyday practice of judicial cooperation
 - Reliance on mutual trust (!)

JUDICIAL CONTROLS (II)

- **Issuing phase**
 - Asymmetries in assessment of proportionality
- **Executing phase**
 - Uneven controls, due to:
 - different measures requested
 - different structures of judicial controls and remedies at national levels
 - Different approaches to remedies against EIO
 - Unclear situation concerning confidentiality of EIO requests and possibility for parties to challenge
- **Reception phase**
 - Problematic control on evidence admissibility
 - impractical and very weak (at times non existent)

Proposal of Guidelines

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
- **Audience**
 - Guidelines for practitioners and/or policy makers and/or legislature

General guidelines

- **PROBLEM:** 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 EJN 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 EJN website (for identification executing authority)
 - Identify contact points in MS to respond quickly

Issuing phase

- **PROBLEM:** uncertainty/confusion over elements of control of proportionality
- **G2: Proportionality check should be streamlined**
 - Clarify difference between internal proportionality (adoption of measures) and cross-border proportionality (issuing EIO)
 - Clarify elements to be factored in both assessments
 - For cross-border proportionality, clarify:
 - relevance of ‘costs’ inherent in triggering a procedure of judicial cooperation in criminal matters
 - relevance –if any– of expected time/promptitude in execution of the measure (though should not normally be relevant)
 - Clarifications should be done either in national law or in soft-law – European law for cross-border proportionality

Issuing phase (II)

- **PROBLEM:** defence frustrated when requesting issuing EIO
- **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

Issuing phase (III)

- **PROBLEM:** Gavanozov II (!)
 - 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 where feasible but in any case affirm under their responsibility that that domestic remedies against measures existent and effective**

Issuing phase (IV)

- **PROBLEM:** 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

Between issuing and executing phase

- **PROBLEM:** lengthy procedures with some States and cases of no response
 - State of uncertainty detrimental to mutual trust and investigations/proceedings
- **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)
- **G6.1: make communication to Eurojust mandatory in above cases**
 - Also to ensure clearer picture on working of EIO

Executing phase

- **PROBLEM:** unclear depth of control at recognition level
- **G7: 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
 - Remedy (i.e. appeals) required if execution interferes with fundamental rights
 - And only against execution of the measure!

Executing phase ... recognition

- **PROBLEM:** unclear situations as to controls on remedies in issuing State
- **G8: Clarify check in executing State on legal remedies in the issuing state**
 - after Gavanozov II there can be no reliance on (blind) mutual trust on this aspect
 - However, no need to carry own control for executing State— control impracticable
 - See *guideline 4*: 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
 - Only in case of manifest doubt must executing authority ask the issuing authority to clarify if effective remedies in place

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
- 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 – close-up

Information on banking and other financial operations

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)

.....

.....

.....

.....

Annex sections D, E, F

D - Non-executed measures

E- Confidentiality

F – Legal remedies

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)

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: ensure adequate control on lawfulness (but not 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

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**
 - **G5.1: Amend annex A w/ section on confidentiality of proceedings**

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)
 - **G6.1: make communication to Eurojust mandatory in above cases**
- **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!