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EVALUATIONS**
On the implementation of the European Investigation Order (EIO)
REPORT ON BELGIUM

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TENTH ROUND OF MUTUAL EVALUATIONS
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1. EXECUTIVE SUMMARY

The 10th round of mutual evaluations focusses on the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (EIO Directive). The aim of the evaluation is to consider not only the legal issues but also the practical and operation aspects linked to the implementation of the EIO Directive. It provides a valuable opportunity to identify areas for improvement as well as best practices to be shared among Member States. The evaluation further promotes the effective implementation of the instrument and aims to enhance mutual trust among the Member States' judicial authorities.

The visit was very well prepared by the Belgian authorities, allowing the evaluation team to meet with all the relevant bodies with responsibilities regarding the European Investigation Order (EIO). The evaluation team would like to express their particular appreciation for the open and cooperative spirit in which the discussions took place. The pleasant atmosphere allowed every practitioner to express their views openly and with a willingness to reflect on the national system and possible areas for improvement.

The EIO is an instrument for evidence-gathering but Belgium has a more flexible approach when it comes to the relationship with other instruments. For example, Belgium would execute an EIO for the service of documents, even when strictly speaking an MLA request would be the appropriate instrument. The Belgian authorities argue that an MLA request is without formalities and can thus be accepted in any form. This is an example of Belgium's pragmatic approach: always trying to find a solution to execute what is requested in the most efficient manner.

Belgium has three regions and three official languages, depending on the region, resulting in a unique position when it comes to the language regime, as EIOs are accepted in four languages (French, Dutch, German and English). The Belgian authorities explained that, because of this unique position, it would be better if other Member States checked what language(s) is/are used in the region where the measure is to be executed, if possible. This significantly speeds up the process of execution.

Belgium is also unique when it comes to dealing with immunities in connection with the EIO because of the large number of EU institutions it hosts. The Belgian authorities explained that it is challenging to get in touch with an EU institution when trying to execute an EIO where, for example, documents are needed from that particular institution.

A current topic for Belgium is the use of videoconferencing in court. Up until now, having a suspect attend his or her trial via videoconference has been considered a violation of fundamental rights and therefore not allowed. Recently, a draft law on videoconferencing in court proceedings was approved in the Belgian Council of Ministers, providing a legal basis for the use of videoconferencing in court. However, it is still not clear if the new law will allow for the EIO to be used to have a suspect attend his or her trial via videoconference when no evidence is to be gathered from him or her. Thus, the evaluation team agreed to recommend that the European Commission provide some guidelines on how to apply the EIO in relation to ensuring the presence of a suspect at his or her trial via videoconference.

Furthermore, the evaluation team confirmed that further clarification from the Commission is needed regarding the concepts of speciality, interception of telecommunications and exceptionally high costs.

The Belgian authorities look forward to the launch of the e-Evidence Digital Exchange System ('e-EDES'), which will ensure secure communication at EU level. The practitioners expect some of the current challenges in communication with other Member States to be resolved when e-EDES becomes fully operational.

The evaluation team identified some areas for improvement that need to be addressed by Belgium and other Member States (see chapter 21). All in all, however, the evaluation team would like to stress that the EIO is applied in Belgium in an appropriate and effective manner, and the Belgian authorities should be commended for their pragmatic and cooperative attitude towards executing all EIOs to the fullest extent possible.

2. INTRODUCTION

The adoption of Joint Action 97/827/JHA of 5 December 1997¹ ('the Joint Action') established a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime.

In line with Article 2 of the Joint Action, the Coordinating Committee in the area of police and judicial cooperation in criminal matters ('CATS') agreed after an informal procedure following its informal meeting on 10 May 2022 that the 10th round of mutual evaluations would focus on the EIO.

The aim of the 10th round of mutual evaluations is to provide added value by offering the opportunity, via on-the-spot visits, to consider not only the legal issues but also – and in particular – relevant practical and operational aspects linked to the implementation of Directive 2014/41/EU. This will allow shortcomings and areas for improvement to be identified, together with best practices to be shared among Member States, thus contributing towards ensuring more effective and coherent application of the principle of mutual recognition at all stages of criminal proceedings throughout the EU.

More generally, promoting the coherent and effective implementation of this legal instrument at its full potential could significantly enhance mutual trust among the Member States' judicial authorities and ensure better functioning of cross-border judicial cooperation in criminal matters within the area of freedom, security and justice. Furthermore, the current evaluation process could provide helpful input to Member States that may not have implemented all aspects of Directive 2014/41/EU.

Belgium was the third Member State to be visited during this round of evaluations, as provided for in the order of visits to the Member States adopted by CATS.²

¹ Joint Action of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime.

² ST 10119/22 and WK 6508/2023.

In accordance with Article 3 of the Joint Action, the Presidency has drawn up a list of experts in the evaluations to be carried out. Pursuant to a written request sent to delegations by the General Secretariat of the Council of the European Union, Member States have nominated experts with substantial practical knowledge in the field.

Each evaluation team consists of three national experts, supported by one or more members of staff from the General Secretariat of the Council and observers. For the 10th round of mutual evaluations, it was agreed that the European Commission and Eurojust should be invited as observers.³

The experts entrusted with the task of evaluating Belgium were Mr Thomas Rauscher (Germany), Ms Alana van Rookhuizen (the Netherlands), and Ms Valeria Sico (Italy). Observers were also present: Mr Jorge Espina (Eurojust) and Ms Toma Milieskaite (Commission), together with Ms Anastasia Pryvalova from the General Secretariat of the Council.

This report has been prepared by the team of experts with the assistance of the General Secretariat of the Council, based on findings arising from the evaluation visit that took place in Belgium between 14 and 16 February 2023, an online meeting on 12 July 2023, and Belgium's detailed replies to the evaluation questionnaire, together with its answers to the ensuing follow-up questions.

The evaluation team had the opportunity to meet representatives from the Ministry of Justice, the Federal Public Prosecutor's Office, several regional public prosecutors' offices, the judiciary, the International Police Cooperation Directorate, the General Customs and Excise Administration, the Institute of Legal Training and the Flemish Bar Association. All the bodies present provided the evaluation team with interesting and detailed presentations on their role in relation to the EIO. The presentations provided an excellent starting point for in-depth discussions between the evaluation team and the practitioners on how the EIO is applied in practice in Belgium.

³ ST 10119/22.

3. TRANSPOSITION OF DIRECTIVE 2014/41/EU

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters has been transposed in Belgium in the Law of 22 May 2017 on the European Investigation Order in criminal matters ('Law of 22 May 2017').

4. COMPETENT AUTHORITIES

Article 2 of the EIO Directive is transposed properly in Articles 4, 6, 14, 16 and 24 of the Law of 22 May 2017. Belgium has not designated a central authority.

Issuing authorities

The Belgian authorities competent to issue an EIO, depending on the offence and the phase of the investigation, are the public prosecutor, the investigating judge and the General Customs and Excise Administration (GCEA). In Belgium, there are four possibilities for issuing an EIO.

Preliminary investigation

The public prosecutor drafts and issues the EIO during a preliminary investigation where no intrusive measures are ordered.

'Mini investigation' ex Article 28septies of the Code of Criminal Procedure

The public prosecutor can request that the investigating judge orders an investigative measure for which the judge is competent. For such measures, however, the public prosecutor does not hand over the entire investigation to the judge. After the investigating judge orders the measure, the file is returned to the public prosecutor who is the issuing authority of the EIO. If the investigative measure in question is one of the measures excluded from the scope of Article 28septies of the Code of Criminal Procedure (such as surveillance measures), the public prosecutor asks the investigating judge to issue the EIO.

Investigation by investigating judge

When the case is under investigation by the investigating judge, the investigating judge is the issuing authority of an EIO.

General Customs and Excise Administration

The GCEA is competent to issue an EIO relating to matters within its exclusive competence, such as smuggling and counterfeiting of tobaccos. Before the EIO is transmitted to the executing authority, it needs to be validated by an investigating judge.

Right of the suspected or accused person or victim to apply for an EIO

According to Article 61quinquies of the Belgian Code of Criminal Procedure, a party to the proceedings can file a request with the investigating judge that any investigative measure be carried out. This can be a measure in Belgium or abroad. The Belgian defence lawyer interviewed explained to the evaluation team that this works well in practice, providing examples where the investigating judge was asked to hear a witness abroad.

Executing authorities

The Belgian executing authorities are the public prosecutor, the investigating judge or the GCEA.

Public prosecutor's office

Usually, the public prosecutor's office at the district court competent to execute the investigative measure, is competent to receive an EIO. If the investigating judge receives an EIO by mistake, it must immediately be forwarded to the public prosecutor. An investigating judge cannot receive an EIO because a check must first be carried out as to whether the execution of the EIO may harm a national case. An EIO may also be sent to the Federal Prosecutor's Office (which has no territorial limits), in particular when it is a matter of urgency, the location of the investigative measure is unclear or coordination of the execution is needed.

The involvement of Eurojust in a Belgian case always goes through the federal level. The Belgian authorities explained that this was a conscious decision to make sure that only cases where assistance is actually needed go to Eurojust and the national desk is not flooded with too many questions. The evaluation team sees this approach as a best practice (*see best practice No 1*).

If the investigative measure(s) indicated in the EIO can be ordered by the public prosecutor in similar national proceedings, the public prosecutors may themselves take a decision on the execution of the EIO, or, if the prosecutor considers it appropriate, request that the investigating judge take the decision on the execution of the EIO.

Within the offices of the five prosecutors-general, located across the country, there is a board of prosecutors, competent in the field of judicial cooperation in criminal matters, which prepares guidelines on international cooperation and informs the Minister for Justice of the most important developments in this area. It includes a network of experts, composed of prosecutors specialising in the field and external professionals, such as the judicial police. These experts in judicial cooperation assist prosecutors working with EIOs. In 2017, a specific working group within the national expertise network on international cooperation was set up. The working group is presided over by the Federal Prosecutor's Office, with several other members from the local public prosecutors' offices, the offices of the prosecutors-general, and the Ministry of Justice. If necessary, the working group can be extended to include members of the police and investigating judges. The group has assisted judicial authorities by providing forms and a FAQ on issues around the application of the EIO. The evaluation team sees this structure as a best practice (*see best practice No 2*).

Investigating judge

If the investigative measures indicated in the EIO have to be ordered by the investigating judge in similar national proceedings, the public prosecutor's office forwards the EIO to the investigating judge for a decision on the execution of the EIO, unless there is a clear reason to refuse its execution. As the executing authority, the investigating judge will have to comply with all obligations (acknowledgement of receipt, recognition decision, etc.) and send notifications to the foreign issuing authorities. He or she must send the documents directly (without going through the public prosecutor) to the issuing State.

General Customs and Excise Administration

In matters that fall within its exclusive competence, the GCEA is competent to receive and execute an EIO for the measures it may order in similar national proceedings. If the investigative measures indicated in the EIO are to be ordered by the investigating judge in similar national proceedings, the GCEA will immediately forward the EIO to the investigating judge for a decision on the execution of the EIO.

5. SCOPE OF THE EIO AND RELATION TO THE OTHER INSTRUMENTS

Scope of the EIO

Article 3 of the EIO Directive is transposed properly in Article 4 of the Law of 22 May 2017.

According to the Belgian law, any judicial investigative measure aimed at obtaining evidence falls within the scope of the EIO Directive, with the exception of the establishment of a Joint Investigation Team (JIT) and the taking of evidence within the framework of that team.

Belgium reported no issues in identifying the appropriate investigative measure. Even a measure that does not exist can be executed as long as it is not against the public order. The practitioners explained that they use the EIO to obtain evidence. In all other cases, such as the service of documents, they will send an MLA request. Some Member States require an EIO even if strictly speaking the measure does not fall within the scope of the Directive, such as the service of documents. In general, Belgium will comply with such requests by the executing State and send an EIO. Belgium will also execute an EIO where strictly speaking an MLA request would be the right choice (such as providing a copy of a judgment), because an MLA request is without formalities and an EIO form can be used. Furthermore, the Belgian authorities have noticed that EIOs are frequently used to request permission to use information previously shared on a police-to-police basis, as evidence in the criminal investigation.

According to the Belgian authorities, an EIO cannot be used to execute a sentence or to enforce a final decision. However, this is very rarely an issue, with Belgium reporting only one case where an EIO was sent to enforce a final decision. The Belgian authorities informed the Member State in question that another instrument should be used in that instance.

With regard to the European arrest warrant (EAW), Belgium often receives an EIO in parallel with an EAW, in order to locate the person. Even though this is not necessary under Belgian law, it usually does not lead to any problems. However, it is important to always mention other instruments sent in the same investigation in the EIO, according to Belgian authorities.

In Belgium, it is possible to arrest a suspect for 48 hours for questioning without an EAW, using an EIO alone. Such an arrest is only possible in a public space.

In the same vein, the Belgian authorities report that it is possible to temporarily freeze assets (for five days) based on an EIO, while waiting for the appropriate certificate for freezing for the purpose of confiscation.

So far Belgium has not encountered any problems with EIOs in relation to JITs. If evidence was obtained by one of the members of the JIT before the JIT was established, no new EIO needs to be issued, according to Belgium. However, if the evidence was obtained in a State not part of the future JIT, an EIO should be issued to obtain the evidence. Belgium suggests that the EIO should always mention the existence of a JIT, its partners and its scope, if applicable. That way it is clear to the executing authorities that evidence will be shared between the JIT members.

The evaluation team agrees that it is important to mention all relevant instruments in the EIO, such as EAWs or JITs, and sees fit to make a recommendation to all Member States (*see recommendation No 6*).

Some Belgian practitioners believe that the EIO is still too slow to meet acute investigative needs that can be better met through informal channels or the police (e.g. temporary freezing of camera footage). Furthermore, even if the issuing authority asks for prioritisation, the reality is that the executing authority will often not (re)act fast enough, resulting in the loss of crucial information or evidence.

Proceedings in which an EIO may be issued

Article 5 of the Law of 22 May 2017 specifies the proceedings in which an EIO may be issued. An EIO may be issued in criminal proceedings and concerning a criminal offence in accordance with the law of the issuing State, in non-criminal administrative or judicial proceedings where the decision may be appealed in a criminal court, and in proceedings as listed above which are brought against a legal person.

Provisions replaced by the EIO Directive in Belgium

Article 34 of the EIO Directive is transposed properly in Article 3 §2 of the Law of 22 May 2017. The Law of 22 May 2017 replaces the corresponding provisions of the Act of 9 December 2004 on the international police transmission of personal data and information for judicial purposes, international mutual legal assistance in criminal matters and amending Article 90ter of the Code of Criminal Procedure.

For the seizure of evidence, the Law of 22 May 2017 replaces, regarding Member States bound by the Directive, the equivalent provisions of the Law of 5 August 2006 on the application of the principle of mutual recognition of judicial decisions in criminal matters between Member States of the European Union.

6. CONTENT AND FORM OF THE EIO

6.1. General challenges

Article 5 of the EIO Directive is transposed properly in Article 8 of the Law of 22 May 2017. Under the Belgian law, the EIO must be drawn up in the form of Annex A. The Belgian issuing authority must certify that its content is accurate and correct and sign the decision. The Belgian practitioners suggest that a separate point be added to Section I where the issuing State could list the questions to be put to the witness or suspect.

The Belgian practitioners interviewed pointed out that Member States such as Portugal and Poland send requests with a complex procedure of pre-hearing rights to be notified and signed. Furthermore, it can happen that a Member State asks for someone to be heard as a witness, but based on the information in Section G that person would be a suspect under Belgian law.

As an executing State, Belgium points out that EIOs are very often incomplete, among other things regarding the details of a suspect (which are important in order to verify that no Belgian investigation is ongoing, for example). The Belgian practitioners specify that often the summary of the facts does not include the basics (place or time) or is limited to police reports added to the EIO. Furthermore, the practitioners commented that sometimes the issuing authority lists the measures they wish to see executed, but does not tick the appropriate boxes in Section C.

The evaluation team finds it appropriate to recommend that all Member States pay particular attention to the quality of EIOs, providing the executing authority with all the relevant information in a comprehensive way, as this is the first step towards successful execution of an EIO (*see recommendation No 7*).

6.2. Language regime

Article 5 of the EIO Directive is transposed properly in Article 15 of the Law of 22 May 2017. The Belgian law states that the Belgian authorities have to translate the EIO into and issue it in an official language of the executing State or any other language indicated by the executing State.

Belgium officially accepts EIOs in four languages: French, Dutch, German and English. The flexible language regime is seen as a best practice by the evaluation team (*see best practice No 3*). French, Dutch and German are all official languages in Belgium, and the language(s) used depend(s) on the region. The Belgian authorities have explained that, if issuing authorities are translating the EIO into one of the official languages, it is best (if possible) to check what language(s) is/are used in the region where the requested investigative measure is to be carried out. This significantly speeds up the process, as a Dutch-speaking prosecutor will then not have to translate an EIO issued in French. The expert team agrees with the Belgian authorities that it can be recommended that all Member States do this (*see recommendation No 8*). However, the expert team will also recommend that Belgium make sure the language information on the European Judicial Network (EJN) website is up to date and easily accessible (*see recommendation No 1*).

Belgian practitioners have pointed out that direct contact with the other Member State can be difficult, especially when emails are in English and not in the official language of the recipient. This is an even bigger issue when the contact point is a general email address. It seems that the person on the other side often does not speak English at a sufficient level, making it almost impossible to get in direct contact. In such cases, practitioners resort to the use of an EJN contact point. The evaluation team finds it very important to recommend that all Member States make sure the point of contact given in the EIO speaks English at a sufficient level (*see recommendation No 9*).

6.3. Multiple requests in one EIO

Article 16 of the Law of 22 May 2017 states that where several investigative measures are indicated in a single EIO and the public prosecutor's office is not competent to execute all the investigative measures, it may decide to divide the file or to transmit it in its entirety to the investigating judge for execution.

6.4. Issuance of an additional EIO, splitting of an EIO, conditional EIOs

Additional EIO

Article 8 of the EIO Directive is transposed properly in Article 27 of the Law of 22 May 2017.

Regarding additional EIOs, the Belgian authorities state that if an EIO is issued to supplement a previous EIO, this should be stated in Section D of the form in Annex A. However, Belgian practitioners stated that in general they are flexible when there is a request for an additional EIO (e.g. because additional investigative measures are needed), often even allowing the additional measures to be sent by email. Belgium stresses the importance of direct contact between issuing and executing authorities during preparation of the additional EIO.

Splitting an EIO

The Belgian practitioners pointed out that where several investigative measures are indicated in a single EIO and the public prosecutor's office is not competent to execute all the investigative measures, the public prosecutor may decide to divide the file or to transmit it in its entirety to the investigating judge for execution.

If the Federal Prosecutor's Office receives an EIO that has to be executed in several districts, it will send it with a guiding note to the various districts, specifying which part of the execution has to be done by each district. In such cases, it is up to the districts to transfer the evidence gathered to the issuing State directly. If such an EIO comes through the Eurojust channel, the Federal Prosecutor's Office will still coordinate the execution and will keep Eurojust informed.

Conditional EIOs

The Belgian practitioners did not have any specific remarks or mention any challenges in relation to cases where the investigative measure in the EIO depended on the outcome of the execution of another investigative measure.

6.5. Orally announced EIOs

Article 7 of the EIO Directive is transposed properly in Article 28 of the Law of 22 May 2017. Under the Law of 22 May 2017, EIOs must be transmitted in writing. However, the Belgian authorities explained that an EIO could be requested orally if urgent, and subsequently confirmed in writing, depending on the investigative measure requested.

The Belgian practitioners pointed out that they can usually accept and act upon orally announced EIOs, but it is always necessary for the issuing authority to send an email immediately providing all the relevant information and confirming that an EIO would be issued as soon as possible.

When it comes to acting upon an orally announced EIO, there might be issues when the subsidiarity and proportionality must be justified, such as with the monitoring of telecommunications. In such cases, a written EIO is preferred, especially in view of the risk of the subsequent confirmation not being sufficiently motivated or even not materialising, despite having been promised.

As an alternative, in urgent cases, the Belgian executing authorities have the option of opening a domestic file, based on the information from the issuing State, in which the investigation measure can then be properly ordered.

7. NECESSITY, PROPORTIONALITY AND RECOURSE TO A DIFFERENT TYPE OF INVESTIGATIVE MEASURE

Necessity, proportionality and conditions

Article 6 of the EIO Directive is transposed properly in Article 6 of the Law of 22 May 2017.

Under the Belgian law, an EIO may only be issued if it is necessary and proportionate to the purpose of the proceedings, taking into account the rights of the suspect, accused or defendant.

In Belgium, the issuing authority carries out a necessity and proportionality test by verifying whether the execution of the investigative measure indicated in the EIO appears to be proportionate, adequate and enforceable, taking into account the rights of the suspect, defendant or accused. The Belgian authorities analyse fundamental rights and the human/technical resources impact. The Belgian issuing authority must verify whether the evidence sought is necessary and proportionate for the purposes of the procedure, whether the investigative measure chosen is necessary and proportionate for the purposes of obtaining the evidence concerned, and whether an EIO should be issued for the purposes of involving another Member State in the obtaining of that evidence.

When an EIO is submitted by the public prosecutor or the GCEA to the investigating judge for validation, the investigating judge checks whether the EIO meets the conditions of necessity and proportionality before returning the EIO.

Regarding the proportionality principle, it is important to mention recital 26 of the Directive, which states that Member States should consider whether issuing an EIO for the hearing of a suspected person via videoconference, would be an effective alternative to an EAW. During the meeting with the Belgian authorities and the member of the Flemish Bar Association, it was made clear to the evaluation team that there is room for improvement for all Member States in this area. The evaluation team would therefore like to recommend that all Member States consider, where possible, whether an EIO would be an effective alternative to an EAW (*see recommendation No 10*). As an aside, the evaluation team acknowledges that in this regard the timely execution of EIOs by all Member States is of great importance to make sure they are indeed an effective alternative in practice.

Recourse to different type of investigative measure

Article 10 of the EIO Directive is transposed properly in Articles 13 and 23 of the Law of 22 May 2017. Under the Belgian law, the Belgian executing authority is to have recourse, whenever possible, to an investigative measure other than that provided for in the EIO when the investigative measure indicated in the EIO does not exist under Belgian law or the investigative measure is not available in a similar national procedure.

The Belgian practitioners explained that the executing authority may also use an investigative measure other than that indicated in the EIO, if the chosen investigative measure achieves the same result by less intrusive means.

If the Belgian executing authority decides to use a different investigative measure, it must inform the issuing authority in advance, which may decide to withdraw or supplement the EIO.

The Belgian law states that the executing authority must also inform the issuing authority immediately if, during the execution of the EIO, the Belgian executing authority considers it appropriate to initiate investigative measures that were not initially provided for or could not be specified when the EIO was issued.

8. TRANSMISSION OF THE EIO FORM AND DIRECT CONTACT

Article 7 of the EIO is transposed properly in Articles 7 and 28 of the Law of 22 May 2017. Under the Belgian law, the Belgian issuing authority forwards the EIO directly to the executing authority by any means capable of producing a written record. If the identity of the executing authority is unknown, the Belgian issuing authority may request information from the executing State by any means, including the Federal Public Prosecutor's Office and the contact points of the EJN. When an EIO is linked to an EAW, the European Network of Fugitive Active Search Teams (ENFAST) is a very useful network for communication.

The Belgian practitioners are of the opinion that all difficulties concerning the transmission or authenticity of any document needed for the execution of an EIO should be dealt with through direct contact between the issuing authority and the executing authority or, where appropriate, with the involvement of the central authorities of the Member States. However, for this to work well it is important that the EJN website is fully up to date, which is often not the case, according to the practitioners. That is why the evaluation team has seen fit to make a recommendation to all Member States and the EJN about keeping the information up to date (*see recommendations No 11 and 20*).

Belgium has taken part in the pilot project of the e-EDES system and is commended for doing so (*see best practice No 4*). Belgian practitioners expect that problems related to the transmission and redirection of EIOs will be resolved in the near future once the e-EDES system is fully operational in all Member States. The use of this encrypted and digitalised exchange platform will enhance cooperation between Member States.

9. RECOGNITION AND EXECUTION OF THE EIO AND FORMALITIES

Article 9 of the EIO Directive is properly transposed in Article 17 §4, Article 19, Article 20 §1-3, Article 23 §2 and Article 26 of the Law of 22 May 2017. The Law of 22 May 2017 only contains provisions regarding the execution of EIOs and not their recognition. These two terms are combined in the term ‘execution’.

Regarding the formalities, the Belgian executing authorities have commented that Box I of the EIO form is not filled in if there are no special formalities. On the other hand, formalities from other States can be very restrictive and the police do not always understand what is being requested. Sometimes the requested formalities are not contrary to fundamental principles of Belgian law but are very burdensome in practice due to differences in procedure. In such cases, the Belgian authorities will contact the issuing authority to confirm whether the requested formalities are really necessary.

In general, Belgian judges do not require prior authorisation, owing to the principle of mutual trust. As long as all the necessary information is included in the EIO, Belgian judges are able to conduct a check and take a reasoned decision. On one occasion, however, an investigating judge refused a house search because he did not have proof that the search had been authorised by a competent authority in the issuing State. The practitioners interviewed were of the view that this was an isolated incident and not in line with the spirit of the EIO.

As issuing State, the Belgian authorities rarely encounter problems with requested formalities. They also have not encountered any problems related to the admissibility of evidence stemming from non-compliance with certain formalities or procedures in the execution of an EIO.

Ultimately, any confusion regarding the formalities can be resolved via direct consultation between the Member States, according to Belgian authorities. However, there is definitely room for improvement when it comes to clearly explaining what formalities are requested by the issuing authorities. Belgium stresses the importance of keeping the perspective of the executing authority, which may have a completely different system, in mind when explaining the formalities in the EIO. The evaluation team sees fit to recommend that all Member States indeed keep this in mind when issuing an EIO (*see recommendation No 12*).

Regarding the execution of EIOs, the evaluation team asked the Belgian practitioners whether they drafted a final report at the end of the execution, summarising the actions taken to execute the EIO. The practitioners replied that it could be difficult to draft a final summary report, especially when an EIO had been sent to several districts for execution. The experts find that it is very important to draft such a report in order for the issuing State to understand immediately what has been done to execute their request. That is why a recommendation is being made to all Member States on this issue (*see recommendation No 13*).

10. SPECIALITY RULE

There is no specific provision in the EIO Directive or the Law of 22 May 2017 concerning the speciality rule. The evaluation team asked the Belgian authorities how they deal with speciality as executing and issuing State.

When acting as an issuing State, the Belgian authorities interviewed do not consider the speciality rule applicable when cooperation is based on the EIO Directive. When it concerns the use of information received as an issuing State, the Belgian authorities apply *Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data*. This means that the evidence received from executing authorities may be used for other criminal investigations in Belgium without prior authorisation, unless the executing State expressly states that the information can only be used for the purposes stated in the EIO. With this approach, information previously received through an EIO may be used in a case in which an EIO could not have been sent, for example due to the nature of the crime (less serious offence).

On the other hand, some Belgian practitioners stated that when acting as an executing State they do not oppose to the use of evidence in other proceedings in the issuing State if the issuing State sends a reasoned request for permission in that regard. The evaluation team concludes that Belgium appears to have diverging practices with regard to the speciality principle. Even though the EIO Directive does not contain a provision regarding speciality, the evaluation team still finds it appropriate to recommend that Belgium take a clear line and handle the matter of speciality in a consistent manner (*see recommendation No 2*).

When Belgium, as executing State, wants to use the evidence it has provided, it requests the issuing State's consent. In such cases, permission is requested because the confidentiality of the foreign investigation needs to be respected. Consent is also sought to avoid an overlap and *ne bis in idem* situations.

When acting as executing State, the Belgian authorities will open a new domestic investigation if the results of the execution reveal that a crime was committed other than the one that gave rise to the issuing of an EIO ('accidental discovery'). The police are obliged to do so and have to issue an official report on the crime. They are also obliged to inform the public prosecutor's office. According to the Belgian authorities, there is no obligation to inform the issuing State in such cases unless that would hinder further investigations. However, it is considered to be a good practice to inform the issuing authority.

During the visit, both the evaluation team and the practitioners interviewed expressed the need for further clarification at EU level regarding the applicability of the speciality rule. Further clarification is necessary to avoid Member States handling this matter differently. The evaluation team invites the Commission to clarify the application of the speciality rule with regard to the EIO (*see recommendation No 15*).

11. CONFIDENTIALITY

Article 19 of the EIO Directive is properly transposed in Article 9 of the Law of 22 May 2017 and Article 46quater of the Belgian Code of Criminal Procedure.

Article 22 of the Law of 22 May 2017 states that, unless it compromises the confidentiality of an investigation, the Belgian executing authority must inform the affected person of his or her right to a remedy in accordance with that article. Article 22 provides that, in the event of seizure of evidence with a view to the execution of an EIO, the public prosecutor or investigating judge must, unless the confidentiality of the investigation would be compromised, inform the affected person of a certain number of elements of the criminal file which is held by the Belgian authorities and on the basis of which it has been decided to execute the EIO. The legal means by which the lifting of a seizure of evidence can be requested does not imply a right of access to the entire criminal file. The complete file or a copy will be sent to the indictment chamber but it will not be made available to the party concerned for inspection because of the secrecy of the investigation. What is made available to the parties for inspection at the registry is only a copy of the pleadings and documents that the public prosecutor (or the investigating judge) considers to be directly related to the request to lift the seizure.

The Belgian authorities consider it to be a good practice to hold consultations between issuing and executing authorities to determine whether there might be any problems regarding confidentiality. This (successful) approach results in Belgium very rarely encountering any issues relating to the rules on disclosure and confidentiality, as potential challenges are tackled at an early stage. The evaluation team sees this approach as a best practice (*see best practice No 5*).

12. GROUNDS FOR NON-EXECUTION

12.1. General

The grounds for non-execution are correctly transposed in Articles 11, 12, 17, 31, 33, 35, 36, 37 and 38 of the Law of 22 May 2017. Just like in the EIO Directive, the grounds for refusal are optional and not mandatory in Belgian law.

In general, non-execution of EIOs in Belgium is a result of practical issues such as when the person sought for the investigative measure can no longer be found, when the person is deceased or when the company concerned has gone bankrupt. Also, it can happen that a request for data cannot be executed because the legal data retention period has expired in Belgium.

In the event of any problems in the execution, the Belgian authorities will always try to find a solution with the issuing authority. The practitioners explained that executing authorities also reach out to them if any problems arise in the execution of Belgian requests.

12.2. Dual criminality

As an issuing State, Belgium did not report many problems with non-execution of EIOs, although one example was mentioned where a Belgian request for banking information was not executed because the committed acts of money laundering did not fall within the scope of the national law of the executing State.

As an executing State, Belgium sometimes experiences difficulties when the EIO requests the tapping of electronic communication, as Belgian law only allows this for certain types of offences and for a limited period of time. For those reasons, the EIO cannot always be executed.

The Belgian authorities had not encountered cases where the dual criminality test was invoked improperly for offences listed in Annex D to the EIO.

12.3. Ne bis in idem

When receiving an EIO, the Belgian authorities always check their databases to see if the persons/entities mentioned have already been the subject of a national criminal investigation. Although there have been instances of parallel investigations, this has not led to any problems so far because the Belgian authorities decide on the way forward together with the other Member State.

12.4. Immunities or privileges

Belgium has a unique position within the European Union when it comes to dealing with immunities and privileges as many EU institutions are hosted there. There are quite a few issues relating to immunities in Brussels. As an executing State, Belgium receives EIOs with requests to seize documents from or to hear a person who works for an EU institution. It has proven to be challenging to receive an answer from the EU institutions, even when the Ministry of Foreign Affairs intervenes. Unable to find a better solution, the Belgian authorities resort to invoking Article 11(5) of the EIO Directive, which states that where power to waive the immunity or privilege lies with an international organisation, it is for the issuing authority to request the authority concerned to exercise that power. Nevertheless, the expert team agreed that it should be recommended that all EU institutions provide clear contact points for governments and reply effectively to authorities concerning the execution of an EIO (*see recommendation No 16*).

12.5. Fundamental rights

Having an accused person attend his or her trial via videoconference is considered a violation of the right of defence and the right to a fair trial in Belgium and is therefore not allowed. During the visit, the Belgian authorities explained that a new law will soon come into force providing a legal basis for videoconferencing in courts. The new law would make the use of videoconferencing compliant with the fundamental principles of Belgian law, and therefore allow its use in the context of an EIO. However, it was not clear to the evaluation team whether the new law would allow the EIO to be used to have a suspect attend his or her trial via videoconference when no evidence is to be gathered from him or her.

The EIO is an instrument with the purpose of gathering evidence (see also recital 25 of the EIO Directive) and attending a trial does not always serve that purpose. The evaluation team would therefore like to recommend that the Commission clarify the application of the EIO in connection with ensuring the accused person's presence at his or her trial via videoconference (*see recommendation No 17*).

13. TIME LIMITS AND GROUNDS FOR POSTPONEMENT OF RECOGNITION OR EXECUTION

Article 12 of the EIO Directive (time limits) is properly transposed in Articles 17 and 18 of the Law of 22 May 2017. Article 15 of the EIO Directive (grounds for postponement) is transposed properly in Article 17 §7 of the Law of 22 May 2017.

When acting as executing State, Belgium faces some challenges in executing EIOs within the time limit, such as capacity issues or other priorities. An EIO may also have to be forwarded from one authority to another, as is the case when the Federal Prosecutor's Office receives the EIO and forwards it to a local prosecutor's office. The complexity of the measure, the dependence on other parties (such as banks), or the need for a translation are further factors that can influence the timely execution of an EIO. Belgian practitioners report that, because of the challenges listed above, the time limit is sometimes slightly exceeded but usually an EIO is executed within three to four months maximum. According to the Belgian authorities, significant delays in the execution of an EIO should always be in line with Article 15 of the EIO Directive (grounds for postponement).

When Belgium acts as issuing State, the experience is that time limits are rarely complied with, even in the event of urgent EIOs. In the view of the Belgian authorities, Member States tend to prioritise domestic cases over a request from another country. Furthermore, Belgium's experience is that in the event of a severe delay the EIO is not always postponed in accordance with Article 15 of the Directive.

Belgium marks an EIO as urgent when there is a risk of loss of evidence, when there is a time limit on the detention of the suspect, or when a search has to be scheduled. The Belgian practitioners mentioned that some Member States treat urgent EIOs from Belgium without any urgency and the success of the execution depends largely on whether direct contact can be established.

When Belgium receives an urgent EIO it usually relates to special investigative measures such as observation or infiltration. The Belgian authorities have noticed that urgent EIOs have sometimes clearly been written in a hurry, with a poor translation. In the end, it takes more time to ask for additional information or clarification. When an EIO is marked as urgent, Belgium always tries to comply with the given deadline. If it is not feasible to execute at short notice, the issuing State will be informed. According to Belgium, it is very important for the issuing State to clearly mention all the relevant information about the case, such as an upcoming trial date, to help ensure timely execution. Such information is sometimes omitted by Member States. The evaluation team sees fit to make a recommendation to all Member States about this (*see recommendation No 14*).

14. LEGAL REMEDIES

Article 14(1) and (2) of the EIO Directive are transposed in Article 22 of the Law of 22 May 2017, which refers to Articles 28sexies and 61quater of the Code of Criminal Procedure, and in Article 23 §4 of the Law of 22 May 2017.

Executing State

When Belgium acts as the executing State, the following applies regarding the available legal remedies. Article 22 of the Law of 22 May 2017 provides for remedies equivalent to the remedies in a similar domestic procedure. This article sets out legal remedies available against the measures ordered in the EIO. Under Belgian law, the person who is subject to the measure must be informed of their rights by the Belgian executing authority, provided that the confidentiality of the investigation remains unaffected. Any person adversely affected by an act of information or an act of investigation relating to their property may request the lifting of that measure from the public prosecutor or from the investigating judge (Article 22 §2 of the Law of 22 May 2017, Article 28sexies §1 to 5 and 7 and Article 61quater § 1 to 6 and 8 of the Code of Criminal Procedure). The person adversely affected by the measure needs to demonstrate the harm and give reasons for the lifting of the measure, as well as demonstrate a legitimate interest. This legal remedy does not allow the substantive reasons for issuing the EIO to be challenged: Article 22 §2 states that the substantive reasons underlying the issuance of an EIO may be challenged only in the issuing Member State.

If property which constitutes the subject of the offence according to the EIO has been seized, the Belgian executing authority communicates by registered letter, fax or email its decision concerning the transfer of the seized goods to the person whose goods have been seized, as well as to the third parties who stand as civil parties and to their counsels. An interested third party may oppose the transfer of these seized goods to the issuing authority. Opposition to the transfer of the seized goods is expressed by means of a reasoned request in which the interested third party demonstrates a legitimate interest. The request must be brought before the pre-trial chamber of the place where the Belgian executing authority took the transfer decision, within 15 days of the notification of the decision by the Belgian executing authority. The ruling of the pre-trial chamber may be appealed before the indictment chamber. The judgment of the indictment chamber may not be appealed before the Court of Cassation.

Issuing State

When Belgium acts as the issuing State, the following applies regarding the available legal remedies. Effective legal remedies exist in Belgian law both for the person subject to the investigative measure and for the parties in the criminal proceedings, at various stages of the trial and pre-trial, and may lead to evidence being excluded or the proceedings even being declared inadmissible.

In the context of an EIO, it is possible to challenge the legality of the investigative measures *post factum* by way of the procedure set out in Article 235bis of the Code of Criminal Procedure. This procedure may take place during or at the end of the judicial investigation and aims to verify whether irregularities have occurred in the gathering of evidence during the investigation. During the judicial investigation, only the indictment chamber can rule on this, while at the end of the judicial investigation both the pre-trial chamber (at first instance, Article 131 Code of Criminal Procedure) and the indictment chamber (at appeal) can do so. Every case will go through this procedure and to the indictment chamber, even when the case will not be handled in court or the accused person will be acquitted. In addition, the indictment chamber also monitors the course of investigations *ex officio*; it can request a report on the state of play and can review the files (Article 136 Code of Criminal Procedure).

Seizure as well as hearing of a witness via videoconference will go *post factum* through the Article 235bis procedure. Regarding seizure, any interested party can appeal the decision, both within a preliminary investigation (Article 28sexies Code of Criminal Procedure) and a judicial investigation (Article 61quater Code of Criminal Procedure). However, this legal remedy does not encompass the substantive reasons for issuing the EIO. There is no legal remedy to challenge the issuing of an EIO. Even after referral to the court, a request for lifting of the seizure may be filed with the court before which the case was brought; this concerns the criminal summary proceedings.

Regarding hearing of a witness via videoconference, there is no legal remedy that can be invoked prior to the hearing. At the trial stage the defendant (and the civil party) can challenge any aspect of evidence-gathering that has not already been dealt with and challenge the probative value of the outcome of seizures and searches. The criminal court may base its conviction on all the evidence lawfully obtained, provided that these elements have been the subject of adversary proceedings. This is an essential aspect of the right of defence and the right to a fair trial. The evaluation team noted that, specifically when it comes to the right of witnesses to be heard via videoconference, not all obligations stemming from the Gavanozov II judgment (CJEU, Case C-852/19) seem to be in place.

On a general note, Belgian practitioners stated that legal remedies were sometimes misused by the defence, for example to stall an investigation. Furthermore, Belgian practitioners argued that *ex ante* remedies would often harm the investigation.

15. TRANSFER OF EVIDENCE

Article 13 of the EIO Directive is properly transposed in Article 21 of the Law of 22 May 2017. In practice, Belgium transfers evidence in consultation with the issuing authorities. This happens as soon as possible. Evidence can be transferred via, for example, judicial police or diplomatic channels. With neighbouring countries, such as the Netherlands, the transfer of evidence can be organised at the border. The Belgian authorities also mentioned that more and more evidence is available only digitally, which makes the transfer a lot easier. All in all, the Belgian authorities did not report any specific issues relating to the transfer of evidence.

16. OBLIGATION TO INFORM - ANNEX B

Article 16 of the EIO Directive is properly transposed in Article 23 of the Law of 22 May 2017.

As an issuing State, Belgium reported that Annex B is often not received. A reminder through police-to-police channels, via EJNI contact points or in exceptional cases through Eurojust is often required. This problem will probably be resolved once the e-EDES system is operational in all Member States.

When Belgium acts as an executing State, sending Annex B is a standard procedure within the Belgian public prosecutor's office. When the EIO gives an email address or when the EIO was sent electronically, confirmation of receipt of the EIO is provided by answering the email or sending an email to the address given, indicating the case number and confirming the contact details.

Having an electronic version of Annex B will improve the procedure. This will be covered in the future in the e-EDES platform.

17. COSTS

Article 21 of the EIO is transposed properly in Article 10 of the Law of 22 May 2017. Under the Belgian law, Belgium bears all the costs of the execution of an EIO. If the Belgian executing authority considers that the costs of implementing the EIO may be deemed exceptionally high, it may consult the issuing authority on how the costs could be shared or whether the EIO could be amended.

The practitioners interviewed are of the opinion that it would be better if the executing authority informed the issuing authority in advance if the execution of the request is expected to involve exceptionally high costs. If no agreement can be reached on those costs, the issuing authority could in exceptional circumstances decide to withdraw the EIO in whole or in part, or to maintain the EIO and to bear a share of the costs.

In Belgium, the executing authorities have the competence to take their own decision on the costs and to consult with the issuing authorities directly. However, there is a threshold for very high costs which need to be authorised by the Ministry of Justice.

The Belgian practitioners gave the evaluation team an example, namely a situation where they had problems with the costs of putting a container aside in the harbour for further examination. This generated excessive costs, which could not be settled with the issuing Member State because they did not reply when Belgium tried to contact them. In the end, Belgium paid for everything because it was too difficult to know when to deem costs exceptionally high.

According to the practitioners, it would be very helpful to have some guidelines at EU level on when to deem costs exceptionally high or what criteria can be taken into account in this regard. Such guidelines could provide the executing State with a starting point when consulting the issuing State about such matters. The expert team agreed that guidelines at EU level would be welcomed and has a recommendation for the Commission in this regard (*see recommendation No 18*).

18. COORDINATION OF THE EXECUTION OF DIFFERENT EIOS IN DIFFERENT MEMBER STATES AND/OR IN COMBINATION WITH OTHER INSTRUMENTS

In Belgium, EIOs which require coordination between different districts are sent to the Federal Prosecutor's Office, which coordinates the execution. EIOs that are executed in different Member States go through Eurojust and the Federal Prosecutor's Office, which will be responsible for coordination.

19. SPECIFIC INVESTIGATIVE MEASURES

19.1. Temporary transfer

Temporary transfer is covered in Articles 22 and 23 of the EIO Directive. These are transposed in Articles 31 and 32 of the Law of 22 May 2017. Most paragraphs have been transposed word for word, with minor editorial changes.

The practitioners interviewed have not encountered problems in ensuring that a person temporarily transferred to Belgium is held in custody. The detention order of the foreign authorities is seen as sufficient grounds to keep the person in custody in Belgium as well.

In accordance with the EIO Directive, the Belgian law provides that temporary transfer may be refused if the detained person does not consent to it. There are no specific procedures in place to determine, before issuing the EIO, whether the person will consent to the temporary transfer. However, Belgium considers it to be a good practice to have prior consultations with the executing authorities or to share an advance copy of the EIO, to discuss the prospect of successful execution. The evaluation team sees this approach as a best practice (*see best practice No 5*). The practitioners have not encountered any cases where the detained person refused the temporary transfer.

Under the Law of 22 May 2017, the Minister for Justice is responsible for allowing the transit of a detained person through Belgian territory. While the EIO Directive specifies only that transit through a third country is to be granted ‘on application, accompanied by all necessary documents’, the Belgian law specifies which documents are necessary. It calls for information on the existence of an EIO, the identity and nationality of the person who is the subject of the EIO, the nature and legal definition of the offence and the circumstances in which the offence was committed, including the date and place.

All in all, the temporary transfer of persons based on the EIO Directive functions well in practice, with no noteworthy issues, according to the practitioners.

19.2. Hearing by videoconference

Hearing by videoconference, as mentioned in Article 24 of the EIO Directive, is transposed in Article 33 of the Law of 22 May 2017. Under the Belgian legislation, the videoconference hearing will take place in the presence of the Belgian executing authority (public prosecutor or investigating judge), or the judicial police officer or police agent designated by the executing authority. The designation of the police as the authority to be present during the hearing might not be contrary to the literal wording of the EIO Directive, since Article 24(5), point (a), of the Directive requires the competent authority of the executing State to be present and not the executing authority itself, though it may have an impact in terms of procedural safeguards (such as the difficulty of a police officer disallowing questions put by a judicial authority).

The Belgian practitioners report that 99 % of all hearings by videoconference are assigned to the local police station. In these situations, a Belgian police officer will be present and act as the designated executing authority, whose task it is to guarantee the identity of the person heard and compliance with the fundamental principles of Belgian law. The experts expressed doubts as to whether a police officer will always be able to intervene if fundamental principles of Belgian law are violated, especially if the interview is conducted by a foreign judge or public prosecutor. Belgian practitioners, however, assured the experts that the police officers are sufficiently trained to do so. If there are any problems, the investigating judge can always be contacted, according to the practitioners.

Due to this practice of assigning videoconferences to local police stations, Belgian practitioners have experienced problems with the issuing and interviewing authorities, for example when the person to be heard has to take an oath and it is expected that a Belgian judge is present for this reason. The Belgian authorities will grant a request from the issuing authorities to have a prosecutor or judge present, but it should be clearly stated in the EIO (Section I, formalities). In addition, Belgian practitioners reported a lack of sufficient technical equipment at the offices of the public prosecutors and investigating judges. This lack of equipment is reportedly being addressed in the wake of the COVID pandemic. Nevertheless, Belgian practitioners still report problems with incompatible videoconferencing systems. The evaluation team would like to recommend that Belgium ensures that there is sufficient technical equipment available at the offices of the public prosecutors and investigating judges (*see recommendation No 3*).

Belgian practitioners report that videoconferences take time to arrange and ask issuing authorities to allow enough time to locate and summon the person to be heard. While a videoconference usually takes weeks to arrange, Belgian practitioners assured the evaluation team that it can be done in one day if necessary.

In the context of hearings by videoconference, the Belgian practitioners pointed out an important practical problem as regards the status of the person to be heard. While the issuing State may consider the person a witness and require a formal act to make someone a suspect, the executing State may already consider the person a suspect. The Belgian way of handling these situations is to give the person as much legal protection as possible.

Although the EIO is correctly transposed in the Belgian law when it comes to the consent of the suspect being an optional ground for refusal, the practitioners stated that consent is always required for a videoconference hearing. If the suspect does not consent to a videoconference hearing, the EIO will be refused. However, the Belgian authorities will consult with the issuing State about a possible alternative.

Currently, Belgian law only allows the hearing of a suspect by videoconference during a preliminary or judicial investigation. Under the current law it is not possible to have a defendant attend the actual trial by videoconference. However, a draft law on videoconferencing in court proceedings was approved on 23 December 2022 in the Belgian Council of Ministers. The Belgian authorities provided the experts with a short statement on the contents of the draft new law but were not able to provide the text of the draft. As the text of the draft is not available and it is not yet certain that it will in fact become law, the experts do not see fit to comment on the probable effects with regard to a person's presence at trial via videoconference (see also chapter 12.5).

To summarise, practitioners encounter both practical (lack of equipment, time constraints) and more fundamental challenges (hearing at trial, status of the person) when executing a hearing via videoconference. The text of the draft new Belgian law on this topic could not be made available to the experts and it is yet to be seen how the new law will impact the possibilities of attending a trial via videoconference.

19.3. Hearing by telephone conference

Article 25 of the EIO Directive has been transposed in Article 34 of the Law of 22 May 2017. This means that it is possible in Belgium to hear a witness or expert by telephone conference. However, the Belgian authorities have not encountered any cases of hearings via telephone conference so far, as issuing or executing State.

19.4. Information on bank and other financial accounts and banking and other financial operations

The EIO Directive has two separate articles for bank/financial accounts and for banking/financial operations (Articles 26 and 27). The Law of 22 May 2017 combines the two in one article (Article 35).

Belgium has a central register listing all financial accounts and insurances a natural or legal person owns or has power of attorney over. Therefore, it is relatively easy to quickly assess whether a person has a bank account in Belgium. The practitioners did mention problems with internet banks, as it can be challenging to request information from them. In any case, money can move fast and the EIO is sometimes perceived as too slow to meet acute investigative needs. The practitioners welcome the new proposal for a Directive on the prevention of the use of the financial system for money laundering, as it is expected to improve cooperation in this regard.⁴

19.5. Covert investigations

Article 29 of the EIO Directive has been transposed in Article 37 of the Law of 22 May 2017. Article 37 provides that an EIO may be issued to request that the executing State assist the issuing State in the conduct of criminal investigations by officers acting covertly or under false identity.

Both the EIO and the Belgian law refer to ‘officers’, suggesting that it applies only to police officers. However, Belgian law does allow for civil infiltrators to be used and they are of great importance. In Belgium, civil infiltrators can only give supporting evidence and before taking any action they sign a contract outlining what they can and cannot do. Belgian practitioners have reported problems with the difference between police infiltrators and civil infiltrators and how these are treated in different legal systems, especially combined with controlled delivery. In general, these problems can be solved or avoided by means of direct consultations between authorities.

19.6. Interception of telecommunications

Article 30 of the EIO Directive, on the interception of telecommunications with technical assistance from another Member State, has been transposed in Article 38 of the Law of 22 May 2017. The term ‘telecommunications’ as contained in Article 38 is understood as referred to in Article 90ter §1 of the Belgian Code of Criminal Procedure. Article 90ter covers the interception of communications, which is broader than telecommunications. This means that this provision not only covers wiretapping but also the bugging of homes, private places and computer systems, the use of software and the temporary removal of protection on computer systems.

⁴ 2021/0250 (COD)

Under Article 90ter of the Belgian Code of Criminal Procedure, the interception of communications is only authorised in exceptional cases for explicitly mentioned offences. The interception may be ordered against a suspect or a person presumed to be in regular communication with the suspect. Article 38 §8 of the Law of 22 May 2017 sets out the procedural requirements for ongoing interception of telecommunications. The interception must be ordered by an investigating judge and may only be ordered for a duration of one month, with the possibility to extend to a maximum duration of six months. The immediate transfer of intercepted telecommunications to another Member State is possible if compatible technical equipment is available in both Member States. Portable devices from the Belgian federal police can be made available to tackle technical problems.

Belgian practitioners have encountered various practical problems with the implementation of interception measures, such as lack of access to the requested data, lack of knowledge of the interception IT program, inability to understand the intercepted data from abroad and technical difficulties in integrating the data in the Belgian analysis software.

Due to the rather broad Belgian understanding of the term ‘telecommunications’, Belgian practitioners report problems with the bugging of cars in other Member States which do not consider such measures to be interception of telecommunications. The Belgian authorities would like to see the term ‘telecommunications’ defined by the European Union and consider that broader, future-proof wording should be introduced that covers all sorts of covert monitoring of communications. The evaluation team agrees that the concept of interception of telecommunications should be clarified, to ensure smooth cooperation between Member States (*see recommendation No 19*).

Article 31 of the EIO Directive, on interception without technical assistance from another Member State, is transposed in Article 39 of the Law of 22 May 2017. In Belgium, the investigating judge is the competent authority to notify the notified State of the interception. When another Member State notifies Belgium of the interception of telecommunications without the technical intervention of a body in Belgium, the public prosecutor will immediately refer the matter to the investigating judge. In such cases, the investigating judge is the competent authority to decide if the interception would be authorised in similar national proceedings.

Belgian law generally requires a prior EIO if a bugged car or a car with a GPS tracker travels to Belgium. In some cases, there will be no objection to the use of data obtained without prior authorisation, but it depends on the assessment of the magistrate in charge. If travel into Belgium was unforeseeable, Belgium will accept an *ex post* notification by means of an Annex C.

19.7. Other investigative measures

The EIO Directive specifically mentions another investigative measure: the gathering of evidence in real time, continuously and over a certain period of time (Article 28). The Belgian Law of 22 May 2017 incorporates this provision correctly in Article 36. Regarding this measure and others that are not mentioned in the EIO Directive, such as house searches, Belgium reported no specific issues. However, the practitioners did mention that the quality of an EIO is important for all investigative measures to be conducted.

20. STATISTICS

Belgium was asked to provide statistics for the last five years concerning the number of incoming/outgoing EIOs, cases of refusal and cases in which the execution of the EIO was postponed. The Belgian authorities provided the expert team with the following tables.

INCOMING EIOS

2018	2019	2020	2021	2022
1 344	2 444	2 434	3 189	3 127

OUTGOING EIOS

2018	2019	2020	2021	2022
809	1 130	1 204	1 654	1 882

Belgium mentioned that these statistics may be underestimated, because the official uniform guidelines concerning registration have been available only since 2021. Furthermore, during the visit it became clear that these statistics only concern the EIOs issued or executed by the prosecutor's office and not those processed by investigating judges.

The means to register refusals within the official registration system have also only been available since 2021, but the Belgian authorities were unable to share statistics on this topic due to technical problems. In Belgium, there are no means to register the postponement of EIOs. Thus, the evaluation team did not receive any statistics on this.

The evaluation team stresses the importance of collecting reliable statistics on the EIO and sees fit to make a recommendation to the Belgian authorities on this topic (*see recommendation No 4*).

21. TRAINING

In Belgium, the Institute of Legal Training is the body that organises courses for magistrates. The people who are invited as trainers also have practical experience, so the courses always have a theoretical and a practical part.

A magistrate from the Institute of Legal Training was present during part of the evaluation visit and explained that all new magistrates starting work in Belgium are required to attend the EIO course, whether they will work as prosecutors or as investigating judges. The evaluation team sees this mandatory course as a best practice (*see best practice No 6*). After completing this course, participants receive a certificate of participation. This course is not mandatory for those entering the field of judicial cooperation, because they are presumed to have already taken the course at least once, at the beginning of their career.

The Institute of Legal Training organises periodic seminars on judicial cooperation which are open to all magistrates. During these seminars, participants can exchange views and best practices. These courses are not mandatory but are well attended.

Furthermore, the Institute of Legal Training is a member of the European Judicial Training Network (EJTN), which allows Belgian magistrates to take part in EJTN-organised training activities. In 2021, the EJTN organised seminars on the EIO in practice and judicial cooperation in criminal matters.

Finally, the Institute of Legal Training participates in various European projects that allow the Belgian judiciary to take part in the training activities that are organised. In 2021, the EIO was covered in the following projects: better applying EU criminal law for court staff, JUDCOOP; recent developments on the EIO and EFE (evidence for environment), focused on the EIO in environmental matters. In cooperation with the BES (bureau for regional cooperation between the Netherlands, Belgium and Germany in criminal matters), basic and more advanced training courses were held where practitioners from the three countries shared training, experiences and best practices in this field during two-day seminars.

The Belgian practitioners reported that training at national level was always evaluated by the participants through a standard evaluation form. International training courses are also evaluated through an evaluation form from the organisers.

The expert team also spoke to the police about their training opportunities on international cooperation. The Belgian police expressed their wish to receive more training on international cooperation and the EIO specifically. The police cannot join the courses provided by the Institute of Legal Training and there seems to be a lack of training available to the police on this subject. The expert team's understanding is that training that is available to the police does not receive enough publicity to attract a lot of participants. The Belgian authorities have provided information on new developments regarding a course on international cooperation that includes the police at federal level. The evaluation team welcomes the initiative and would like to recommend that the Belgian authorities provide the police with sufficient training on the EIO by facilitating new courses and increasing publicity on existing training (*see recommendation No 5*). The expert team would like to commend the way the EIO is dealt with in Antwerp, with specialist units and training available at all levels: police, prosecutors and judges (*see best practice No 7*).

22. FINAL REMARKS, RECOMMENDATIONS AND BEST PRACTICES

22.1. Belgium

The Belgian authorities reported that, all in all, the EIO works well and is used very frequently. Before the EIO Directive came into force, there were few incoming and outgoing MLAs in Belgian districts. They were perceived as cumbersome by some prosecutors. Working with the standard form of the EIO has alleviated many of these burdens.

Although Belgium is pleased with the forms in general, some possible improvements were mentioned by the practitioners. As mentioned in chapter 6.1, a separate point could be added to Section I, where the issuing authority could list the questions that need to be put to the subject of the hearing. Also, according to Belgium it would be helpful if the size of EIOs could be limited by deleting any unused sections.

Belgium looks forward to the moment when the e-EDES system will be fully operational within all Member States. According to Belgium, it will help resolve current problems, for example with the transmission of the EIO. During the visit, practitioners mentioned that it would be extremely beneficial if freezing orders would also be sent through this system in the future.

Lastly, the evaluation team has followed Belgian suggestions to make recommendations concerning guidelines for costs (see chapter 19 for more details) and checking the appropriate language before issuing an EIO to Belgium (see chapter 6.2 for more details).

22.2. Recommendations

Regarding the application and implementation of Directive 2014/41/EU, the team of experts involved in assessing Belgium found the Belgian system to be satisfactory.

The evaluation team sees fit to make a number of suggestions for the attention of the Belgian authorities. Furthermore, based on the various good practices identified, related recommendations are made for the attention of the EU. Belgium should conduct an 18-month follow-up to the recommendations referred to below after this report has been agreed by COPEN.

22.2.1. Recommendations for Belgium

Recommendation No 1: Belgium should make sure that the information on the EJM website regarding the language(s) used in the various regions (French, Dutch or German) is up to date and easily accessible (*chapter 6.2*).

Recommendation No 2: Belgium is invited to review its practice on the speciality rule and to handle the matter more consistently (*chapter 10*).

Recommendation No 3: Belgium should make sure that there is sufficient technical equipment available at the offices of the public prosecutor and investigating judges, to ensure the effective execution of EIOs involving videoconferences (*chapter 19.2*).

Recommendation No 4: Belgium should improve the way statistical data is collected in respect of the EIO, including data from all authorities competent to issue an EIO. Belgium should ensure that the technical problems encountered in the registration of data are dealt with (*chapter 20*).

Recommendation No 5: Belgium should ensure that the police receive sufficient training on the practical application of the EIO, by providing new courses and by raising awareness regarding existing courses (*chapter 21*).

22.2.2. Recommendations for the other Member States

Recommendation No 6: When sending an EIO, Member States should mention all other instruments sent to the executing State (such as an EAW or JIT) that are connected to the same investigation, so executing authorities have all the relevant information before executing the EIO (*chapter 5*).

Recommendation No 7: Member States should pay particular attention to the quality of the EIO, providing the executing authority with all the relevant information in a comprehensive way, as this is the first step towards successful execution of an EIO (*chapter 6.1*).

Recommendation No 8: When sending an EIO to Belgium, Member States are encouraged to check the EJN website to confirm, where possible, what language(s) is/are spoken in the region of execution. This will ensure more efficient execution of the request in Belgium (*chapter 6.2*).

Recommendation No 9: Member States should ensure that the contact person mentioned in the EIO speaks English at a sufficient level, in order to allow effective direct consultations (*chapter 6.2*).

Recommendation No 10: Member States should consider, where possible, whether an EIO would be an effective alternative to an EAW (*chapter 7*).

Recommendation No 11: Member States should keep the information on the EJN website up to date to allow direct contact between authorities (*chapter 8*).

Recommendation No 12: Member States should keep the perspective of the executing authority, which may have a completely different system, in mind when explaining the necessary formalities in the EIO. Likewise, executing authorities should keep an open mind with regard to the requested formalities (*chapter 9*).

Recommendation No 13: When acting as executing State, Member States should include a final summary report together with the evidence, to inform the issuing State efficiently about the actions that have been taken to execute its request (*chapter 9*).

Recommendation No 14: Member States should, when labelling an EIO as urgent, provide the relevant information to substantiate the urgency, such as an upcoming trial date. At the same time, Member States should make sensible use of the ‘urgent’ label in order for it not to lose its meaning (*chapter 13*).

22.2.3. Recommendations for the European Union and its institutions

Recommendation No 15: The Commission is invited to clarify the application of the speciality rule in relation to the EIO (*chapter 10*).

Recommendation No 16: The EU institutions should provide a clear contact point for authorities for cases where the execution of an EIO requires the cooperation of the institutions. In addition, the EU institutions should also ensure that when authorities reach out, they receive a reply (*chapter 12.4*).

Recommendation No 17: The Commission is invited to clarify the application of the EIO in connection with ensuring the accused person's presence at his or her trial (*chapter 12.5*).

Recommendation No 18: The Commission is invited to consider issuing guidelines on when costs can be deemed exceptionally high, to give Member States the tools to enter into consultations. The guidelines could mention the possibility of calling on Eurojust to facilitate such consultations, if needed. Reference is also made to Article 31 of the Regulation on freezing and confiscation orders, which already includes such a provision (*chapter 17*).

Recommendation No 19: The Commission is invited to clarify the concept of interception of telecommunications and what measures are covered in relation thereto (*chapter 19.6*).

22.2.4. Recommendations for EJM

Recommendation No 20: The EJM should ensure, together with all Member States, that the information on the EJM website is correct and up to date (*chapter 8*).

22.3. Best practices

The following is a list of best practices to be adopted by other Member States.

Belgium is to be commended for:

1. creating a single point at the Federal Prosecutor's Office through which assistance from Eurojust is requested, thereby ensuring that Eurojust's assistance is requested only in cases where it is actually needed and the national desk is not flooded with too many requests (*chapter 4*);
2. the structure of the board of prosecutors, competent in the field of criminal cooperations, which, among other things, prepares guidelines and includes a network of experts in international cooperation (*chapter 4*);
3. its flexible language regime, accepting EIOs in all national languages and in English (*chapter 6.2*);
4. taking part in the e-EDES pilot project (*chapter 8*);
5. its practice of consulting with the other Member State at an early stage in the execution of an EIO, to deal with any problems regarding confidentiality (*chapter 11*) and regarding temporary transfer of a detained person (*chapter 19.1*);
6. its practice of making a course on international cooperation obligatory for all new magistrates (*chapter 21*);
7. the training of practitioners on the EIO in Antwerp, where specialist units are in place at all levels: police, prosecutors, judges (*chapter 21*).

14 February 2023 – Federal Public Service (FPS) Justice, Brussels, Belgium

09:30-10:00	Welcome
10:00-12:00	Presentations on legal system and legal framework <ul style="list-style-type: none"> - FPS Justice - Public Prosecutor's Office of Ghent - Federal Public Prosecutor's Office
12:00-13:00	Lunch
13:00-16:30	Meeting with practitioners <ul style="list-style-type: none"> - Institute of Legal Training - Public Prosecutor's Office of Antwerp - Public Prosecutor's Office of Liège - Public Prosecutor's Office of Ghent - Public Prosecutor's Office of Leuven

15 February 2023 – FPS Justice, Brussels, Belgium

09:30-12:00	Meeting with practitioners <ul style="list-style-type: none"> - General Customs and Excise Administration - International Police Cooperation Directorate - Investigating judge
12:00-13:30	Lunch
13:30-16:30	Meeting with practitioners <ul style="list-style-type: none"> - Public Prosecutor's Office of Hal-Vilvoorde - Public Prosecutor's Office of Brussels - Federal Public Prosecutor's Office

16 February 2023 – FPS Justice, Brussels, Belgium

09:30-10:30	Final Q&A with representatives of the police, National Prosecution Authority, Federal Public Prosecutor's Office and Ministry of Justice
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12 July 2023 – Online meeting

15:00-17:00	Online meeting with a representative of the Flemish Bar Association
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ANNEX B: LIST OF ABBREVIATIONS/GLOSSARY OF TERMS

LIST OF ACRONYMS, ABBREVIATIONS AND TERMS	ENGLISH
BES	Bureau for regional cooperation between the Netherlands, Belgium and Germany in criminal matters
CATS	Coordinating Committee in the area of police and judicial cooperation in criminal matters
CJEU	Court of Justice of the European Union
Directive	Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters
EAW	European arrest warrant
e-EDES	e-Evidence Digital Exchange System
EIO	European Investigation Order
EJN	European Judicial Network in criminal matters
EJTN	European Judicial Training Network
ENFAST	European Network of Fugitive Active Search Teams
FPO	Federal Public Prosecutor's Office
GCEA	General Customs and Excise Administration
GDPR	General Data Protection Regulation
JIT	Joint Investigation Team
Law of 22 May 2017	Law of 22 May 2017 on the European Investigation Order in criminal matters
MLA	mutual legal assistance