



# JUST/2013/JPEN/AG/4496

## Procedural rights in EU criminal law

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### Methodology







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## 1. Overview

The project ``Procedural rights in EU criminal law`` (JUST/2013/JPEN/AG/4496) is supported by the European Commission within the framework of the Specific Programme Criminal Justice of the European Union.

The Romanian Superior Council of Magistracy coordinates the project and is supported by the National Institute of Magistracy in issues related to the training activities.

The Associate Partners are the Academy of European Law (ERA), the Italian School for the Judiciary and the Romanian National School of Clerks. The Co-beneficiary Partners are the Institut de Formation Judiciaire (IFG-IGO) from Belgium, the National Institute of Justice from Bulgaria, the National School of Judiciary and Public Prosecution from Poland, the Judicial School of the General Council for the Judiciary in Spain and the National Institute of Magistracy.

All partners are requested to appoint experts in the project. They should be highly appreciated professionals, judges or prosecutors, with an excellent legal background in judicial cooperation. Participation in previous projects constitutes an important criteria for being selected as an expert. The appointed professionals should be fluent in English and have excellent legal English skills. Moreover, the expert responsible with the linguistic sessions should have experience in training judges and prosecutors both at national and at European level.

During the project's preliminary meeting, the experts establish the agenda, the topics, and the study cases' content and they are expected to divide the tasks among them. The trainers should know each other from the project's start-up meeting. They have to agree on a common view concerning the project. The linguist has to complement the legal background of the project. The lecturers should also be asked to include in their presentation all the legal issues tackled during the workshop sessions.

## 2. Background of the project

The project has as a premise the increased need for training in the field of EU law, human rights and international judicial cooperation. This need was previously underlined by magistrates themselves. Each year judges and prosecutors face a larger volume of cases. There are a rather large range of issues related to the settlement of legal relations with foreign elements.

The free movement of persons also involves free movement of crime. Therefore, judges and prosecutors have to handle a significant increase in cases involving issues related to international judicial cooperation in criminal matters. As any EU citizen can move throughout the European Union, crimes need to be punished and trials have to occur with a proper protection of rights and freedoms.



Minimum standards in the field on procedural rights have to be respected throughout the European Union. On the other hand, there is an increasing need of obtaining evidence abroad or of using in national criminal proceedings evidence obtained in another Member State.

Most of the previous training programs developed both at national and international level focused mainly on informing judges and prosecutors about the EU legal instruments, such as EU regulations, framework decisions and directives.

We considered that a program with the above sole purpose is not fully able to offer the practical insight on all the nuances of the judicial cooperation hypostasis. Most of the EU legal instruments are already a part of national law and the main goal is, at this moment, to ensure a proper balance between an enhanced judicial cooperation in criminal matters and the procedural rights of victims and accused persons.

The practical approach improves the understanding of how the judicial cooperation instruments actually work in practice. We believe that the participants' satisfaction and the training's effectiveness will be increased given the interactive approach encouraged by this type of project. The linguistic component is also deeply valued by the participants to this type of sessions. Thus their legal English and their English grammar skills improve.

The presence of lawyers and clerks throughout the seminar enable a better understanding of each professions' particularities and facilitated the creation of an environment promoting respect and understanding.

### **3. Concept. A new approach**

Therefore, NIM has created a seminar that would integrate several types of practical exercises. Each exercise aims to position the participant in direct contact with the legal provisions. According to this format the participant is expected not only to listen, but also to search for the applicable legal provisions, to write legal documents in relation to the issue, to answer to legal practical problems and to solve issues related to criminal judicial cooperation in the European Union.

In our opinion, this will help the participants in properly understanding how these legal instruments work. Also, this type of training leads to a better assimilation of legal knowledge.

The new concept was necessary because a more practice-orientated approach of the training is needed. In order to replicate all the elements that usually collide when solving a judicial cooperation case, we decided to involve judges and prosecutors from other Member States, to create a project with an international dimension. The trainings are provided by an international team of experts in order to reach the training needs of participants from different Member States.

We have also decided to invite lawyers and court clerks. Their presence is useful because they are highly encouraged to share their perspectives. We encourage them to share the challenges they were faced with when applying the judicial cooperation instruments. Also, during the practical exercises they are asked to perform their specific role, in order to increase the experience's veracity.



## 4. Format of the project

### 4.1. Format of the seminars

#### 4.1.1. General overview

The project is conceived as a series of 4 – 6 seminars, repeating the same format and the same agenda. Each seminar involves about 24 judges and prosecutors coming from all the Member States partners in the project. The same number of participants are expected from each Member State (4-6 participants). All seminars involve also lawyers and clerks from Romania.

The seminars have no translation. All the activities during the seminars are conducted directly in English. One goal of the project was also to ensure a direct communication between the trainers and the participants. Also, this way the direct communication among the participants was encouraged and helped them improve their language skills.

The seminars we conceived is a combination of:

- Lectures;
- Linguistic sessions;
- Moot court sessions;
- Simulated proceedings of judicial cooperation.

We thought this combination is able to reach the teaching goals of the project. As we discuss about teaching for professionals in the field of justice, we have to try to get as close as possible to the practical issues concerning the judicial system. Even if the agenda is previously known by the participants, a brief presentation of the relevant legal instruments, held by a legal practitioner, is needed. We try not to have a lot of lectures in order to get the participants to be involved in the seminars and in the final conference.

The linguistic sessions are needed because one of the goals of the project is to improve the English Language skills of all the participants.

Therefore, their ability to get involved in the seminars is enhanced and this also contributes to the interactivity of the project's activities.

The moot court sessions try to enhance the trust between the judicial systems of the Member States involved in the project. Also the moot court is a good pretext to discuss the problems arising from the



execution of European Arrest Warrants in the legal framework established by the jurisprudence of the ECtHR and of the ECJ.

## 4.1.2. Lectures

The seminar starts with lectures on the legal framework of the issues that are going to be discussed during the seminar. The basic legal concepts should be clarified for the participants before they begin to put in practice the relevant legal instruments.

### The first lecture

The first lecture handles a general overview of the judicial cooperation instruments within the EU legislation. Of course, the presentation could not ignore the connection between judicial cooperation, procedural rights and the principle of mutual recognition. This lecture is also concerned with the presentation of new legal instruments in the field of procedural rights (Directive 2010/64/EU, Directive 2012/13/EU and Directive 2013/48/EU).

Moreover, it also deals with the evolution of the EU Criminal Law. The Criminal Law was initially of no concern for the European Communities. But, throughout time, the treaties were modified and the Maastricht Treaty allowed harmonisation of Criminal Law, even if in rather restrictive conditions. The Treaty of Lisbon integrated Criminal Law and the Treaty on the Functioning of the European Union included provisions concerning enhanced criminal judicial cooperation and on substantive Criminal Law.

The judicial cooperation between the Member States improved gradually and instead of the principle of mutual assistance the principle of mutual recognition began to apply. Framework decisions had a rather important contribution in this field. There are tools that are at the disposal of the judicial practitioners such as Eurojust, the European Judicial Network, ECRIS, Atlas, Compendium, Fiches Belges.

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 is also an important legal instrument that was discussed in this lecture.

The focus of the presentation is on the Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings and on Directive 2013/48/EU of the European Parliament and of the Council of 22 of October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

These three directives were necessary in order to achieve a proper balance between the right to a fair trial of the accused person and the legal instruments issued in order to enhance criminal judicial cooperation. There are also analysed practical issues regarding the implementation of these directives in national law.

### The second lecture



The second lecture deals with the Charter of fundamental rights of the European Union and with the proper references of the Charter to the ECHR. This lecture also tries to connect the procedural rights within the framework established by the Charter and the jurisprudence of the ECHR.

The presentation allows for a short overview on the general principles of EU law. The connection between the EU Law and the ECHR is reflected in the decisions of the ECJ. Still, a problem arises from the temporary impossibility of the European Union to adhere to the ECHR, as in this moment such an accession contradicts the way ECJ interprets the Treaties. The Charter of Fundamental Rights handles issues derived from the jurisprudence of ECtHR in articles 47 to 50. The right to an effective remedy and to a fair trial is related to art. 13 and art. 6 para. 1 of the ECHR.

The presumption of innocence and the right of defence are also dealt with by articles 6 para 2 and 3 of the ECHR. The principle of legality and proportionality of criminal offences and penalties and the right not to be tried or punished twice in criminal proceedings for the same criminal offence also concerns art. 4 of the Protocol 7 to the ECHR. The risk of overlapping and the relevant jurisprudence of the two courts are also handled by this presentation.

The third lecture

The third lecture is scheduled in the second day of the seminar. It handles the European Arrest Warrant from the perspective of the procedural rights of the requested person. The focus of the lecture is on the *ne bis in idem* principle. This principle is also discussed in the framework of the workshops that follow this presentation. The lecture starts with a short overview on the European Arrest Warrant. It deals with the main features, the general concerns, the scope and the grounds for refusal (as the *ne bis in idem* principle is such a barrier for executing the European Arrest Warrant).

The procedural aspects are also important as they raise issues concerning the authority in charge of executing the warrant, the authorities that can file a request and the forms of request. The presentation needs to discuss the Human Rights issues that appear rather seldom in the field of executing a European Arrest Warrant. Of particular interest are the cases when a flagrant denial of justice appears or when the requested person suffers any other infringement of the rights guaranteed by the ECHR.

The proportionality issue is also important as the European Arrest Warrant should not be issued for petty crimes, even if the legal framework would allow such a request. The lecturer also makes a brief analysis of all the case law of the ECJ related to the scope of the *ne bis in idem* principle in EU Law. The legal framework of the principle's applicability in the EU Law is also analysed, because the fear to bear another criminal proceeding in another Member State could act as a barrier to the free movement of persons. No person should be subjected to another criminal proceeding only because it has decided to enjoy the right to free movement in the European Union.

### 4.1.3. Linguistic Session

The lectures are followed by a linguistic session – a training module that has the goal to warm up the participants by using their English in the seminar's framework. Even if the participants have a medium level of command of English, they need to be reminded the basic rules of English Grammar. The use of proper



vocabulary is also necessary in order to avoid any confusion. The issues raised by the use of legal English are also dealt with at this moment.

As the source of legal English is the common law, the legal concepts are rather difficult to be translated into institutions from a continental law system. Unfortunately, even legal English differs from plain English and therefore another problem appears. There are also big difficulties as some concepts are not shared between Member States such as the term 'magistrate'. There is also the issue of false friends such as 'prescription', 'sentence' or 'instance'. The exercises done during the training try to employ the technical terms such as 'defendant' or those that have a specific meaning in legal context such as 'procedure'.

The participants are asked to exercise with these concepts related to criminal law and procedure, court language, the legal profession. The training also deals with the formal vocabulary common in legal texts such as complex prepositions ('in the event of', 'having regard to'), formal expressions ('in accordance with'), compound prepositions and adverbs ('hereby', 'herein', 'hereinafter', 'thereafter', 'thereof', etc.), as well as words belonging to a higher register ('expedite' instead of 'speed up', 'deem' instead of 'considered').

The participants also practice the specific morphological structures and syntax for legal English. This involves the use of certain modal verbs ('shall', 'may', 'should', 'can' and 'must'), passive structures, formal connectors ('provided that') and complex sentences specific for legal English. There are different exercises for different English language skills. The 'matching', 'multiple choice', 'word formation', 'gap fill' and 'reading' are all exercises that aim at enriching the speaker's vocabulary.

Exercises dealing with particles, modal verbs or other grammatical structures should improve the speaker's fluency in English. Other exercises are only meant at helping speakers communicate in work related contexts.

#### 4.1.4. Moot Court

The afternoon of the first day starts with a moot court sequence where a judge, a prosecutor, a lawyer and a clerk, coming from Romania, are performing in front of their colleagues.

The moot court concerns the execution of an EAW and the hearing in a Romanian court (sequence prepared by the Romanian trainers with the help of Romanian lawyers and clerks).

The moot court shows the participants to the seminar how a certain judicial cooperation procedure would be dealt with in a Romanian court. The foreign participants receive the relevant case details. They are able, therefore, to follow the procedure, to compare and to identify any differences between their national legal systems.

The moot court is a good opportunity to discuss some issues related to the judicial cooperation in criminal matters. There are a few issues that are dealt with during the proceedings. The requested person asserts that his procedural rights have been infringed by the requesting authority. The judge should check whether we are dealing with a flagrant denial of justice, but the case details do not lead to such a conclusion. The



rights of the requested person to legal aid and to be notified on the object of the European Arrest Warrant are respected during the proceedings.

Even if issues concerning a potential breach of the right to a fair trial and to the right to respect of private life are analysed, the circumstances of the case cannot block the execution of the European Arrest Warrant. There are also decisions of the ECJ that apply in this case, such as “Decision Radu”.

The moot court is followed by a debriefing session, where the participants are encouraged to share their own experiences, to explain how these procedures are solved in their countries. Also the participants are asked to tell if they have noticed any differences or if their jurisdictions have better, more innovative solutions.

There are also issues discussed that concern the potential conflict that could appear between the rules on cooperation in criminal matters and the rights guaranteed by the ECHR. There are ECtHR cases that could apply to European Arrest Warrants or to extradition proceedings such as “M.S.S. against Belgium and Greece”, “Soering v. The United Kingdom” or “Stapleton v. Ireland”.

This exercise tackles also problems such as those that arise from obtaining the evidence in one Member State which leads to the impossibility of the defendant and of the national judge to have access to the file in order to check whether the right to a fair trial or to respect the private life of the defendant were respected.

#### 4.1.5. Simulated Proceedings

The first day's afternoon continues with another practical exercise, simulating drafting letters of rights related to the procedural rights of the accused persons. They also have to discuss some issues related to the study cases.

The study cases are created from combining circumstances that occurred in real cases. The main issues tackled in the case studies concern the right to an effective defence of the defendant, the right to be informed of the accusation, the right to access the file and the right to interpretation and translation. Also, another delicate issues raised is how to get a proper balance between the right to defence and the obligation to find out the judicial truth.

Participants are divided in two big separate groups and they work in different rooms. Each group has to deal with a practical case with an international dimension. Even within the two big groups, a further division is made into smaller teams. This smaller teams are composed of 4 - 5 persons, coming (as much as possible) from different Member States. Each team has to draft a letter of rights according to the EU applicable rules (the model of letter of rights was not attached to the materials given to the participants) and to discuss on the topics related to the study case.

Each team receives the study case and they have to decide, based on the elements in the file, what the answer on the issues raised in the study case is. They are asked to discuss between them and to decide together how the letter of rights should be written. Then, all of them or only one of them (it is up to them to decide) has to write the letter of rights. The tasks are within the scope of application of the legal instruments previously presented during the lectures. During this process, they are assisted by two trainers, the



workshop moderators. It was a very good opportunity for the participants to share and to debate. The written letter of rights is handed at the end of the day to the moderators.

The next morning, the letter of rights written by one team is checked by another team from the other room. Each team has a letter of rights from their colleagues to check. The decision on the conformity of the letter of rights, the answers and their grounds are discussed in the plenary. Also, the trainers give their feedback during the plenary session.

In the second day's seminar afternoon, the participants are also divided in teams (but they will remain in the same room), each with a task within the scope of application of the *ne bis in idem* principle according to the jurisprudence of the Luxembourg and Strasbourg courts.

There are also two case studies that need to be solved, one based on a real case from the Sofia District Court (similar with the Case C 398/12 M. of the ECJ) and one based on the *Zolothukin v. Russia*, case of the ECtHR. The study cases are also a good opportunity to discuss the meaning of 'criminal' according to the jurisprudence of the ECtHR and also on the applicability of the *ne bis in idem* principle according to the jurisprudence of the two courts.

#### 4.1.6. Second Linguistic Session

On the third day, there is another linguistic session focused on the meaning and content of the terms frequently used in the field of judicial cooperation in criminal matters.

One type of exercises deals with special prepositions that are used when dealing with the European Arrest Warrant, mutual legal assistance and procedural rights.

Another category of exercises handles the specific vocabulary used in the field of international cooperation in criminal matters, such as words that are used in the Convention on the Transfer of Sentenced Persons from 1983. In order to get the participants accustomed to the vocabulary used in the field of EU Criminal Law, excerpts from press articles and official documents are used in order to check their reading comprehension abilities.

As is the case in the field of judicial cooperation, judges and prosecutors are encouraged to communicate directly, with the help of exercises focused on listening and comprehension related to the European Arrest Warrant and to the European Investigation Order are provided. The writing ability of the participants is also dealt with as they are also asked to fill in a European Arrest Warrant form.

#### 4.1.7. Final Lecture

The seminar ends with a lecture on the latest developments in the area, the newest tendencies, things that are yet to come. The participants need to understand the further direction of Criminal Law in the EU. In this moment, it is rather arguable to discuss upon the concept of 'European Union Criminal Law'. There are substantive rules that apply to the most dangerous crimes perpetrated at a transnational level such as



terrorism, drug trafficking or counterfeiting of Euro. If a crime is able to profit from the lack of national borders, the judicial authorities find it rather difficult to do that.

We could even ask ourselves how can we talk about an EU Criminal Law without an EU Constitution. There are a lot of threats to the future of the European Union and an adequate EU Criminal Law is needed, but it is debatable whether the present EU Criminal Law is effective.

The presentation also deals with the sources of Criminal Law within the European Union legal order. An important question concerning EU Criminal Law is related to its fairness, for example those cases when accused persons are surrendered to another Member State where proper detention facilities are not available. The lecture also tries to offer useful suggestions related to future potential developments of the European Union Criminal Law, as better legal instruments and proper supplementary guarantees are needed.

## 4.2. Final Conference

The project ends with a final conference. A number of about 120 participants should attend the final conference. It is possible to participate in one seminar and also at the final conference.

The conference should challenge the discussions from the seminars in order to offer an overview on the future of EU Criminal Law. It should be a good opportunity to focus on the essential issues raised during the seminars. The focus should be also placed on legal instruments that are particularly important for the further evolution of procedural rights.

Therefore, the final conference should try to mix lectures with case studies in order to create an interactive environment where participants can offer their feedback on the issues tackled.

There is a need for further procedural guarantees at the level of the European Union. The starting point are the Directives 2010/64/EU, 2012/13/EU and 2013/48/EU. Still, procedural guarantees in European Criminal Law involve also the rights of the victims. It is highly important that the presumption of innocence of the suspect or the accused person is respected in all Member States.

The protection of the accused person should be enhanced if they are minors. The legal aid should be effective throughout the European Union and all defendants tried in absentia should have the right to a new trial. One should also offer a proper solution in order to avoid forum shopping in criminal matters, for the criminals and for the judicial authorities. These issues constitute the main topics of the final conference.

## 4.3. Handbook

One of the projects deliverables is the handbook which brings together the contributions of every expert involved in the project. This handbook is first presented to the participants during the project's final conference, when each expert involved will briefly present its contribution.



The large number of participants at the final conference should offer proper feedback. Based on this feedback and with the experts' support present at the conference, all the parties involved will agree on a final version of the handbook. Participants are encouraged to express their opinions and it is highly recommended that at least one participant from each Member State could provide a useful feedback based on his national legal experience.

The materials included in the handbook can constitute valuable sources of information only if they are discussed and agreed upon by legal practitioners, judges, prosecutors, lawyers and court clerks. Only this way, the handbook will have an important impact on the participants' future activity and will be able to become a useful tool for the legal practitioners throughout the European Union.



## Annex to the methodology

The agenda:

### Day 1

9:15 – 9:30	Arrival and registration of participants
	General overview of the judicial cooperation instruments within EU legislation: available instruments, status of implementation, electronic tools. Principles of mutual recognition.
	Presentation of several new instruments:
	<ul style="list-style-type: none"> <li>▪ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings;</li> <li>▪ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings;</li> <li>▪ Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons.</li> </ul>
9:30 - 11:00	
11:00 – 11:15	Coffee break
11:15 – 12:15	Charter of fundamental rights of the European Union and references to the ECHR. Procedural rights within the EU
12:15 – 13:00	Linguistic training
13:00 – 14:00	Lunch
14:00 – 15:00	Moot court. Executing an EAW. Presenting a hearing in a Romanian



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	court
15:00 – 15:15	Coffee break
15:15 – 17:00	Workshop no.1. Study cases

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### Day 2

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9:00 – 10:30	Executing the requests in separate rooms
10:30 – 11:00	Feed-back from the workshops
11:00 – 11:30	Coffee break
11:30 – 13:00	European Arrest Warrant from the perspective of procedural rights of the requested person. The principle of ne bis in idem
13:00 – 14:00	Lunch
14:00 – 15:30	Workshop no. 2 (ne bis in idem)
15:30 – 15:45	Coffee break
15:45 – 17:00	Workshop no. 2 – continuation Feed-back from the workshops

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### Day 3

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9:30 – 11:30	Linguistic training
11:30 – 12:00	Coffee break
12:00 – 13:00	EU rules concerning judicial cooperation in criminal matters; new legal instruments
13:00 – 14:00	Lunch

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