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Preparing the environment for the EPPO: Fostering mutual trust by improving common legal understanding and awareness of existing common legal heritage. Proposal of guidelines and model curriculum for legal training of practitioners in the PIF sector

Rosaria Sicurella
European Criminal and International Criminal Law, University of Catania, Italy

Abstract
The adoption on the 12 October 2017 of the Council Regulation (European Union [EU]) 2017/1939 'implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office' (the EPPO) marks a turning point in the development of the EU as an Area of Freedom, Security and Justice, by the creation of the first EU investigating and prosecuting authority. However, the structure and functioning of such a new body, together with the limited scope of its competence established by referring to provisions in the Directive (EU) 2017/1371 – the PIF Directive – 'as implemented by national law', make the EPPO as an authority whose legal environment largely builds on the national legal systems. Therefore, the putting in place of the new investigative body is far from fully eradicating in itself the various difficulties of judicial cooperation in criminal matters. Instead, its implementation strongly revives the crucial need to foster mutual legal understanding and mutual trust that the experience showed is not achieved yet among the member states. After shortly presenting the main features of the recently adopted EPPO regulation, the article focuses on the crucial need to reshape training of all legal practitioners involved in criminal investigations (first of all when dealing with PIF offences) as the essential condition for the new European investigating body to function smoothly. The author stresses the need for improving mutual understanding of the different legal systems and above all awareness of the common legal grounds already in place as the primary way to boost the necessary mutual trust among practitioners and establish the first embryo of a

Corresponding author:
Rosaria Sicurella, Full Professor of Criminal Law, European Criminal Law and International Criminal Law at the University of Catania, Italy.
Email: rsicurella@lex.unict.it

genuine European legal culture. The article then analyses the main features of a proposal for a training curriculum based on an *ius commune* perspective recently drafted in the framework of the EUPen-TRAIN project run by the Centro di Diritto Penale Europeo of Catania and co-financed by Olaf.

Keywords
legal training, Protection of EU financial interests (PIF), General Principles of Criminal Law, European Prosecutor's Office (EPPO), Mutual Trust and understanding

Introduction: An EPPO is born. Let's get ready for it!

The adoption on the 12 October 2017 of the Council Regulation (European Union (EU)) 2017/1939 'implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("The EPPO")'[1] marks a turning point in the development of the EU as an Area of Freedom, Security and Justice, by the creation of a new EU actor 'responsible for investigating, prosecuting and bringing to judgment [. . .] the perpetrators of [. . .] offences against the Union's financial interests'. Indeed, the first EU investigating and prosecuting authority has come into play.

However, the structure and functioning of such a new body, together with the limited scope of its competence established by referring to provisions in the Directive (EU) 2017/1371[2] 'as implemented by national law', make the EPPO as an authority whose legal environment largely builds on the national legal systems. Not only the way it is structured makes it to be deeply embedded in the structure and functioning of national investigating and prosecuting authorities, since it will essentially function through members of the national investigating and prosecuting authorities acting in their function of 'European Delegated Prosecutors', constituting the 'decentralized' component of the EPPO. Indeed, this solution could have resulted in the most effective way to set up an EU investigative authority able to easily exert its functions in the contexts of the different legal systems of the member states and relying on enforcing authorities established at the national level, provided that effective direction of investigations and prosecutions is maintained at the supranational level.

However, this is hardly to be found in the regulation recently adopted. Indeed, at the operational level, lying on collegial bodies (the Chambers) of three European prosecutors each, one of whom will generally be the European prosecutor of the member state concerned by the investigation, the latter's role will probably prevail on the other two members with respect to the supervision of the European Delegated Prosecutors and the coordination of the same directly running investigations on the territory of the member state concerned. This risks to very much undermine the supranational nature of the European inquiring authority as it was originally conceived, since direction of the investigation will presumably continue to lie on the national prosecutor of the State where the largest number of offences was committed. More in general, one can easily denounce the shift towards the national dimension of the decision-making through the progressive watering down of the role of the central level, which consisted originally of a European Prosecutor, assisted by four

1. OJ L 283, 31 October 2017, 1. Only 20 member states agreed to participate to the enhanced cooperation procedure. Non-participating member states, for the time being, are in addition to Denmark, United Kingdom and Ireland, also Hungary, Malta, Poland, Sweden and The Netherlands. Any reference to member states in the text is meant to refer to the member states participating to the procedure, unless otherwise specified.
2. OJ L 198, 28.7.2017, 29.

Deputies, with direct direction power of the investigations materially conducted by the European Delegated Prosecutors. Unlikely, the current text of the regulation provides for a College composed of a European Prosecutor for each participating member state (for the time being 20 Prosecutors representing the 20 States participating to the enhanced cooperation), chaired by the European Chief Prosecutor, with a 'mere' power of supervision of investigations and prosecutions conducted by the European Delegated Prosecutors in their respective State of origin.[3]

But the most critical point arises when considering that national prosecutors members of the EPPO will essentially act – still with quite a wide discretion – using current (very slightly harmonized) national rules of criminal law and procedure of the member state where the act is to be accomplished, subject to the *ex ante* and *ex post* control of the competent judge in the same State.

Indeed, as for the rules of substantive criminal law, the regulation establishes in Article 22 that the EPPO 'shall be competent in respect of the criminal offences affecting the financial interests of the Union that are provided for in the Directive (EU) 2017/1371 as implemented by national law [. . .]'. Looking at the text of this directive (the PIF Directive) adopted on the 5 July 2017, it unequivocally confirms a restrictive approach to the EU competence in the PIF sector. While a specific provision on VAT (Value added tax) fraud was finally introduced at Article 3, para 2 (c) and (d), as the consequence of the decision of the Court of Justice in the *Taricco* case,[4] the compromises which were achieved on the most controversial issues stifle all progress in the fight against crimes affecting the financial interests of the Union. In particular, the quite limited scope of the PIF Directive, combined with the imprecision and vagueness of many of its provisions, will presumably bring about an extremely weak effect on the member states' legal systems and will consequently barely improve the actual situation of harmonization of offences provided for the protection of EU financial interests.[5]

As for rules of criminal law procedure, the adopted regulation only establishes a minimum set of investigative measures that need to be made available to the European prosecutors on the territory of all the participating member states. Moreover, as the consequence of the abandon of the principle according to which the territory of the participating member states is to be considered as an unique territory, transborder investigations will continue to rely on the judicial cooperation among the interested national authorities while a new cooperation mechanism among the European Delegated

3. The regulation explicitly excludes that operational measures in individual cases are adopted by the College; see Article 9 of the regulation.
4. Case 105/14, Taricco et al. (2015). The inclusion of VAT-related frauds has turned out to become the burning issue in the negotiations. Although the Council does not directly object to viewing VAT as a part of the EU budget, the same pretended to exclude VAT-related frauds from the scope of the directive, arguing that harmonization of VAT frauds would not be in compliance with the principle of proportionality as one of the basic criteria for the EU to exercise its competences. The reason for this is that only a little part of the VAT revenue is to be considered as the EU's own resources. From its side, the European Parliament regarded the inclusion of VAT-related frauds as a prerequisite for agreeing with both the proposed directive and the proposed regulation establishing the EPPO. These insurmountable disagreements debouched into a decision to suspend negotiations waiting for the judgment of the European Court of Justice on a preliminary reference under Article 267 TFEU, which was referred to the Court by an Italian court (Tribunale of Cuneo) in the context of criminal proceedings brought against Mr Taricco and others for having formed and organized a conspiracy to commit various offences in relation to value added tax
5. For a critical overview on the PIF Directive's provisions, see F. Giuffrida, '*The PIF acquis in light of the new directive*', in: R. Sicurella, et al., eds., *General Principles for a Common Criminal Law Framework in the EU* (Milano, Giuffré, 2017), (ongoing publication); see also R. Sicurella, '*A blunt weapon for the EPPO? Taking the edge of the proposed PIF Directive*', in P. Geelhoed, A. Meij and L. Erkelens, eds., *Shifting Perspectives on the European Public Prosecutor's Office* (T.M.C. Asser Press & Springer-Verlag) (ongoing publication). Both contributions refers to the provisions in the directive proposal's as adopted by the Commission and then amended by the Council in its General Approach.

Prosecutors is expected to replace mutual legal assistance and mutual recognition mechanisms in the cross-border cases, investigations on PIF offences will continue to be run essentially under national law, so confirming the current fragmentation with almost no Europeanization of judicial decisions.

In its original model, proposed in the document known as the 'Corpus juris for the protection of the financial interests of the Union' (the Corpus juris),[6] the EPPO enjoyed an exclusive competence with respect to a set of EU offences (in the Pif sector) established in the same document,[7] together with intrusive investigative powers that any of its members (that is to say any of the Delegated Public Prosecutors) was able to employ all over in the Member States of the EU, which were in fact considered for the purpose of the activity of the EPPO as constituting a unique territory. The latter was indeed the most significant feature of the proposed model: by conceiving an authority having European wide investigation powers the Corpus juris provides for a way to abandon the need for using the mutual legal assistance instruments, and also overcome fragmentation of the EU judicial space. Moreover, the proposed European inquiring authority was structured in a way to rely on the decentralized operational activity essentially run by the European Delegated prosecutors, embedded in the judicial systems of the Member States, but operating under the direction of a centralized very lean Head Office of four European Prosecutors topped by the European General Prosecutor and supported by some staff. This structure was able to guarantee a desirable balance between the decentralize dimension of the operational activity with the centralization of direction of investigations and consequently verticalisation of control of relevant information and instruction power over the investigations conducted all over on the territory of the EU. The latter were considered to be necessary to improve effectiveness of investigation on offences affecting EU financial interests.[8]

Both these two crucial features were maintained in the Commission's proposal adopted in 2013,[9] together with the exclusive competence of the EPPO for offences affecting the EU financial interests (that unlikely the set of provisions in the Corpus juris, are not established in the same text but indicated by referring to the Pif Directive that had been adopted by the Commission the year before but still under negotiation when the proposal for the Regulation establishing the EPPO was adopted). This solution implied an access of the EPPO to all relevant information. Moreover, the Commission's proposal provided for a catalogue of procedural measures and especially investigative powers to be applied in all the Member States (even if a referral was made to national laws for more detailed measures necessary during investigation). However, a very critical solution affecting the supranational nature of

6. The first version of the document dates back to 1997; see M. Delmas-Marty, ed., *Corpus Juris Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union* (Paris: Economica, 1997). A second version was drafted in 2000 (*Corpus juris 2000*); see M. Delmas-Marty and J.A.E. Vervaele, eds., *The Implementation of the Corpus Juris in the Member States* (Antwerpen-Groeningen-Oxford: Intersentia, 2000, p. 187 ff). Any quotation in the text refers to the *Corpus juris 2000*.
7. Fraud affecting the financial interests of the European Communities and assimilated offences (Article 1), market-rigging (Article 2), money laundering and receiving (Article 3), conspiracy (Article 4), corruption (Article 5), misappropriation of funds (Article 6), abuse of office (Article 7) and disclosure of secrets pertaining to one's office (Article 8).
8. The set of provisions proposed in the *Corpus juris*, when they were drafted, could not rely on a clear legal basis in the treaties in force at that time. A proposal aiming at introducing a new provision – Article 280 bis TEC – was put by the Commission in 2000 in view of the Intergovernmental conference that finally resulted in the adoption of the Treaty of Nice. The Commission's proposal was refused and never formally discussed. However, the same was further developed by the Commission in its 'Green paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor', COM(2001)715, 11 December 2001. This was also the basis of a new proposal put by the Commission in the framework of the European Convention for the future of Europe (Chaired by Valery Giscard d'Estaing) which ended up with the proposal for a Treaty establishing the Constitution for Europe. Here, Article III-175 was introduced establishing the main features of the future European Public Prosecution Office as it is now provided for in Article 86 TFEU.
9. COM(2013) 534

> the new body as proposed by the Commission was the one concerning the jurisdictional control over the EPPO's activity which was essentially left to national authorities (except for some very limited situations) – derogating by that to the general principle according to which control of acts of European bodies are of the competence of the European Court of Justice.
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> Negotiations in the Council, started by the Lithuanian Presidency in September 2013 and then took up by the Greek Presidency in the first semester of 2014, have resulted in the abandon of the key elements mentioned above, and first of all the abandon, under the pressure especially of the French and German Delegations, of the 'vertical' dimension and the introduction of the collegial structure, with by consequent the abandon of the 'integrated' nature of the EPPO as originally conceived, and the adoption of a 'coordination driven' body (presenting quite significant similarities with Eurojust). The shifting towards the national dimension of the decision making has radically changed the nature of the EPPO, making the 'national link' a crucial feature of the new body as conceived in the Regulation.[10]

In the framework of the new regulation, then, the national legal systems and the competent authorities in each of the participating member states will remain the main actors in the running of investigations in the PIF sector. More in general, the quite complex structure it establishes, which lies on different layers – the College, the Chambers, the European Prosecutors, the delegated prosecutors – finally, results in a limited impact on the current situation of judicial cooperation.

Therefore, the putting in place of the EPPO is far from fully eradicate in itself the various difficulties of judicial cooperation in criminal matters. Instead, its implementation strongly revives the crucial *need to foster mutual legal understanding and mutual trust* that the experience showed is not achieved yet among the member states.

'Preparing the environment for the EPPO' means to provide the necessary 'amniotic liquid' for its action by boosting the necessary mutual trust among practitioners, the latter relying not only on the mutual understanding of the different legal systems but also on the awareness of the common legal grounds already in place.

Training of legal practitioners involved in criminal investigations (first of all when dealing with PIF offences) should play a key role in the putting in place all the necessary conditions for the new European investigating body to function smoothly, and then the strategy to make it a success story.

Developing a genuine European legal culture by reshaping legal training

When establishing the principle of mutual recognition as the basis for judicial cooperation in criminal matters, Article 82 TFEU implicitly recognized mutual trust as the very foundation of the EU as a common 'area of freedom, security and justice'.

However, mutual trust cannot be postulated and cannot even been considered as something that can be achieved once and forever. Mutual trust is a dynamic status and by consequent it needs to be constantly fed. Indeed, the link between the implementation of mutual recognition – and more in general the objective to improve judicial cooperation – and the need for strengthening mutual trust was stressed since the adoption of the Hague programme,[11] and the Stockholm programme, adopted by the European Council in 2009,[12] still referred to the objective of 'ensuring mutual

10. Among the few elements marking the European nature of the EPPO, it is interesting to stress that, unlikely the members of Eurojust, who get their salary from their State of origin, members of the EPPO's College hold the qualification of 'temporary agents' and are considered, with respect to their economical and juridical status, on equal foot with other European agents.
11. The Hague Programme: strengthening freedom, security and justice in the European Union, OJ C 53, 3 March 2005, 1 ff.
12. The Stockholm Programme: An open and secure Europe serving and protecting the citizen, OJ C115, 4 May 2010.

trust and finding new ways to increase reliance on, and mutual understanding between the different systems in the member states' as 'one of the main challenges for the future'.

Harmonizing competences of the EU – as established in Article 82 TFEU especially for procedural law, and 83 TFEU for substantive criminal law, together with Article 325 TFEU with respect in particular to the PIF sector – are expected to contribute to foster a common understanding by establishing common standards for procedural measures and common requirements for a fact or a behaviour being considered as criminally relevant, which logically reflects a shared consideration of the detrimental consequences of such behaviour with respect to common values.

However, while aiming at boosting a common sense of 'justice', harmonizing competence of the EU cannot be considered as able by itself to achieve the crucial goal of developing and consolidating mutual understanding and mutual trust. Mutual trust needs that a radical change of attitude is developed among practitioners, and that a genuine European legal culture is established, boosting first of all common legal grounds already existing and resulting not only from implementation of EU law and standards but also from the common legal heritage among member states, and spontaneous convergences or trends on issues that are not directly covered by EU law. All together this represents what can be considered as the current *ius commune*.

In this perspective training of legal practitioners is a key issue. Since the entry into force of the Treaty of Lisbon, establishing the competence of the EU to adopt, under the ordinary legislative procedure, measures aiming at ensuring 'support for the training of the judiciary and judicial staff' (Articles 81(2)h and 82(1)(c) TFEU), all European Institutions advocated a significant engagement of EU in fostering judicial training as a fundamental tool for the development of the EU as a common area of justice by improving effectiveness of member states justice systems also ensuring smooth cross-border proceedings and recognition of judgments.[13]

This has been stressed in particular by the Commission in its EU Justice Agenda for 2020, when it says that 'mutual trust is to be strengthened', and then it continues saying that 'among the many ways to achieve this objective legal training of practitioners is considered of the utmost importance to build trust in each others' judicial systems and enable practitioners to cooperate and trust each other across borders'.[14]

Implementing a genuine European approach in the definition of contents and methodology of the training, then, is to be considered the crucial tool to improve common understanding and awareness of common legal heritage which is at the very basis of mutual trust. This implies that not only EU law is integrated in national training but that a good understanding of other member states legal systems is ensured boosting on commonalities and the existing common core values and common principles and standards flowing from the rule of law in order to build confidence and trust which are un-eliminable to improve cooperation and mutual recognition of decisions. Indeed, implementing a shared judicial culture among practitioners is necessary to develop the Union as a common judicial area. This is only further exalted by the institution the EPPO.

13. European Parliament Resolution of 17 June 2010 on judicial training (OJ C 236 E, 12 August 2011, p. 130 f.; European Parliament Resolution of 4 March 2012 on judicial training (2012/2575(RSP)); Commission Communication of 13 September 2011 'Building trust in EU-wide justice – a new dimension to European Judicial Training' (COM(2011)0551); Council Conclusions on European Judicial Training, 3221st Justice and Home Affairs Council Meeting, Luxembourg 27–28 October 2011; Council Conclusions 'Training of legal practitioners: an essential tool to consolidate the EU *acquis*', OJ C443, 11 December 2014, p. 7 f.
14. Communication by the European Commission, The EU Justice Agenda for 2010 – Strengthening Trust, Mobility and Growth within the Union, COM (2014)144.

Legal training is traditionally based on the national legislation and legal tradition of each member state. Even general issues – issues of the general part of criminal law, which correspond to crucial questions of any criminal law system – are dealt with as they reflected the 'specificity' of each system. This naturally leads to a mentality which is very hardly keen on understanding the 'logic' and the solutions adopted by other legal systems and on cooperating.

It is necessary to change the 'way of thinking' of practitioners, and especially their attitude when approaching not only EU law but also any legal issue in their daily practice, which is to be dealt with in the perspective of an integrated system where national legal orders are interacting pieces of a whole and not separate, competing entities.

Reshaping judicial training on criminal law matters: The EUPenTRAIN project proposal of a training curriculum based on a *ius commune* perspective

The approach

The EUPenTRAIN project, run by the *Centro di Diritto Penale Europeo* of Catania under the leadership of Professor Rosaria Sicurella (University of Catania), aims at contributing to develop such a European legal culture among practitioners by proposing a model of training curriculum (especially focusing on the PIF sector) joined by a set of guidelines for its implementation that lay on the following *basic methodological assumption*: organizing training contents by starting from *what member states have already in common*, either as a consequence of implementing procedures of EU legal texts and the jurisprudence of the European Court of Justice (ECJ) and the European Court for the protection of Human Rights (ECtHR), or as the result of already existing common legal traditions, or spontaneously emerging common trends, and then, *approaching specific issues* arising in single systems *as outstanding issues* (which can conflict or not conflict with common features).

Adopting a '*ius commune*' *approach* implies that not only EU law is considered but also national legal systems. However, the latter are first examined to bring out commonalities and to show more or less well-established common trends which cover a much wider area than implementation of EU legal texts. Then, the goal is not to provide for a traditional comparative analysis, aiming at equally detecting similarities and differences among the member states legal systems, but to bring out a 'common core' of legal grounds of the member states' legal traditions that is wider than EU law or ECJ and ECtHR case law, while at the same time providing with some knowledge of other member states' legal systems. Indeed, this must be stressed in order to enhance mutual knowledge and understanding as a precondition to foster mutual trust.

Such a choice is made visible by the fact that each module is divided in two parts (anyway strictly interconnected). Part I – *Ius commune* – covers not only obligations stemming from EU law and ECJ and ECtHR case law but also common/emerging common trends. Possible differences, instead, are dealt with only in part II – *Specific and peculiar (national) issues*. The idea is to present such issues to participants against the common legal understanding that is to be clearly examined in part I of each module, and so as matters to be dealt with not as they were in-touchable aspects of each system but as issues where divergences in national legislation are to be carefully examined quite in terms of costs benefits, and so putting on a balance the consequences of such divergences with the possibility to overcome them or at least reduce them.

Following this approach, participants are expected to improve their capacity to deal with cases with a cross-border dimension and also national cases where EU law comes at stake. More in

general, they are expected to develop or improve their awareness and full understanding of the implications of the establishment of a common legal area; the functioning of the EU integrated system of legal orders (and especially the dynamics of EU legal order and their impact on the member states systems of criminal justice); the main cooperation instruments and also the tools offered by EU law to legal practitioners in their respective role; and the need for protecting fundamental interests and objectives of the EU.

Such an approach has important consequences also as for the selection of trainers. Indeed, the interest of the proposed curriculum relies essentially on the approach suggested and it requires, then, that trainers share the EU perspective/approach embraced by the curriculum. Trainers must be familiar with the implementation of this kind of initiatives. Moreover, they need to be able to show how specific practical issues fit in the framework of the general dynamic or principle examined.

The proposal for a training curriculum and guidelines implementing such quite different approach obviously needs to rely on a very careful choice of contents/issues to be dealt with, and above all, collection of data about national legal systems that were not always available. This is especially true when considering that dealing with *ius commune* means much more than only dealing with EU law and implementing legislation as it was already mentioned. The outcome of the implementing legislation can be considered as a *ius commune* '*by default*', since this legislation deals with issues covered by EU legislation and the member states are under an obligation to comply with it. More generally, the *ius commune* by default deals with the harmonizing effect that EU law (and also the ECtHR jurisprudence) have had on member states. In addition to that, the proposed curriculum aims at boosting *well-established or emerging common trends* than can be detected through a comparative analysis of the member states legal systems of criminal justice.

In order to achieve this goal, distinguished Academics from seven different member states representing different legal traditions – Thomas Elholm (University of Southern Denmark), Valsamis Mitsilegas (Queen Mary University of London), Adan Nieto Martín (Universidad de Castilla-La Mancha), Celina Novak and Joanna Mierzwińska-Lorencka (Institute of Law Studies of the Polish Academy of Sciences), Raphaële Parizot (Université Paris Nanterre), Rosaria Sicurella (University of Catania) and Thomas Wahl (Max Planck Institute) – engaged in a preliminary study aimed at identifying general criminal law principles common to the member states and clarifying their contents in an integrated legal order including detecting common trends covering issues not covered by the same principle at EU level. Contributions on specific issues were also given by other Academics: Anna Maria Maugeri, Floriana Bianco, Livio La Spina, Annalisa Lucifora, Valeria Scalia, Martina Costa and Fabio Giuffrida. Results of the study were the material to build up the training modules. A first draft of the proposed training curriculum and guidelines was submitted to the assessment of five senior practitioners: Giovanni Grasso (Professor of Criminal Law, Defence Laywer and President of the 'Centro di Diritto penale europeo'), Lorenzo Salazar (Deputy Prosecutor General in the Court of Appeal of Naples), Scott Crosby (Solicitor – member of the European Criminal Bar Association (ECBA) and ECBA Human Rights Officer), Drago Kos (Chairman of the OECD Working Group on Bribery) and Tricia Howse (CBE – Past President).

The beneficiaries

The proposed model curriculum and guidelines are conceived to be provided for mainly *training agencies (national or European)*. However, they can result in a useful tool also for the Commission to implement its strategy for supporting legal training.

As for the *training agencies*, the proposed model curriculum and guidelines are meant to provide first of all *national training authorities* (National Legal Schools) with the necessary basic contents and structure for 'ordinary' training of legal practitioners. Indeed, a change of attitude in the way legal practitioners approach other legal systems needs a very throughout and 'massive' training initiatives/activities that only national training agencies can reasonably be expected to achieve. However, cross-border training activities have to be considered an essential tool when aiming at boosting mutual understanding and mutual trust among legal practitioners of different countries. This is true both for young practitioners and specialized ones. The first may have the occasion to develop awareness of the European dimension of their profession. This is especially relevant for members of the judiciary, since they are the ones in the frontline in assuring compliance of internal legal systems with EU legal instruments whenever this is possible within the scope of their competence as established by the member states constitutions. As for specialized practitioners, face-to-face cross-border training may offer a fruitful occasion for creating informal networks among them that could facilitate the solving of every-day cross-border issues (this is especially the case when the training is addressed to specialized practitioner dealing, on an ordinary basis, with cross-border cases).

The proposed training curriculum is then structured in a way to be employed also by *European training agencies*, with some adjustments concerning the second part of each module.[15]

As for the *Commission*, following in particular recommendations by the Council to identify and assess solutions at European level supporting legal training, 'including European Training Schemes [...]',[16] the proposal aims at providing the Commission with a first model of such training schemes, especially focused on criminal Law and the protection of EU financial interests. This could facilitate the objective of implementing the 'Exchange Programme for Judicial Authorities' (developed by the European Judicial Training Network (EJTN)) and also fostering the underlying idea of an 'Erasmus for judges' where training followed in another member state is then validated in one's home country. Indeed, such an objective will result presumably to be facilitated by the fact that a 'common core' for the training of practitioners is established and it is required to be implemented (in an harmonized way) by all the member states.

Moreover, adopting such training schemes could be the basis for establishing award criteria for granting financial support to proposals for training activities, since priority in the access to European funds should be given to proposals implementing the common scheme.

The targeted practitioners

The setting up of a training curriculum for legal professionals requires that a preliminary choice is made between two opposite approaches, depending on the targeted group and the fact that the curriculum addresses all categories of legal practitioners, or on the contrary, it is tailored to the needs of single categories, such as the one of the judges and prosecutors, or the one of the defence lawyers.

Both approaches have advantages and disadvantages. A training curriculum addressed to all categories of legal practitioners is desirable when considering the occasion it offers to all actors to interact to better understand each others' positions and difficulties in their daily activity. This can

15. See also point (f).
16. Council Conclusions 27–28 October 2011, point 10.

result to be very useful to improve mutual understanding among the different actors and as a consequence to swifter the functioning of legal proceedings especially when cross-border cases are at stake. On the contrary, setting up a specialized curriculum addressed to only one category of legal practitioners allows to better tailor the training to specific needs of the targeted group, and above all, it can presumably benefit from a more 'confident' atmosphere which can generally be found among professionals of the same category.

Following the approach of the European Commission in its Communication of September 2011, in the proposed curriculum, no precise distinction is made concerning specific categories of 'officers of Court'. In particular, no distinction is made between judges and prosecutors, on the one hand, and defence lawyers, on the other.[17]

Indeed, the idea of a mixed audience perfectly fits with the aim of the project. Mutual trust also relies on mutual understanding and respect for each ones positions of judges and prosecutors, on the one hand, and of defence lawyers, on the other, since it will create the opportunity for different perspectives to be showed with respect to the same case/topic and consequently exchange experiences. Moreover, the position of defence lawyers is crucial, since they are the ones who have to indicate the possible 'European way' to the defendant, and also sometimes, to the judicial authorities dealing with the case. A true common area of justice in the EU then requires that both judges and prosecutors, on the one hand, and defence lawyers, on the other, become 'European legal actors' to fully fulfil their responsibility.

However, while desirable, a mixed audience could be not feasible for some training providers, such as National Judicial Schools. Moreover, national authorities may want to further tailor the Curriculum proposed in order to fit with possible different categories of practitioners.

Indeed, in this respect, the proposed training curriculum provides for some compulsory contents that competent training authorities are given with great discretion to further develop either as a specialized curriculum or as a training addressed to more than only one category of legal practitioners. However, in accordance to the 2011 Commission's Communication,[18] priority should be given to training of the judiciary because of the pivotal role they play for the enforcement and the respect of Union law, and more in general, the concrete functioning of the EU integrated system of legal orders. Notwithstanding, in line with the approach and the aim of the project, it would be highly desirable to implement the proposed curriculum by considering the possibility that at least some of the training events have a mixed audience.

A second crucial choice to be confronted with is the fact to conceive the training as an *initial training* addressed to young professionals before or on taking up duties or as a *continuous training* of experienced professionals.

The aim of the project to provide a model of training curriculum which is intended to significantly innovate the traditional 'National State centred' approach naturally leads to choose the form of an initial training. Indeed, young practitioners are presumably more flexible and keen on adopting the new approach than senior practitioners. Moreover, initial training allows to get a wider range of practitioners who will participate all on equal foot. However, continuous training of senior practitioners cannot be marginalized. Indeed, it is up by senior judges in Higher Instance Courts that the most relevant decisions are taken.

17. A different approach comes out from the EJTN training guidelines in European Criminal Justice – 2012.
18. Point 2.

The *training proposed is conceived as a model for initial training*. The contents, structure, timing and so on are proposed as properly fitting with this kind of audience. However, also in this respect, the proposed curriculum leaves a great room for discretion to national authorities to use the curriculum also for continuous training, provided that the arrangements which are necessary to meet the needs of practitioners on duty do not affect the overall approach of the proposed training modules.

Training methods and material

While acknowledging that budgetary constraints together with other reasons can push for investing primarily on training provided via the Internet through the various tools of e-learning, the proposed training curriculum is essentially based on a face-to-face method. Indeed, technology-based training allows to reach a much wider target of participants and they are generally more cost-effective. However, one must keep in mind the lack of e-learning culture among most of the legal practitioners and above all the judiciary. Moreover, face-to-face training is highly desirable since it especially encourage interaction and confidence among participants (even of different nationalities in case of training provided by European Agencies): It is therefore essential that face-to-face training remains the main tool, while e-learning methodologies could be used to integrate and further support the training, as for disseminating of material, case study, simulations.

As for the material to be used by participants, it is evident that the new approach followed in the proposed curriculum makes it highly desirable that specially tailored learning materials are provided presenting the relevant legal texts and case law in a way that puts in evidence the common legal environment the practitioners involved are encouraged to become aware of.

Indeed, having this need in mind, a Handbook has been produced on the basis of the outcomes of the preliminary study mentioned above, which was run in order to get all the necessary knowledge (on EU and member states law and jurisprudence) to set up the training curriculum.[19] The Handbook is meant not only to provide practitioners (and all interested people) with the relevant legal framework but also to present such a material in a way that it can contribute to foster the common understanding in the field. It is divided in two parts, followed by an appendix presenting the proposed training curriculum and guidelines. The first part consists of seven chapters dealing each with a principle identified as one of the common principles in the EU concerning criminal law: legality, proportionality, guilt/fault, fair trial and defence rights, presumption of innocence, fair trial and effective remedy, ne bis in idem. The second part includes six chapters dealing with general principles of European law – the principle of sincere cooperation and the national legislature; the principle of sincere cooperation and the national judicial authority; the principle of mutual recognition in criminal matters; mutual recognition and defence guarantees – and other crucial issues which were considered to be relevant in the perspective of being the ground for a training for legal practitioners, such as harmonization of offences in the PIF sector and the notion of 'criminal matters' stemming from the ECtHR and ECJ case law.

In addition to the Handbook, a text collecting relevant cases and legal texts should be provided. These materials should be organized in a way to further support the approach followed in the curriculum. An in-depth analysis of the most significant case law should be provided

19. R. Sicurella, et al., eds., *General Principles for a Common Criminal Law Framework in the EU. A Guide for Legal practitioners* (Milan: Giuffré) (ongoing publication).

aiming at showing the link between the general rules and standards and concrete features of the fact. Not only ECJ and ECtHR case law are to be covered but also significant jurisprudence of Constitutional Courts and other High Courts of the member states should be dealt with. Updating of this material will be much easier to be provided than updating the Handbook, and it could be realized by also involving participants. Such a solution could be of a great interest when considering cross-border training events. Thus, contribution of participants could allow to achieve the necessary constant updating of the material provided, without requiring that new comparative studies are run to that end.

A special consideration deserves the issue of the language the curriculum (and the material) is going to be provided. Indeed, language is a crucial issue when launching initiatives that aim at improving mutual understanding. This is evident when considering cross-border training. Indeed, the knowledge of a common language is to be promoted and supported as an essential tool to facilitate direct contacts among practitioners and make their exchange more informal and 'relaxed'. However, the situation is to be faced of the fact that only a relatively limited number of practitioners (and especially members of the judiciary) speak a foreign language well enough to be able to participate actively in a cross-border training (or training in another member state – or Erasmus for judges). In order to reduce the resistance from participants because of insufficient language capacity, simultaneous translation could result to be inevitable to be provided for selected events.

However, the issue of the language is to be faced also with respect to training addressed to a one nationality audience, as for the material to be provided. Since the aim of the training is to foster knowledge and understanding of the legal systems of the other member states, this could logically imply that material could be provided in a foreign language.

The Handbook produced in the framework of the EUPenTRAIN project was drafted in English. The crucial issue of the terminology to be employed, especially when dealing with principles having a non-perfectly correspondent scope in the legal systems analysed in the project, had to be solved by the authors. It was considered that it was in line with the aim of the project to stick on the terminology generally employed in legal texts adopted at EU level. Indeed, it is the scope of the principle as it is established at the European level which is taken as the 'common core' with respect to which solutions at national level are analysed. Moreover, the practice-oriented approach of the training curriculum proposed implies that it is not the aim to define the principles at stake but to show all practical implications and so also how they can result in a tool for practitioners' daily activity.

Contents and structure of the curriculum

The proposed curriculum consists of nine modules: one introductory module, seven principle-based modules and one special part module dealing with the PIF sector

The *introductory module* covers the main *EU general principles having an impact on criminal law* and it aims to give a general overview of the main dynamics of EU law. The principle-based modules cover *the main EU criminal law principles*. A *special part module* is devoted to PIF offences (the pilot sector of the training).

In particular, *as regards the seven principle-based modules* they focus on principles that essentially correspond to the list of rights in Chapter 6 of the Charter of Fundamental Rights of the EU (devoted to rights dealing with Justice). However, provisions in this chapter of the Charter are not considered as the list of fundamental rights but as the list of most well-established *EU criminal law principles* (except for the principle of guilt/fault whose position in EU legal order is still controversial). This is important to stress since modules also deal with repressive/prosecution

measure, being the core of European Criminal Law. A clear example is the module on proportionality, where the 'obligation to protect with criminal sanction' stemming from this principle is also examined which clearly relies on proportionality as a principle and not as a right.

The model of a 'principle-based training' appears to be the most suitable since it allows to structure and shape the curriculum in a way that better shows commonalities. Moreover, it allows to properly deal with a number of crucial practical issues addressed in many of the modules focusing on different aspects of the same. An interesting example is the topic of the European arrest warrant that, after being considered as the crucial reference when dealing with the principle of mutual recognition, is to be analysed also in the framework of the module on legality (because of the issue of complying with this principle when looking at the list of the 32 offences for which requirement for double criminality has been overcome); in the framework of module on proportionality as a limit to fundamental rights limitations; and also in the module on defence rights.

The unique module proposed with respect to what is generally called the 'special part' of criminal law is devoted to the PIF sector, the core of the EPPO's scope of competence. However, focusing on the PIF sector is also logical when considering that financial interests of the EU have always been considered an 'avant-garde' sector when dealing with harmonization of member states criminal law justice, and more generally, when dealing with relation between EC/EU law and criminal law. It is worth recalling that the first proposal put by the Commission to amend the Rome Treaty so as to guarantee a criminal law protection of the European budget dates back to 1976. This proposal relied on the 'assimilation' of the European financial interests with member states's ones – and the extension that follows of the scope of national criminal law offences protecting national budget. While this proposal was abandoned without being even discussed by the Council, judicial activism of the Court of Justice produced especially interesting outcomes during the 1980s concerning harmonizing competence of the European Community based on the general provision of Article 5 TEC (of the Rome Treaty, then Article 10 TEC),[20] and then on the specific provision of Article 209A TEC replaced by Article 280 TEC. The protection of financial interests of the Union through criminal law measures was again under the spotlight in 1995, since it was the object of the first legal text adopted in the framework of the third pillar inaugurated by the Maastricht Treaty (Article K1, n. 5 TEU) – the Convention on the protection of the European Communities' Financial Interests (the PIF Convention),[21] binding member states to establish certain behaviours affecting European financial interests as criminal offences at the domestic level. The PIF Convention is still in force and it will be replaced only starting from 6 July 2019 by the PIF Directive adopted on 5 July 2017.

Therefore, the PIF sector is also the area allowing the best understanding of the long path which brought to the progressive establishment of what we call nowadays the 'European criminal law' and will provide also with the necessary 'historical perspective' for practitioners involved in the project about the progressing setting up of a European Criminal Law. Because of the specific focus on the EPPO and its scope of competence, topics concerning PIF offences and competent institutions are also presented in the introductory module and also developed as transversals issues in the principle-based modules, as a subject matter of basic seminars or workshops.

20. A leading case is CGUE C-68/88, *Commission v. Greek Republic* [1989] ECR I-2965 f.
21. OJ C 316, 27 November 1995, 48. The Convention was joined by two protocols: the first protocol adopted on 27 September 1996, dealing with corruption of European or national officials managing European funds (OJ C 313, 23 October 1996, 1); and the second protocol adopted on 19 June 1997, binding member states to establish criminal sanctions for money laundering of proceedings of offences of frauds to the European budget, together with obligation to confiscate and to provide for responsibility of legal entities (OJ C 221, 19 July 1997, 11).

Notwithstanding, national authorities are free to integrate the proposed curriculum with further special part modules dealing with offences/criminal phenomena other than PIF offences, presenting a transnational dimension, and that could benefit from a training as the one proposed, provided that these additional modules are set up following the structure and methodology proposed. In particular, the possibility to extend the competence of the EPPO to terroristic offences is currently debated – something which would require that an amendment of the Regulation is adopted through unanimity of the member states.[22]

The structure of the curriculum as presented above is conceived as flexible, in order to easily adapt the training to different categories of practitioners. More precisely, the nine modules are conceived as possible autonomous training modules. As an example, a short training curriculum could be implemented by combining the general introductory module (even as a shortened version) with one or more modules. The option of a shortened combination is useful when adapting the training curriculum into continuous training. The introductory module can be implemented also as the content for an autonomous training.

Contents and methodology of the modules

Legal training has always been considered a very sensitive matter and the national authorities are quite jealous of their competence in this field. A training curriculum aiming at approximating some of the contents, and above all the traditional approach of the training needs to take carefully into consideration the necessary discretion which is to be left to national authorities. In this respect, the proposed training curriculum is conceived as a 'framework' curriculum, to be further developed by national authorities. Each proposed module indicates minimum (compulsory) contents of basic seminars and workshops. Then national authorities enjoy a broad discretion to further integrate the training, provided that the approach and structure is preserved.

Each module is divided in two parts. Part I, dealing with the *ius commune* with respect to each principle, covering the core of the principle at the EU level and also the existing/emerging common trends in the member states's legal orders; part II, devoted to issues at the national level not in line with common trends. It is with respect to implementation of this second part that national authorities enjoys wider discretion.

As for part I, contents of basic seminars and workshops rely on the preliminary study mentioned above covering both EU legal order and the seven legal orders of the seven member states involved in the project. With respect to the latter, a special comparative analysis was realized approaching national legal systems with the aim to detect constantly evolving common trends. Then common trends are not only consolidated common trends in a significant number of member states but also trends that can be detected in few member states but indicating a possible evolution in the direction of a common understanding. This way of considering common trends makes the link with part II.

Despite the title 'Special and peculiar national issues', part II is not aimed at focusing and promoting national differences as a value in themselves. On the contrary, these differences are selected to be dealt with in the perspective to skip or at least reduce possible detrimental effects to cooperation and more generally, as situations which should not undermine the overall *ius commune* perspective. This should be the case not only when differences are quite formalistic but also when differences are really essential

22. Whether unanimity required by Article 86.4 TFEU is to be considered as unanimity of the member states participating to the enhanced cooperation, or as unanimity of all EU member states is a lively debated issue at the moment.

– as they reflect the real constitutional identity. The approach should be aimed at avoiding any exacerbation of conflicting aspects and on the contrary finding solutions and interpretations allowing to approach national issues at stake in a *ius commune* perspective. Workshops should also deal with national case law which reflect the interrelated nature of the common legal area.

It is worth noting that a different modulation of contents in the part II is to be considered in case the training curriculum is implemented by a European training agency. Indeed, generally speaking, training provided by European Agencies is more focused on EU level training. This means that part I of the modules will probably be predominant. However, a certain attention and space needs to be granted also to the 'national dimension' covering specific issues being often an obstacle for the smooth functioning of cooperation. This appears necessary in order to foster mutual knowledge and also contribute to mutual trust. Basic seminars and workshops should be able to give an overview of controversial issues concerning more than one legal order that should be examined as sample of national 'specificities'. The aim is to improve mutual knowledge about this critical issues but also to face the question about how they could be bypassed when they are detrimental for cooperation, stressing in contrast those national solutions which are in line with European principles.

As for the methodology, the need is to be taken into consideration to carefully guarantee the best balance between traditional top–down training formula and interactive training where participants can exchange experiences and face concrete practical issues discussing case studies. Indeed, while legal training need to be practice oriented to meet expectations of participants, some top–down training is to be considered an un-eliminable tool for various reasons. Indeed, it cannot be skipped especially because of the need to foster the *ius commune approach* in presenting the basic knowledge of the subject matter concerned. But there are also very basic practical reasons to provide for some top–down training, such as the need to overcome the different level of knowledge by participants about the topics dealt with in the curriculum and also demonstrate the connection between the general principle which each module is devoted to and practical issues and instruments. However, workshops (and other form of interactive training) need to be guaranteed an adequate space. They are to be focused on cooperation instruments and also leading cases establishing principles and standards relevant for cooperation in judicial matters.

Concluding remarks

The recent adoption of the Regulation establishing the EPPO is a crucial challenge that should not be failed. Many significant criticalities are to be denounced about the solutions adopted, which directly flow from the ir-reductable and persistent refusal by the member states to confer true operational powers to a genuine supranational inquiring body. Indeed, the current legal framework for the EPPO risks to not fully implement Article 86 TFEU. The allocation of the decision power, which because of the 'national link' element, finally stays in the hands of the national prosecutors of the State where the main investigations are run, risks to completely affect the aim and the original rationale of the EPPO, laying on the Europeanization/verticalization of investigations. The latter should be conducted by a body having a complete view of the facts, as they are realized on the whole territory of the EU. And above all, investigations on offences affecting the financial interests of the EU should be run by a body that is able to overcome inaction of the member states or even their unwillingness to prosecute, because of the current insufficient awareness about the importance of the illegal acts affecting the financial interests of the EU, or because of possible 'conflicting interests' (in the wide sense) that can arise when taking action to fulfil the obligation to properly protect these interests of the EU. In fact, the current legal framework makes the EPPO to only formally meet the requirements

for this body to be 'responsible for investigating, prosecuting and bringing to judgment the perpetrators of offences against the Union's financial interests' as provided in Article 86 TFEU.

However, progressive improvements can flow from the case law of the Court of Justice. While the general rule about judicial control of acts of the EPPO is that it is up to the national authorities to control procedural acts of the EPPO having an impact on individuals, the Court of Justice is recognized to be competent, in the framework of a preliminary ruling started by a national jurisdiction, for interpreting the regulation itself establishing the EPPO, and especially Article 22 dealing with the material scope of the EPPO, and Article 25 concerning possible conflicts of competence with the competent national authorities, and also for assessing the compliance of the acts of the EPPO with EU law. In addition, one should consider the ordinary competence of the Court of Justice with respect to the provisions of the PIF Directive, which is the main legal reference as for the material scope of the EPPO.

In any case, the significant novelty is to be stressed and fostered: It is the first European inquiring body which is going to be set up, whose members are qualified as European officials and whose material scope is focused on the supranational interest *par excellence*. Establishing an European inquiring authority logically implies to take the path towards a different way to look at 'sovereignty' (covering also the control over the territory) as something that cannot anymore be fully guaranteed by national authorities but needs to find a European dimension which, finally, is the only one that is able to provide a stronger protection to the interests and values that are common to all European citizen. Resistance from the national States to maintain State sovereignty risks to be detrimental to the true protection of citizen which is the core of true sovereignty.

Limitation of the material scope of the EPPO to the PIF sector, while perfectly in line with the provision in Article 86.1 TFEU, and also with its origins in the *Corpus juris* and the lively debate which followed the publication of the document, may not make easily visible to all European citizen the role that such body can play. Something that would certainly change whenever its material scope is extended to other sectors, first of all the fight against terrorism, as it was recently suggested also at a very high political level by the European Commission's President Junker and the French President Macron.

However, the challenge is there. All the necessary efforts need to be made in order to make it possible the smooth functioning of the new body, and finally, the achievement of a true improvement in the cooperation of judicial authorities for fighting against offences to the common budget.

Developing a genuine European legal culture of legal practitioners by fostering awareness of the existing common legal grounds and a collaborative attitude when facing possible differences in national legislations is crucial. Training of legal practitioners, then, should provide not only the necessary knowledge to enhance mutual understanding and full awareness of the European legal context but also foster a different attitude and a different way of thinking of legal practitioners who are confronted more and more frequently with cases having cross-borders elements.

The proposed training curriculum and guidelines intend to actively contribute to such a difficult but challenging goal.

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