DIRITTO PENALE CONTEMPORANEO

MOVING FORWARD ON JUDICIAL COOPERATION IN EUROPE: CAN THE ITALIAN ANTI-MAFIA DATABASE BE TAKEN AS AN EXAMPLE?

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Abstract. *Article 86(1) TFEU provides for the possibility of the establishment of the European Public Prosecutor's Office at Eurojust. However, the reform wished by Article 86(1) needs to be backed by two substantial reforms: the first, is the recognition of more powers to EU agencies; the second, is the creation of an adequate flow of information to the new Prosecutor's office. This article aims at discussing how the further improvement of the European Criminal Record Information System can actually help fight cross-border serious crime. The model suggested by this article is to replicate the Italian anti-Mafia information system to support judicial cooperation in Europe.*

1. Introduction.

The establishment of the four freedoms[1] in the EU not only has contributed to carry lawful activities outside domestic borders, but has also helped the expansion of transnational crimes: indeed, it is now easier for criminals to escape the clutches of domestic crime enforcement by taking advantage of the freedoms of movement[2]. The former statement is particularly true in the case of criminal organisations, as they could expand their business abroad, change the structures of their markets, and evolve simultaneously in different areas[3]. Those factors have been preventing law enforcement authorities to tackle effectively the changing and moving menaces[4]. The same, in fact, could be said for threats related to terrorism, drugs and human

[1] Free movement of goods, people, capitals, services.

[2] STEFANOU, *Databases as a means of combating organised crime within the EU*, Journal of Financial Crime, 2010, p. 101.

[3] Ibid. see footnote 2.

[4] EUROPOL, *Exploring tomorrow's organised crime*, 2015, p. 5 and 11.

trafficking[5]. As a consequence, the EU has the duty to set up adequate policies and measures to combat unlawful use of the four freedoms[6].

Traditionally, the fight to international crime is carried on by means of judicial cooperation, which consists of bilateral or multilateral agreements amongst countries[7]: however, this proved to be insufficient, for further tools were developed within the European Union. In particular, the EU set up many instruments that could help Member States (MSs) to coordinate their fight to crime: this process began in 1993 – when for the first time "Justice and Home Affairs" became a formal policy of the Union[8] – and culminated with the adoption of the Lisbon Treaty, which enhanced the competences of the Union in criminal law matters[9]. Alongside the increase in criminal law powers, the Union created bodies and mechanisms to encourage judicial cooperation amongst MSs[10]. As for the use of databases, the Falcone Project[11] revealed for the first time the necessity to set out a common database for combating organised crime within the EU. However, the way the Union set policies to combat crime in its territory has been strongly criticised for the lack of a consistent structure and efficient implementing tools[12].

For the above mentioned reasons, the Commission showed interest in the creation of an EU-wide criminal record. Indeed, the use of bilateral or multilateral agreements became a "logistic nightmare"[13] in the framework of judicial cooperation, which was the reason why so many different instruments of judicial and police cooperation were born in the context of the Treaties – above all Eurojust and Europol[14]. The idea of using interconnected criminal databases to prevent and combat serious transnational crimes was put forward by Stefanou, who, in 1999, presented to the Commission an assessment on the feasibility of the European Criminal Record (ECR)[15], which contained data on criminal convictions for certain types of serious crimes. The

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[5] See Eurojust Annual Report 2014, in particular pp. 27-28.

[6] WADE, *Developing a Criminal Justice Area in the European Union*, study for the Directorate General for Internal Policies of the European Parliament, 2014, p. 24.

[7] CONSO, GREVI, BARGIS, *Compendio di Procedura Penale*, CEDAM Padova, 2012, p. 1100.

[8] KAUNERT, OCCHIPINTI, LÈONARD, *Supranational Governance of Europe's Area of Freedom, Security and Justice*, London, 2015, p. 2.

[9] KAUNERT, OCCHIPINTI, LÈONARD, *Supranational Governance of Europe's Area of Freedom, Security and Justice*, London, 2015, p. 1.

[10] See the next paragraphs.

[11] STEFANOU, XANTHAKI, *Towards a European Criminal Record*, Cambridge, 2008, p. 59.

[12] KAUNERT, OCCHIPINTI, LÈONARD, *Supranational Governance of Europe's Area of Freedom, Security and Justice*, London, 2015, p. 20.

[13] As written by STEFANOU, *Databases as a means of combating organised crime within the EU*, Journal of Financial Crime, 2010, p. 103

[14] WADE, *Developing a Criminal Justice Area in the European Union*, study for the Directorate General for Internal Policies of the European Parliament, 2014, p. 23.

[15] For the complete research, consult STEFANOU, XANTHAKI, *Towards a European Criminal Record*, Cambridge, 2008.

author noted that the use of criminal databases proved to be crucial in investigations[16]: indeed, the possibility to access, find, and cross-check data in a rapid and efficient fashion was key to a successful and fast end of investigations. In fact, Stefanou noted that the success of international investigations against organised crime often depended on the ability to understand information[17], for some types of transnational crimes looked like puzzles, which pieces were hidden in different States.

In the following lines, I will, firstly, outline Stefanou's study and explain the current legal framework and status of information exchange by means of databases. Secondly, I will focus on the role of European agencies, and why I believe that the post-Lisbon regime raised their democratic legitimacy, thus the possibility for them to be conferred with more incisive powers to tackle crime. To that extent, I will discuss in detail Majone's theory, which criticises limitations on power delegation to agencies. Thirdly, I will argue how privacy and human rights in general are better off protected by EU agencies – such as Eurojust. Lastly, under the light of the previous considerations, I will explain how the implementation of the European Criminal Record Information System (ECRIS) could be improved by taking into account the database tailored for Italian anti-Mafia prosecutors. To that extent, I will develop the discourse on the new possibilities offered by the Treaty of Lisbon, and by the legal framework of Eurojust, which is going to be updated by the new Eurojust Regulation.

2. The project of the European Criminal Record.

The study conducted by Stefanou underlined the importance of databases in criminal investigations quoting the example of Scotland Yard, which ability to store data in well-organised databases made it one of the most efficient police authorities in the world, and inspired others to adopt the same system[18]. Particularly, the success of international investigations against organised crime often depended on how quickly and efficiently could police or judicial authorities have access to information[19]. As the four EU freedoms had an impact on the enlargement of the sphere of influence of some powerful illicit organisations, Stefanou's study rationale was essentially to assess the feasibility of a criminal record that could improve judicial cooperation.

That assessment not only showed positive aspects, but also negative ones. In the first place, the author of the research believed that the establishment of a Community database was considered a more realistic project than the institution of a

[16] STEFANOU, *Databases as a means of combating organised crime within the EU*, Journal of Financial Crime, 2010, p. 100.
[17] Ibid. see footnote 16.
[18] Ibid. see footnote 16.
[19] MITSILEGAS, *Databases in the area of freedom, security and justice*, a chapter of the book by STEFANOU, XANTHAKI, *Towards a European Criminal Record*, Cambridge, 2008.

"European FBI"[20], because MSs appeared to have a more favourable approach towards the European Criminal Record idea, rather than the creation of a centralised investigative authority[21]. EU countries also showed interest in the creation of a decentralised database. Indeed, a centralised database would oblige MSs to adopt a shared system of data insertion and storage, which involves not only high costs for both the Union and its countries in terms of time for the adoption of the necessary logistic instruments and resources, but also that would raise issues of duplication of data for domestic and EU databases[22]. On the contrary, a decentralised database would allow EU countries to retain direct control over data entries and distribution[23]. Moreover, according to De Busser, in that way MSs could be held accountable for the management and distribution of information as citizens can directly challenge decisions before national courts[24]. As for the type of crimes contained in such interconnected criminal record, it was considered as preferable to insert only data on *res judicata*, i.e. "final and enforceable" judicial decisions[25]. De Busser also suggested a solution to linguistic problems with a labelling system of crimes: a list of labels for crimes could help to sort out entries in the ECR without the need to adopt harmonised legislation and to translate data[26].

Protection of privacy could be ensured by allowing access to those data only to judicial and investigating authorities both at EU and domestic level, as advised by Stefanou[27]. Also, concerned citizens should be granted access to data to control information and challenge unlawful use of data concerning them[28]. According to the outcome of Stefanou's study, an agency like Eurojust, envisaged as implementing body – or "host" - would better serve privacy protection goals[29]. In fact, Eurojust is a quasi-judicial authority, as it is a *forum of prosecutors and judges*[30] with the expertise to supervise the connection of national databases; hence, it is capable of ensuring the correct balance between protection of human rights and the use of a criminal register[31].

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[20] O'NEILL, *A Europe that protects: moving to the next stage of cross-border law enforcement cooperation*, Police Journal, 2011, p. 125.

[21] Data showed that the level of political consensus was almost unanimous when MSs where asked if they would have preferred judicial cooperation by means of databases. See table in STEFANOU, XANTHAKI, *Towards a European Criminal Record*, Cambridge, 2008, p. 68.

[22] O'NEILL, *A Europe that protects: moving to the next stage of cross-border law enforcement cooperation*, Police Journal, 2011, p. 125.

[23] Ibid. see footnote 22

[24] For further information, read: DE BUSSER, *A European criminal records database: an integrated model*, in STEFANOU, XANTHAKI, *Towards a European Criminal Record*, Cambridge, 2008.

[25] Ibid. see footnote 24, p. 343: the inclusion of intermediary judicial decision would have a detrimental effect for the efficiency of data exchange.

[26] STEFANOU, XANTHAKI, *Towards a European Criminal Record*, Cambridge, 2008, in particular pp. 339-340.

[27] STEFANOU, XANTHAKI, *Towards a European Criminal Record*, Cambridge, 2008, in particular pp. 74 to 76.

[28] Ibid. see footnote 27.

[29] STEFANOU, XANTHAKI, *Towards a European Criminal Record*, Cambridge, 2008, p. 48

[30] Expression used in STEFANOU, XANTHAKI, *Towards a European Criminal Record*, Cambridge, 2008, p. 44: also, see Point 46 of the presidency conclusions to the Tampere European Council, 1999.

[31] STEFANOU, XANTHAKI, *Towards a European Criminal Record*, Cambridge, 2008, pp. 43 to 49.

Having a close look to Eurojust decision[32], it is actually possible to note that this EU agency has its own system for judicial review on data protection[33].

In 2009, the Lisbon Treaty introduced significant changes in the area of freedom, security and justice, which consequences need to be properly assessed. In particular, the post-Lisbon framework not only gave European agencies more legitimisation to carry out their work[34], but it also provided enhanced competence in criminal law for the EU[35]. This might have important consequences for strengthening of powers for agencies like Europol and Eurojust, which were made to improve the level of cooperation among EU countries in the field of security and justice. Although these agencies could have the instruments to perform an effective fight to crime, they have not been explicitly conferred with the enough powers to perform their tasks.

The Stockholm Programme[36] set provisions for the improvement judicial cooperation tools, and mentioned *in primis* the necessity to enhance information exchange in judicial cooperation[37]. The European Council, in fact, invited the European Commission to assess whether the networking of criminal records could help prevent crimes[38]. As a result, the project outlined in Stefanou's research became solid reality with the establishment of ECRIS, which dated back to 2007, when the Council issued a Decision[39] on the EU programme for 'Criminal Justice' for the period 2007-2013. The objective of that Decision was primarily to put into practice provisions of the former Title VI of the Treaty on European Union[40], which contained rules on the creation of an area of freedom, security and justice, and cooperation in criminal matters. Those articles aimed at implementing and improving judicial cooperation by means of mutual recognition of judgements, but also aimed to enhance cooperation in investigations by means of databases[41]. The Council was therefore aware of the importance of creating a common framework of mutual and shared cooperation in criminal matters.

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[32] Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime as amended by Council Decision 2003/659/JHA and by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust (OJ L 138, 4.6.2009, p. 14), Articles 14 to 25.

[33] STEFANOU, XANTHAKI, *Towards a European Criminal Record*, Cambridge, 2008, pp. 46-47.

[34] See paragraph 3 of this article.

[35] See Title V, Chapters 4 and 5 TFEU on judicial and police cooperation.

[36] Stockholm Programme, OJ C115/1.

[37] Stockholm Programme, OJ C115/1, p. 18.

[38] Ibid. see footnote 37, p. 19.

[39] Council Decision 2007/126/JHA establishing for the period 2007 to 2013, as part of the General Programme on Fundamental Rights and Justice, the Specific Programme 'Criminal Justice' [2007] OJ L 58/13.

[40] Now placed in Title V, part three TFEU.

[41] See Council Decision 2007/126/JHA, Recital 7; Art. 2(1)(a), (b) and (c); also, Art. 3(a)(v) ibid. Those provisions ask for a better system of data sharing from national criminal records. This programme is consistent with the adoption of other instruments of judicial cooperation, such as Prüm decision, Schengen, and Stockholm declaration.

In 2009, following the evolution of judicial cooperation tools, the Council issued two Framework Decisions, which posed the basis for the creation of the European Criminal Record suggested by Stefanou. The first of the Framework decisions[42] established measures for the creation of a criminal databases network within the Union, as the interconnection of national criminal records was regarded as a priority by the preamble of the Decision at stake. Council Decision 2009/315/JHA took into account, to a certain extent, what Stefanou wished for: i.e. the creation of a network of existing and already functioning national databases[43]. The second Framework Decision[44] pursued the aim of promoting systematic exchange of data between the competent MSs' authorities. Eventually, ECRIS was established in April 2012 on the basis of a proposal of a "network of judicial registers" put forward by France, Germany, Spain and Belgium[45], and followed later by other EU countries[46]. The purpose of that proposal was the establishment of a network that could connect bits of information contained in MSs' criminal records, in order to let judicial authorities have EU-wide access to data. Technically speaking, ECRIS – reflecting the ECR model by Stefanou – was shaped on a decentralised IT architecture, which linked EU judicial registers by using a standardised format for the transmission of data[47]. Also, crimes and offences were thereby classified by MSs into numerical codes sorted out by category, thus avoiding to the maximum extent possible mistakes arising from the diversity of criminal legislations[48].

Pursuant to Article 13, Council Decision 2009/315/JHA, each MS must take all the necessary measures to implement ECRIS, including the designation of at least one central authority entrusted with the task to manage entries, disclosure, and requests of data[49]. Those central authorities have no direct access to criminal records of other MSs, but have indirect access to those data by means of networking software developed under the joint supervision of the Commission and MSs' representatives[50]. The implementation of the numerical codes used in defining offences in ECRIS, however, is left in the hands of the Council[51], which has the task to consult the EP before adopting changes in relevant Annexes[52].

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[42] Council Framework Decision 2009/315/JHA on the organisation and content of the exchange of information extracted from the criminal record between Member States [2009] OJ L93/23.

[43] Ibid. see footnote 42, Article 3.

[44] Council Framework Decision 2009/316/JHA on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA [2009] OJ L 93/33.

[45] PERONI, GIALUZ, *Cooperazione informativa e giustizia penale nell'Unione Europea*, Trieste, 2009, p. 210.

[46] Ibid. see footnote 45, pp. 210-211.

[47] Council Framework Decision 2009/316/JHA on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA [2009] OJ L 93/33, Art. 3.

[48] Ibid. see footnote 47, Article 4.

[49] Ibid. Article 3.

[50] Ibid. Article 3(6), and (7).

[51] Council Framework Decision 2009/316/JHA, Article 6(2).

[52] Council Framework Decision 2009/316/JHA, Annexes A and B.

These Council Decisions missed the chance to set as host of ECRIS a body with expertise in criminal matters, such as Eurojust. The idea to use an agency as host dated back to the outcome of Stefanou's research, which concluded that the ECR would have its right place in the hands of Eurojust, for the latter is a quasi-judicial authority defined as a *forum of prosecutors and judges that can successfully handle data exchange*[53]. Also, Eurojust is an agency, and by definition it has a certain degree of independence and expertise in its field of competence[54]. Additionally, Eurojust's national members are prosecutors in their countries of origin; hence, they are able to take well-reasoned decisions, making gross misuse of data less likely[55]. Also, in case disputes arise, Eurojust has already set up a mechanism of appeal for its decisions, which can ensure an additional level of protection for EU citizens[56]. Furthermore, Eurojust has adopted core norms for data processing, and by statute the agency is subject to periodical control of its activity by the Council and the EP[57]. For all these reasons, Stefanou considered Eurojust the most suitable EU body to supervise the implementation and the use of a criminal database. Indeed, Eurojust offered guarantees such as high levels of expertise, control, and review of decisions, in the light of Stefanou's analysis.

However, the Treaties do not expressly allow EU agencies – at the present time – to be conferred with sufficient powers to regulate on their own fields of competence, for agencies are limited by the so-called *Meroni* doctrine. As it will be discussed below, the *Meroni* doctrine basically prevents agencies from exercising regulatory powers with a certain degree of discretion; thus restricting European agencies to have almost exclusively executive tasks. Nonetheless, as European agencies flourished, their powers were extended more and more, so much that now the EU has some agencies which have *de facto* truly regulatory powers.

3. European agencies and the Meroni doctrine.

In the last decades, agencies in the EU grew in number and importance[58], yet what are they and what their powers are have not been clearly outlined in the Treaties[59]. It is possible, though, to note that European agencies share a common structure: indeed, they have legal personality, are bodies of secondary EU law, and are permanent independent bodies[60]. The Commission tried to provide a definition of EU agencies by saying that "[a European agency is] *an independent legal entity created by the*

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[53] STEFANOU, XANTHAKI, *Towards a European Criminal Record*, Cambridge, 2008, pp. 44-45.
[54] Ibid. see footnote 53.
[55] Ibid. footnote 53.
[56] Ibid. footnote 53.
[57] Ibid. footnote 53.
[58] GRILLER, ORATOR, *Everything under control? The "way forward" for European Agencies in the footsteps of the Meroni doctrine*, European Law Review, 2010, p. 10.
[59] Ibid. see footnote 58, p. 7.
[60] GRILLER, ORATOR, *Everything under control? The "way forward" for European Agencies in the footsteps of the Meroni doctrine*, European Law Review, 2010, pp. 7 to 9.

legislator in order to help regulate a particular sector at European level and help implement a particular Community policy"[61]. Therefore, agencies help the Union in the implementation of policies for which institutions alone would be insufficient.

The establishment of the first agencies was imposed by the insufficiency of Community's institutions to carry out expanding executive and regulatory tasks[62]. For instance, agencies such as Europol or Eurojust were created to improve coordination amongst Member States in security matters. Nevertheless, despite the practical need of supplementing the Commission's executive competences, the powers held by agencies have been limited by both the lack of constitutional bases and limitations in giving truly regulatory powers to agencies[63]. As a consequence, European agencies have been established using a wide range of different norms in the attempt to justify their existence. Agencies have been created mostly by means of what are now Articles 352 TFEU and 114 TFEU[64]. Under the regime of the Lisbon Treaty, agencies like Europol and Eurojust obtained explicit constitutional recognition[65]: Eurojust's tasks and competences are now listed in both Articles 85[66] and 86[67] TFEU, while Europol's activity is regulated by Article 88 TFEU. The lack of clear constitutional bases for EU agencies has always been the source of their power delegation issues. Moreover, without constitutional bases, it has been impossible to clarify once for all the legitimacy of the administrative practice to delegate powers upon agencies. In this context, the *Meroni* judgement[68] not only did address for the first time the rules on delegation to agencies, but also created a doctrine on delegation, which is still considered as good law by many scholars[69]. The challenge of the next paragraphs is to criticise the validity of the classic *Meroni* doctrine after the adoption of the Lisbon Treaty.

The role of agencies in the EU law-making system has grown considerably in the last years[70]; yet, the question on the legitimacy of the practice to transfer powers

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[61] Sentence contained in the "Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies", COM(2005) 59 final, para 5. See, also, GRILLER, ORATOR, *Everything under control? The "way forward" for European Agencies in the footsteps of the Meroni doctrine*, European Law Review, 2010, p. 6.

[62] HOFMANN, ROWE, TÜRK, *Administrative Law and Policy of the European Union*, Oxford, 2011, p. 285.

[63] Although there are EU agencies classified as "regulatory" by some scholars, such classification does not reflect reality: indeed, those agencies do not have a actual regulatory powers. For further information, GRILLER, ORATOR, *Everything under control? The "way forward" for European Agencies in the footsteps of the Meroni doctrine*, European Law Review, 2010, p. 9.

[64] HOFMANN, ROWE, TÜRK, *Administrative Law and Policy of the European Union*, Oxford, 2011, p. 290.

[65] See Title V, Chapter 4 TFEU.

[66] Art. 85 TFEU: "[…] support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more MSs […]".

[67] Art. 86 TFEU: "In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust".

[68] Joined cases 9 and 10/56 *Meroni v ECSC High Authority* [1957/1958] ECR 133.

[69] See further in this article, paragraph 4.

[70] The traditional delegation system provided by Articles 290 and 291 "has been supplemented over time by European agencies", see HOFMANN, ROWE, TÜRK, *Administrative Law and Policy of the European Union*, Oxford, 2011, p. 241.

upon European agencies was left open by both Articles 290 and 291 TFEU, for they did not clarify the role of such bodies[71] - while they certainly did for the regime of comitology[72]. That was a missed opportunity for the Union to adopt a framework of law that was consistent with the administrative practice. The only solid ground on which delegation theory on agencies found bases was – and it still is – represented by the *Meroni* judgement[73], where the Court posed the foundations for a doctrine that has been used to support the thesis against delegation of powers upon EU agencies. In *Meroni*, the High Authority transferred some powers related to the regulation of ferrous scrap market to two different bodies of private law, under the regime of the ECSC Treaty[74]. First of all, the ECJ held that the delegating act was unlawful because the delegating authority conferred on the delegated bodies more powers than those possessed by the delegator itself under the Treaty[75]. In fact, the delegated bodies were subject to less obligations then the High Authority. Furthermore, the ECJ stated that the delegation of powers at stake was presumed; whereas, the delegating act must transfer "*clearly defined executive powers*"[76]. The Court also noted that the two Brussels agencies had discretionary powers, whereas the Court considered that only the delegation of executive powers would not jeopardise the Community's *institutional balance*[77]. To sum up, the Court stated that in principle delegation was possible, but it should be exercised within certain limits: i.e. a body could not confer upon another more powers than the first had, and that the delegating act should confer non-discretionary and '*clearly defined*' powers.

The central point around which pivots the *Meroni* doctrine is the maintenance of the institutional balance. Delegation, according to the Court's reasoning, can be very different depending on the type of delegated power: in fact, the exercise of strictly controlled executive powers is not capable of endangering the balance of powers set out in the Treaties; while, discretionary powers are considered more dangerous, for the margin of discretion of a given body is very difficult to limit and to define[78]. Consequently, the transfer of powers from a body to another needs to be expressly defined and limited by means of EU primary law. Indeed, the Court noted in *Meroni* that the power given to the Brussels agencies was not possible to be measured on objective grounds[79].

The *Meroni* doctrine has been regulating delegation to agencies since 1958, because the Court used as main argument not a specific written norm of the ECSC Treaty, but rather the general principle of institutional balance, which could be

[71] In the wording of both Articles 290 and 291 TFEU delegation to agencies is not mentioned.
[72] Article 291 TFEU is the new legal basis of comitology after the adoption of the Lisbon Treaty.
[73] Joined cases 9 and 10/56 *Meroni v ECSC High Authority* [1957/1958] ECR 133.
[74] Joined cases 9 and 10/56 *Meroni v ECSC High Authority* [1957/1958] ECR 133, at 135-137.
[75] See case *Meroni* (footnote 73), at 149-150.
[76] See case Meroni (footnote 73), at 152.
[77] Ibid. see footnote 76.
[78] See footnote 76.
[79] Joined cases 9 and 10/56 *Meroni v ECSC High Authority* [1957/1958] ECR 133, at 152.

considered valid regardless of changes in the institutional framework[80]. However, many criticisms arose during the years, as the use of agencies became more and more frequent and the institutional balance protected by the Court in *Meroni* radically changed. Indeed, the two bodies at stake in *Meroni* were bodies of private law; whereas, now EU agencies are bodies of public law, adopted under the framework set out by the Treaties[81]. Furthermore, in 1958, the ECSC Treaty did not provide any rule for delegation of powers[82]; while, at the present time, the delegation of discretionary powers is a practice consistently used at EU level and enshrined in the text of the Treaties[83]. Thus, the institutional balance that the Court protected in *Meroni* does not exist anymore. The criticisms against the supporter of *Meroni* also took into account the fact that, nowadays, in many cases delegation to agencies is stretching to the very limits the *Meroni* doctrine, as some agencies found themselves to have *de facto* decision-making powers[84].

One of the most famous opponents to the *Meroni* doctrine is Majone, whose argumentations are based on Jacqué's concept of institutional balance. The latter held that the European Community was not founded on the classic principle of separation of powers, but rather on the principle of representation of interests[85], which constituted the real dimension of the EU's institutional balance. Jacqué argued that such different concept of institutional balance, under which the EC was organised, was depending on the interests that each institution intended to serve: indeed, he thought that whenever a given domestic interests needed to be conciliated with the Community's ones, the Treaty provided for the Council to legislate[86]. On the contrary, every time a common interest was considered superior to the national interest, the Commission was granted decision-making powers. Therefore, the conciliation of all those interests was a way to check and control powers within the Community[87].

The institutional balance intended in this way gives a picture on how delicate and difficult was to design a different allocation of powers other than the one provided for in the Treaties. Nevertheless, the Community – then, the Union – received more and more competences and functions, which could not be fulfilled merely by the traditional institutions. For this reason, new bodies and administrative settings were created by means of practice or secondary legislation. The framework that was created

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[80] HOFMANN, ROWE, TÜRK, *Administrative Law and Policy of the European Union*, Oxford, 2011, p. 242.
[81] HOFMANN, ROWE, TÜRK, *Administrative Law and Policy of the European Union*, Oxford, 2011, p. 241.
[82] See footnote 80.
[83] The Treaties now provide for delegation of discretionary powers in Articles 290 and 291 TFEU, yet not expressly to agencies. See, 'Delegation and the European Union Constitutional Framework' in HOFMANN, ROWE, TÜRK, *Administrative Law and Policy of the European Union*, Oxford, 2011.
[84] Ibid, see *supra* footnote 83. For instance, the EMEA has been conferred with the task to provide for scientific assessments in order to authorise the use of certain medical drugs. Although its analysis was not binding for the Commission, it has been considered that EMEA's opinions were largely influencing the Commission. There are also many other examples of agencies with *de facto* regulatory powers.
[85] MAJONE, *Delegation of Regulatory Powers in a Mixed Polity*, European Law Review, 2002, pp. 326-327.
[86] Ibid. see footnote 85.
[87] Ibid. see footnote 85.

was substantially different from the one traditionally framed in the theory of the separation of powers by Montesquieu, where, for instance, the three powers where absolute and perfect in their spheres of action[88]. For that reasons, according to Majone, the Union is a peculiar form of mixed polity, where sovereignty was shared amongst the actors of the polity[89], and where powers stemmed by the will of MSs flowed to a plurality of different principals and agents[90]. The problem of delegation in such context became a matter of life or death especially in the framework of the establishment of the internal market in 1992, as the Commission asked for help to effectively enforce Union's law[91].

The first proof that a centralised decision-making process was not adequate to rule the internal market came with the "mad cow" disease case, when Union's institutions acted with a considerable delay[92]. In that case, as Majone argued, the recourse to comitology committees did not solve problems of accountability, transparency and efficiency of decision-making; on the contrary, according to Majone, comitology increased uncertainty and disagreement amongst experts, as they were not trying to pursue shared interests, but national ones[93]. At that time, the Commission implemented a system of delegation of powers based on the use of committees (comitology) for assistance in the exercise of its functions[94]. Comitology has now reached full constitutional recognition by means of Article 291 TFEU. Majone commented negatively on comitology by saying that experts in committees tended to defend national interests rather than Community's general interests. On the contrary, he argued, agencies' experts would be more independent. Therefore, in general, the creation of EU independent agencies with true law-making powers – or at least a more incisive decision-making power – would be preferable. Also, Majone notes that comitology lacked transparency, which constituted part of the democratic deficit of the Union[95].

Another problem that Majone noted was that the Commission has "*reached the limits of its regulatory capacities*"[96]; indeed, delegation has been widely used within the

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[88] MAJONE, *Delegation of Regulatory Powers in a Mixed Polity*, European Law Review, 2002, in particular p. 325 and p. 327.

[89] MAJONE, *Delegation of Regulatory Powers in a Mixed Polity*, European Law Review, 2002, in particular, pp. 326 and 327.

[90] See *supra* footnote 89.

[91] MAJONE, *Delegation of Regulatory Powers in a Mixed Polity*, European Law Review, 2002, p. 329.

[92] Ibid. footnote 91.

[93] Ibid. footnote 91

[94] Briefly, comitology can be explained as follows: committees are appointed with advisory or executive tasks by the Commission, and are composed by representatives appointed by MSs, who are advising the Commission on specific subjects according to different procedures that changed over the decades. For more information about the current status of comitology see: Regulation 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L55/13; 'Delegation and the European Union Constitutional Framework' in HOFMANN, ROWE, TÜRK, *Administrative Law and Policy of the European Union*, Oxford, 2011.

[95] MAJONE, *Delegation of Regulatory Powers in a Mixed Polity*, European Law Review, 2002, p. 327.

[96] MAJONE, *Delegation of Regulatory Powers in a Mixed Polity*, European Law Review, 2002, p. 330.

Union, and many agencies with quasi-regulatory powers were created to cover those areas where the Commission was not acting effectively[97]. Thus, Majone's idea was that European agencies could help more the Commission in carrying out its tasks with independent expertise; moreover, agencies could really reduce the administrative overload of the Commission, much more than comitology does[98].

Majone discussed the role of European agencies in 2002; now, under the regime of the Lisbon Treaty, the European Parliament actually gained more power in the establishment of EU agencies. It is a matter of fact that, after Lisbon, the legal bases, under which agencies are adopted, are changed[99]. Now both the Council and the EP have a say in enabling acts for agencies. Thus, the Union's framework on agencies started slightly to move towards the direction wished by Majone[100]. Indeed, there has been a considerable growth of agencies with quasi-regulatory powers[101]. Those agencies have a great influence over the Commission, when the latter adopts their own decision, because they often deal with technical regulations for which is required specific expertise – which often the approving Commission's members do not have. Therefore, the Commission, when approving drafts, has in practice little say over their decisions about complex technical matters. This created many doubts as to the accountability and control of those types of agencies, for they do actually have regulatory powers, although it is not set out by the Treaties and it is in principle contrary to the *Meroni* doctrine.

4. Majone criticised.

In the academic world, Majone's theories created disagreement, which was expressed by Griller and Orator[102]. Although they recognised that the Lisbon Treaty allowed more extensive delegations of powers to other EU bodies, they stated that, since EU agencies were not expressly included in those set of norms, delegation to such bodies was not possible[103]. The two authors used *Romano*[104] to state the validity of Meroni as good law for the present days. The ECJ, in *Romano*, reached the conclusion that the lawfulness of delegation of powers was subject to the condition of being

[97] Ibid. see footnote 96. For instance, civil aviation, food safety regulation, etc.
[98] Ibid. see footnote 96.
[99] Now agencies are adopted mostly under Articles 114 or 100 TFEU, which both provide for a joint action of the Council and the European Parliament, in contrast with the previous regime set out by (now) Article 352 TFEU.
[100] MAJONE, *Delegation of Regulatory Powers in a Mixed Polity*, European Law Review, 2002, p. 331.
[101] CRAIG, *EU Administrative Law*, Oxford, 2012, see chapter 'Agencies'.
[102] GRILLER, ORATOR, *Everything under control? The "way forward" for European Agencies in the footsteps of the Meroni doctrine*, European Law Review, 2010, 3.
[103] GRILLER, ORATOR, *Everything under control? The "way forward" for European Agencies in the footsteps of the Meroni doctrine*, European Law Review, 2010, pp. 18-22.
[104] Case C-98/80 *Romano v Institut National d'Assurance Maladie-Invalidité* [1981] ECR 1241.

expressly stated by the Treaties, as protection of the institutional balance[105]. What Griller and Orator found interesting was the fact that the Court in that case did not mention *Meroni*: i.e. the *Meroni* doctrine had to be regarded as stating principles that are generally applicable in EU law[106].

Furthermore, according to Griller and Orator, the ECJ's case law was aimed at limiting the delegation of powers with the goal to protect the Commission's prerogatives. Indeed, the Commission clearly demanded for the defence of its executive tasks against the fragmentation that would be caused by a more generous approach of delegation of powers. In addition, the authors explained that agencies with *de facto* regulatory powers, such as CPVO, operated in less important fields of EU policy, demonstrating that delegation of more powers to agencies represented an exceptional circumstance. In the light of those statements, Griller and Orator endorsed the role of the Commission as the only trusted player in the context of delegation of powers, and rejected Majone's argument because it was not backed by proper bases in the Treaties[107] and in the case law.

Nevertheless, Griller and Orator did recognise the necessity to make more flexible the constraints of the *Meroni* doctrine; also, they stated the need to preserve the Commission's leading position, keeping strict to the wording of the Lisbon Treaty[108]. However, the most recent development in the CJEU's jurisprudence showed that the Luxembourg Court seemed to move towards the directions pointed by Majone. Griller and Orator justified the fact that some agencies have *de facto* regulatory powers by saying that those agencies worked in subordinate fields of Union policy; by contrast, the so-called ESMA case[109] showed that agencies with strong decision-making powers have been created also in strategic areas of Union competence.

5. Was Majone right? The latest development in delegation to EU agencies in the light of the "ESMA" case.

The latest developments show that administrative practice within the EU tends to move towards a more extensive delegation of powers to agencies, being the constitutional background different to the one in *Meroni*. In the latest case on delegation of powers to agencies[110], the CJEU posed the basis for a possible update of the *Meroni* doctrine. In this case, the UK brought proceedings before the Court against

[105] GRILLER, ORATOR, *Everything under control? The "way forward" for European Agencies in the footsteps of the Meroni doctrine*, European Law Review, 2010, p. 18.
[106] Ibid. p. 21.
[107] Ibid. p. 27.
[108] Ibid. pp. 27 to 30.
[109] Case C-270/12 *UK v Parliament and Council* [2014] OJ C85/4.
[110] Case C-270/12 *UK v Parliament and Council* [2014] OJ C85/4.

a norm contained in a regulation[111], which apparently gave to ESMA[112] wide discretion in the regulation of short-selling assets. The UK's claim was based on the fact that such level of discretion was, first of all, contrary to the principles set in *Meroni*, because it was too broad and based on subjective evaluations; second, the UK claimed that ESMA could adopt decision with the "force of law", thus contrary to the Romano judgement[113]. Moreover, the UK claimed that delegation of powers was limited by the wording of Articles 290 and 291 TFEU, and it was therefore not possible respectively to delegate powers or implementing functions upon bodies different from those listed thereby[114].

Disregarding AG's opinion[115], who basically stuck to the old *Meroni* doctrine, the Court held that the conferral of decision-making powers to a Union body was possible if the latter was established by EU legislation[116] within defined boundaries set by the establishing act[117]. On the contrary, in *Meroni* the "Brussels agencies" were bodies of private law established by the High Authority, thus there was a substantial difference in the nature of the legal act from which stemmed their power[118]. Moreover, the Court held that ESMA's powers were well-defined and limited in scope[119], thus respecting *Meroni*. The Court recognised the possibility that such pre-defined delegated powers could produce individual decisions as well as acts of general application for the purposes of market law harmonisation, for ESMA's powers were triggered in case of national authorities' inaction – hence, ESMA's measures were subsidiary[120].

The UK also claimed that, under Lisbon, the delegation for the adoption of legally binding acts fell outside the scope of Articles 290 and 291 TFEU. The Court held that, although it was not expressly enshrined in the wording of the Lisbon Treaty, the delegation of powers to bodies not mentioned by Articles 290 and 291 TFEU was possible[121]. The Court reached that decision by reading Article 263(1) TFEU, which allowed judicial revision of decisions adopted by Union agencies[122]. The Court critically assessed the provision of Article 263(1), holding that judicial review of acts adopted by agencies would be useless if those acts had no binding effects[123]. Furthermore, the

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[111] Regulation 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps [2012] OJ L86/1, Art. 28.
[112] European Security and Markets Authority.
[113] Case C-270/12 *UK v Parliament and Council* [2014] OJ C85/4, paras 27 to 40.
[114] Ibid. footnote 113, in particular paragraph 69.
[115] Case C-270/12 UK v Parliament and Council [2014] OJ C85/4, Opinion of AG Jääskinen.
[116] Case C-270/12 UK v Parliament and Council [2014] OJ C85/4, paragraph 41.
[117] Ibid. paras 53-54.
[118] Ibid. para 43.
[119] Ibid. paras 44 to 53.
[120] Ibid. paras 100 to 115.
[121] Ibid. para 79.
[122] Ibid. paras 80-81.
[123] Ibid. see *supra* footnote 122.

Court noted that decision-making powers were delegated to ESMA in a context where particular technical decisions needed to be taken by highly qualified expertise[124].

In this judgement the Court made clear that limits of the *Meroni* doctrine needed to be updated – or at least considerably loosened – and contextualised to the post-Lisbon legislative framework. Indeed, the CJEU opened new chances for delegation of powers with a wide margin of appreciation to agencies, as long as they were clearly-defined in advance by Union's law. In my opinion, this decision of the Court could pave the way for the long-awaited update of *Meroni*, and the recognition of wider delegated powers to agencies. In the light of the outcome of ESMA case, a delegation of truly regulatory powers to Eurojust for the implementation and management of ECRIS would not alter the current institutional balance provided for in the Treaties.

6. The protection of privacy and human rights

Processing information – in particular personal data – raises concerns over the protection of the right to privacy, which is recognised with the status of fundamental human right by Article 8 of the European Convention of Human Rights (ECHR). Article 8(2) ECHR allows restrictions to privacy "in accordance with the law" for a specific number of reasons, amongst which there are national security, public safety, and prevention of crime. The concept of privacy is inevitably linked to the idea of what constitutes personal data: the European Convention 108[125] gives a broad concept of personal data[126], and it also sets guidelines on minimum safeguard requirements, such as the obligation for States to ensure that national laws offer adequate guarantees and remedies for citizens[127].

The accession of the Union to the ECHR is formally established by Article 6(2) TEU, but the conclusion of the process is still far[128]. In 2000, the Union made its first steps for the recognition of the rights contained in the ECHR with the adoption of the Charter of Fundamental Rights[129] (CFR) – also known as "Nice Charter"[130]. The CFR

[124] Case C-270/12 UK v Parliament and Council [2014] OJ C85/4, paras 82-86.

[125] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data 108/1981 of the Council of Europe.

[126] It includes all kinds of information related to an individual. See, Art. 2(a) Convention of the Council of Europe 108/1981, as reported in DI PAOLO, *La circolazione dei dati personali nello spazio giudiziario europeo dopo Prüm*, in RAFARACI, *La cooperazione di polizia e giudiziaria in materia penale nell'Unione Europea dopo il trattato di Lisbona*, Milano, 2011, p. 186.

[127] Council of Europe, *Handbook on European data protection law*, 2014, p. 144.

[128] Nonetheless, the Court, in Opinion 2/13 of 18 December 2014, objected the Union's accession to the ECHR. In that opinion, the Court basically reaffirmed the principle of supremacy of EU law: in the Court's view accession to the ECHR would bring to conflicts of powers between the EU and the ECHR. Therefore, despite the crystal clear wording of the Treaties, it appears that full accession to ECHR by the EU is still under discussion.

[129] Charter of Fundamental Rights of the European Union [2010] OJ C83/02.

[130] LENAERTS, VAN NUFFEL, *European Union Law*, London, 2011, p. 830.

elevated the protection of personal data to the rank of fundamental right, as it possible to see by the wording of Articles 7 and 8 CFR. Moreover, the Union adopted a series of laws intended to provide full and adequate protection of personal data. However, the EU legal framework on data protection is too broad to be taken into account for the activity of Eurojust; indeed, Directives 94/46/EC and 2002/58/EC, and Regulation 45/2001 do not contain specific provisions for data processed in criminal justice matters. The Commission stated the importance of finding the best balance possible between the demand of high level of security for citizens and protection of privacy[131]; this statement underlined the significance of the adoption of specific provisions for the protection of personal information in the context of cooperation in criminal matters[132]. Indeed, Directive 95/46/CE on the protection of personal data was not a sufficient to guarantee protection in the context of criminal proceedings[133]. Therefore, ad hoc provisions with high-level protection needed to be included in the Eurojust Decision on the light of the agency's peculiar tasks[134]. To that extent, Framework Decision 2008/977/JHA contains specific provisions on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, yet those provisions are too general to be a sufficient legal framework for the nature of Eurojust's work[135].

Data protection in the field of police and justice is a specific subject that requires particular attention and care. Eurojust worked on a robust tailor-made highly protective regime contained in Article 14 to 25 of Eurojust Decision. The kind of data processed by Eurojust regards persons who, under the national legislation of MSs concerned are suspected of having committed or having taken part in a criminal offence in respect of which Eurojust is competent, or have been convicted of such an offence[136]. Under the Decision at stake, Eurojust is committed also to respect the principles of necessity, of adopting equivalent level of protection to that of Convention 108, and of proportionality[137]. With the first[138], Eurojust processes personal data insofar as it is needed to achieve its objectives. With the second[139], Eurojust binds itself to the

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[131] DI PAOLO, *La circolazione dei dati personali nello spazio giudiziario europeo dopo Prüm*, in RAFARACI, *La cooperazione di polizia e giudiziaria in materia penale nell'Unione Europea dopo il trattato di Lisbona*, Milano, 2011, p. 196.

[132] Ibid. see *supra* footnote 131, p. 199.

[133] Ibid. see footnote 132.

[134] Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime as amended by Council Decision 2003/659/JHA and by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust (OJ L 138, 4.6.2009, p. 14), Articles 14 to 25.

[135] Council Framework Decision 2008/977/JHA, Recital 39.

[136] Article 15 EJ decision. Originally, the text of the article indicated people who have been subject to criminal investigations, victims, witnesses, and persons; however, this list was considered to be too restrictive to be complied with. See Data protection document, p. 9. Also, Article 15 lists all the type of data that Eurojust can rightfully handle.

[137] Article 14, Eurojust Decision (footnote 134).

[138] Article 14(1), Eurojust Decision.

[139] Article 14(2), Eurojust Decision.

respect of the provisions contained in Convention 108, a landmark in data protection for judicial cooperation in Europe, as seen above. With the third[140], Eurojust uses those data when they are relevant and not excessive in relation to the agency's competences.

In addition to the above mentioned principles, Eurojust not only did limit the scope of data processing, but also it limited time frame. Indeed, Article 21(1) Eurojust Decision states as follows:

> "Personal data processed by Eurojust shall be stored by Eurojust for only as long as is necessary for the achievement of its objectives"

This means that whenever a case is closed, Eurojust has no title to retain data on that specific case. Article 21(2) lists criteria under which data shall be deleted: when the prosecution to which they relate is barred under the statute of limitations, when a judicial decision has become final, and when coordination of the case by Eurojust is no longer necessary. If any of these conditions is met, Eurojust should not retain data; nonetheless, data on closed cases can still be useful in future investigations, and provide precious pieces of information, thus previous authorisation by the National Members concerned is required whenever data retention is useful for the fulfilment of Eurojust's objectives. Further protection of the time limit observance for storage of information is offered by Article 21(3)(a), which provides that data should be reviewed every three years.

Moreover, Eurojust recognises rights to access, correction and deletion of data for individuals under the provisions listed in Articles 19 and 20 Eurojust Decision. These rights need to be balanced with the demands of criminal prosecutions; indeed, Eurojust has the power not to grant access in cases where access to information may jeopardise one of Eurojust's activities, or may jeopardise any national investigation, or may jeopardise the rights and freedoms of third parties[141]. An additional safeguard to individuals' rights is Article 19(3) of Eurojust Decision, which allows concerned parties to request correction, blockage, or deletion of data that are incorrect or incomplete. Furthermore, Eurojust appointed a Data Protection Officer[142], in compliance with Article 24(1) of Regulation 45/2001, which prescribes each Community institution or body to designate at least one person with the role of officer protecting personal information. The Data Protection Officer has the duty to supervise how data are processed at all levels within Eurojust, and has also the task to inform the College and the Administrative Director of the status of data protection[143]. It is therefore clear that Eurojust has set up a complete, strong, and specific legal framework to ensure that information is protected as much as possible. Those rules make the agency a reliable host for ECRIS, and they can ensure that the enhancement of such an instrument is carried out in a responsible fashion.

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[140] Article 14(3), Eurojust Decision.
[141] Article 19(4)(a), (b), and (c), Eurojust Decision.
[142] Article 17, Eurojust Decision.
[143] Article 17(2) and (4), Eurojust Decision.

In my view, this set of norms for data processing not only provides a formal protection of personal information processed in Eurojust's investigations, but also guarantees substantial safeguards, like the establishment of the Joint Supervisory Body in Article 23, and the Data Protection Officer in Article 17. The previously analysed Council Decision on the establishment of ECRIS [144], on the contrary, does not provide any such guarantees for individuals' privacy. Indeed, in the wording of ECRIS's founding Directive, there is no mention of protection of privacy. Consequently, entrusting a body – such as Eurojust – that has already set rules and remedies for privacy protection can only be beneficial. Additionally, an instrument like ECRIS in the hands of Eurojust would better serve its purposes, for the agency at stake has the required expertise and could make proper use of the data contained therein.

The rule of law is important for democratic society, especially in the application of norms of criminal law; therefore, derogations on human rights, such as privacy, need to be justified in the light of clearly-defined rules. Also, the case law on right to privacy states the importance of the application of the principle of proportionality, which assures guarantees as to the respectful balance of the interests at stake when breach of privacy are needed[145]. The combination of compliance with both the 'rule of law' (or principle of legality) and proportionality needs to be balanced by a competent body, like Eurojust. Indeed, an independent agency with a Data Protection Officer could better satisfy the requirements of analysing and balancing conflicting interests in the use of data[146]. In the CJEU jurisprudence, the Luxembourg Court held[147] that 'complete independence', as stated by Article 28(1) of the Data Protection Directive[148], is fundamental for supervisory bodies, as they are compelled to act with objectivity and impartiality. That obligation was valid for supervisory bodies in MSs, but it is likely that bodies at EU level have to meet the same requirements. In my opinion, Stefanou was right when he pointed out that Eurojust should be the authority – or *host*[149]– controlling how data are processed in the use of the ECR. Indeed, the choice that it is for the European Commission to set up rules for protection of data does not ensure the same level of independence as the choice of a European agency[150]. The CJEU has also excluded the possibility of an interference by the States or Regions in supervisory authorities, for the Court considered that to be "*external influence*"[151]; thus, it is possible to note how the choice of the Commission to deal with ECRIS was not the best possible solution, and should instead be corrected with the entrustment of Eurojust for that matter.

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[144] See paragraph 2 of this paper.
[145] For further information, see Case C-28/08 P *Bavarian Lager v Commission* [2010] OJ C 234/3.
[146] STEFANOU, XANTHAKI, *Towards a European Criminal Record*, Cambridge, 2008, p. 85.
[147] Case C-518/07 *European Commission v Germany* [2010] OJ C 113/3, paras 17, 27 and 29.
[148] Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.
[149] STEFANOU, XANTHAKI, *Towards a European Criminal Record*, Cambridge, 2008, p. 48.
[150] MAJONE, *Delegation of Regulatory Powers in a Mixed Polity*, European Law Review, 2002, 319.
[151] Case C-518/07 *European Commission v Germany* [2010] OJ C 113/3, para 25.

In conclusion, EU law has still a fragmented legal framework on protection of personal data, meaning that there could be possible risks for privacy in processing ECRIS data. Indeed, the implementation system of ECRIS was considered by the European Association for the Defence of Human Rights (AEDH) not to provide sufficient levels of protection and control of data contained therein, thus posing new challenges for the protection of privacy. The AEDH suggested entrusting the Commission with the management of such database, from rules of harmonisation to the coordination of the network[152]. However, I believe that Eurojust could ensure better protection of privacy, for it has already adopted norms on protection of data in the area of judicial cooperation. In the Council Decision on Eurojust[153], there are detailed norms on exchange of information between Eurojust, and MSs[154] that seek bits of information. With the adoption of ECRIS, it would be possible to by-pass the authorisation request phase, as the MS would have already selected and put the relevant information in the EU-wide database. If the ECRIS network could be included within the framework of Eurojust, the agency would dispose information in a more immediate way, without jeopardising the right to privacy.

7. A proposal for the enhancement of ECRIS.

As we noticed in the previous paragraphs, the Union's legal framework has clearly been moving towards the delegation of more and more powers to EU agencies, as the regulatory competences of the Union grew. Power delegation to agencies has been part of the Union's administrative practice, yet it has not been backed by proper recognition in primary EU law. The Court recognised this practice as legitimate in the recent ESMA case, which allowed the loosening of the limits posed by the old *Meroni* doctrine[155]. Moreover, Article 85(1) TFEU states that the European Parliament and Council shall determine Eurojust's structure, operations, and tasks by means of regulation under the ordinary legislative procedure[156]. In 2013, the Commission proposed a regulation on Eurojust, which is still under discussion. The aim of the new regulation would be to remove obstacles to the efficient functioning of the agency[157]. The fact that now Eurojust can be reformed under the ordinary legislative procedure – which, after Lisbon, sees the European Parliament and Council acting as peers – really does increase considerably democratic legitimacy. For these reasons, it would be

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[152] AEDH Communication, *The European Criminal Records Information (ECRIS) creates new risks for the protection of personal data* of October, 23rd 2008.

[153] Council Decision 2002/187/JHA setting up Eurojust with a view of reinforcing the fight against serious crime [2002] OJ L63/1 as amended by Council Decision 2009/426/JHA [2008] OJ L138/14.

[154] Council Decision 2002/187/JHA setting up Eurojust with a view of reinforcing the fight against serious crime [2002] OJ L63/1 as amended by Council Decision 2009/426/JHA [2008] OJ L138/14, Article 13.

[155] See paragraph 5 of this paper.

[156] See Articles 289(1), and 294 TFEU.

[157] COM(2013) 535 final, p.2.

appropriate to start a debate over the strengthening of Eurojust's powers, when a draft Eurojust Regulation is under analysis: it could be a good chance for suggesting the entrustment of ECRIS to Eurojust, which may also shape it according to its needs. The goals of the new regulation, which are relevant to the extent of the present article, are: first of all, to increase the efficiency of the European agency at stake; second, to define more clearly status and powers of National Members; third, to provide participation for both the European Parliament and national Parliaments to Eurojust's activity[158]. Also, another important objective set out by the draft regulation is the improvement of privacy protection provisions: the proposal would be to take into account the principles enshrined in Regulation 45/2001[159], as legal basis for data processing[160].

Under Article 21 of the draft new regulation, MSs shall exchange information with Eurojust, but this provision does not differ too much from the current Article 13 of the Eurojust Decision[161]. Therefore, on the light of the considerations made in the previous paragraphs, it would be preferable to set up an information system, which could provide direct and ready access to data for Eurojust. In this manner, there could be considerable development and evolution in the tools available to carry out judicial cooperation. With the entrustment of a comprehensive ad hoc database, Eurojust could become a real player in judicial cooperation, for nowadays it is not thinkable to combat crime without closely cooperating with foreign judicial authorities. Obviously, it is not easy to convince MSs to share – or give away – some of their crime enforcement powers or knowledge. The establishment of a networking database, according to Stefanou's ideas[162], would enhance considerably the powers of Eurojust.

As seen above, the evolutionary trend of judicial cooperation in Europe showed that there has been considerable interest in information exchange. In fact, in 1998, before the establishment of Eurojust, the creation of the European Judicial Network (EJN) raised the issue of transferring information among judicial authorities in a timely and secure manner[163]. Also, data exchange seems to be a crucial topic under Article 3 of Decision 2009/426/JHA, as it states priority over the improvement of data processing and movement. To that extent, improvement can be achieved in three different fields: first of all, 'asymmetry' in the way information is exchanged amongst States should be overcome by adopting a more consistent system; second, a common strategy on judicial cooperation should be adopted in order to encourage judicial authorities to have a more favourable attitude towards cooperation; third, a specific legislative system should back the development and promote cooperation of police and judicial

[158] COM(2013) 535 final, p. 4.
[159] Regulation 45/2001, OJ, L 8, 12/01/2001, p.1.
[160] COM(2013) 535 final, p. 5.
[161] Council Decision 2002/187/JHA setting up Eurojust with a view of reinforcing the fight against serious crime [2002] OJ L63/1 as amended by Council Decision 2009/426/JHA [2008] OJ L138/14.
[162] See paragraph 2 of the this article.
[163] Joint Action of 29 June 1998, 98/428/JHA, OJ L 191/4, Art. 10(1).

authorities[164]. In 2011, even the European Parliament reinforced the former statements in its resolution against organised crime[165].

The new legal framework for agencies and the number of documents produced by EU bodies with the purpose to enhance judicial cooperation are certainly good grounds to start a discussion about the enrichment of ECRIS and other databases. Particularly, it would be advisable to entrust Eurojust with the power to run and administrate ECRIS. First of all, Eurojust is an agency with expertise, which can properly exploit the potential offered by EU-wide criminal record database[166]. Second, now EU agencies enjoy a legal framework which could theoretically allow them to have more influence, especially because of more democratic bases[167] and the possibility to delegate more powers upon them[168]. Third, Eurojust can adequately guarantee the protection of privacy[169].

EU action in criminal law is also limited to what is often defined in the wording of the Treaties as "serious crime"[170], meaning crimes which represent such a threat that justifies a breach of the sovereignty of a State in the administration of justice[171]. The concept of serious crime can also be found in some MSs[172], and even where it is not possible to find it clearly mentioned in the legislation, it is often possible to note special provisions for crimes that are considered as requiring tougher measures[173]. As it is well-established practice of EU countries to tackle more dangerous crimes in a different manner, it would not be inappropriate for the Union to set up programmes, bodies, and rules that could coordinate those bodies and tackle particular criminal threats, when they assume transnational dimension.

In Italy, a criminal record has been developed ad hoc for crimes committed by criminal organisations in the reforms that brought to the establishment of the so-called *Direzione Nazionale Antimafia*[174]. The idea behind the establishment of the *Direzione*

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[164] EUROJUST, *Enhancing the work of Eurojust in drug trafficking cases*, January 2012, p. 12.

[165] ALFANO, Risoluzione del Parlamento Europeo del 25 ottobre, *Per un contrasto al crimine organizzato e alle mafie*, 2011.

[166] Eurojust is an agency which members are also national public prosecutors. See Council Decision 2002/187/JHA setting up Eurojust with a view of reinforcing the fight against serious crime [2002] OJ L63/1 as amended by Council Decision 2009/426/JHA [2008] OJ L138/14, Article 2(1).

[167] Eurojust is expressly mentioned in the wording of Article 85 TFEU.

[168] See the reasoning of paragraph 5 of this article.

[169] See paragraph 6 of this article.

[170] Article 83 TFEU.

[171] WADE, *Developing a Criminal Justice Area in the European Union*, study for the Directorate General for Internal Policies of the European Parliament, 2014, p. 12.

[172] For example, in Germany. WADE, *Developing a Criminal Justice Area in the European Union*, study for the Directorate General for Internal Policies of the European Parliament, 2014, p. 12.

[173] Ibid. footnote 171, pp. 13 to 15.

[174] The Direzione Nazionale Antimafia is the Italian coordination unit specialised against terrorism and criminal organisations. It was established by law number 8 of 20 January 1992. Members of the Direzione Nazionale Antimafia are appointed to deal specifically with crimes listed by Article 51, paragraph 3-bis, of the Italian Code of Criminal Procedure. Those crimes roughly correspond to the concept of "serious crimes" used by the EU Treaties.

Nazionale Antimafia was to create a network that offered a systematic and specialised answer to the problem. The *'Direzione Nazionale Antimafia*' (hereinafter DNA) has the competence for coordinating prosecutors' action in criminal proceedings related to criminal organisations[175]. The most important novelty of the creation of anti-Mafia prosecutors is the figure of the *Procuratore Nazionale Antimafia*[176] – i.e. national anti-Mafia prosecutor – who has among his/her competences to facilitate coordination of other public prosecutors scattered all over the country. Indeed, The DNA has the task to help coordination of other local units – called *Direzioni Distrettuali Antimafia* – placed in given premises of certain Tribunals[177], as established by Italian law. However, the DNA was not given the competence to initiate investigations for constitutional reasons[178].

Without going too much into the details of the organisation of both the anti-Mafia units, what keeps in close contact and relationship the district areas to the central establishment is a database, which is called with the acronym 'SIDDA-SIDNA'[179]. This acronym indicates that differently based information records are put in communication to form one – the information systems of local anti-Mafia bodies (SIDDA) are linked together by the system hosted in the DNA (SIDNA). This criminal database is a key tool that allows the national anti-Mafia prosecutor to carry out coordination at domestic level[180], for coordination cannot exist without knowledge of the overall situation. The Italian law is clear about that last point: in fact, "il potere della conoscenza" - i.e. the power of knowledge – is one of the prerogatives of the national prosecutor[181]. The most valuable quality that can be said of the anti-Mafia database is that it makes easier for prosecutors to share information and their work[182].

Nonetheless, in order to share this knowledge, the Italian law[183] provided for derogations to the principle that precludes access to information to people who are not

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[175] In the Italian Criminal Code, Article 416-bis enshrines specifically the felony of taking part to a criminal organisation. This is a peculiarity of the Italian criminal system, due to the fact that criminal organisations represented historically a well-known problem.

[176] See Article 371-*bis*, paragraph 1, of the Italian Code of Criminal Procedure.

[177] See Article 70-bis ordinamento giudiziario, as modified by the law establishing the "Procura Nazionale Antimafia" No 8/1992.

[178] Article 101, second paragraph of the Italian Constitution states independence of Italian magistrates, who shall not be subject to any centralised authority in charge to ordinate prosecutors how and when to carry on investigations.

[179] i.e. information system of the district anti-Mafia tribunal (SIDDA), and information system of national anti-Mafia unit (SIDNA).

[180] MARITATI, *Coordinamento delle indagini nei procedimenti per delitti di criminalità organizzata. Il ruolo della DNA*, Quaderni n. 99, II Volume, p. 8.

[181] See Article 371, paragraph 3, letter c, and Article 117, paragraph 2-*bis*, of the Italian Code of Criminal Procedure.

[182] As read in the 2012 annual report on the status of services of SIDDA-SIDNA databases for the Consiglio Superiore della Magistratura, by Cons. Giovanni Russo.

[183] Derogations are established under Article 117, paragraph 2-bis, of the Italian Code of Criminal Procedure.

party in criminal proceedings[184]. Also, in order to ensure that this knowledge is full and up to date, the body entitled to regulate and judge the Italian magistrates – Consiglio Superiore della Magistratura – issued an obligation to update the anti-Mafia database[185]. Moreover, the national anti-Mafia prosecutor has full, and without limitations[186], access to data inserted in the information system SIDDA-SIDNA. The database of Italian anti-Mafia was created and studied to link local databases held in the district tribunals with the central database hosted by the DNA. As explained above, the various local units have the duty to insert data into their information system; then, those data flow to the national database, where they are processed, stored, and made available nationwide.

In conclusion, the SIDDA-SIDNA information system has threefold advantages: first, it clearly speeds up investigations, as public anti-Mafia prosecutors can cross-check and refer to data collected all over the country; second, this database is able to store a huge amount of data, which can be kept for undetermined period of time, thus allowing not to lose track of the phenomenon of criminal organisations or to lose knowledge of previous investigations; last, but not least, the information gathered in the anti-Mafia database come from reliable sources, and are collected according to guarantees provided by law, therefore can be brought as proof before a judge.

8. Is it time for a revolution at Eurojust?

Eurojust and the *Direzione Nazionale antimafia* have common features: in fact, it can be affirmed that both are bodies that were created to promote coordination among criminal prosecutors, and both have no power to independently initiate investigations. Under the Lisbon Treaty, the office of the European Public Prosecutor shall be established at Eurojust[187], this is a figure which can recall the role of the *Procuratore Nazionale Antimafia*. It is obvious that Eurojust and the *Direzione Nazionale Antimafia* cannot really be compared as being akin, yet they do share similar features: those that were grounds to the creation of the Italian anti-Mafia ad hoc database – as seen above. The EU has long been trying to pull the project of creating the office of the European Public Prosecutor in the premises of Eurojust: this proposal has assumed more concrete dimension following the successful constitutionalisation of Eurojust[188].

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[184] This is a principle of Italian law. For further information, CISTERNA, DE LUCIA, Direzione Nazionale Antimafia, Digesto delle discipline penalistiche, UTET giuridica, 2011, p. 162.

[185] Decision of Consiglio Superiore della Magistratura, 26 January 1994, Problematiche relative alla DNA, Notiziario CSM, 1994, 1, 6. See, also, CISTERNA, DE LUCIA, Direzione Nazionale Antimafia, Digesto delle discipline penalistiche, UTET giuridica, 2011, p. 163.

[186] CISTERNA, DE LUCIA, Direzione Nazionale Antimafia, Digesto delle discipline penalistiche, UTET giuridica, 2011, p. 163.

[187] Article 86(1) TFEU.

[188] DE AMICIS, *Il "rafforzamento" di Eurojust nella prospettiva del pubblico ministero europeo: finis an transitus?*, in RAFARACI, *La cooperazione di polizia e giudiziaria in materia penale nell'Unione Europea dopo il trattato di Lisbona*, Milan, 2011, p. 285.

Article 86, paragraph 1, TFEU drafts the establishment of the European Public Prosecutor, who would be responsible for protecting the Union's financial interests and would be in charge of investigations to that extent[189]. As early as in 2003, the Convention on the Future of Europe suggested entrusting the European Prosecutor with the competence to investigate not only for crimes against the Union's financial interests, but also against transnational crimes in general[190]. This idea suffered a setback in 2007, a few years before the entry into force of the amendments to the Treaties made by the Treaty Lisbon, so that the Intergovernmental Conference decided to insert a clause in Article 86(4) TFEU, establishing that the European Council could choose whether the European Prosecutor should also pursue other types of crimes in addition to financial ones: in such a manner, Member States would be in the condition to actually decide what to do in that regard[191].

The office of a public prosecutor at Eurojust still seems a distant possibility, although the powers and abilities of the EU agency for judicial cooperation – and of agencies in general – have increased considerably over the last years[192]. In addition, data show that there has been gradual increase in requests made to Eurojust by Member States[193]. Indeed, from the latest annual reports of the agency, it appears that the operations coordinated by Eurojust increased by 27% between 2003 and 2004[194], by 31% when between 2005 and 2006[195], by 10% in the period from 2007 to 2008[196], an increase by 2.8% from 2012 and 2013[197], and another increase of 14.5% in 2014, thus reaching a total of 1804 cases in 2014[198]. Considering also Decision 2009/426/JHA on the strengthening of Eurojust, it is of paramount importance to build up and tighten international relations amongst prosecutors in the contrast to cross-border organized crime: one may say that globalisation nowadays is forcing law enforcement authorities to have more and more relationships, thus criminal law enforcement sovereignty is shared with other countries[199].

At the moment, Eurojust is considered by European lawyers as an unfinished project[200]; even the European Parliament once complained about the limited powers in

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[189] LENAERTS, VAN NUFFEL, *European Union Law*, London, 2011, pp. 339-340.
[190] Ibid. see footnote 189.
[191] See *supra* footnote 189.
[192] See paragraphs 3 and 5 of this article.
[193] DE AMICIS, *Il "rafforzamento" di Eurojust nella prospettiva del pubblico ministero europeo: finis an transitus?*, in RAFARACI, *La cooperazione di polizia e giudiziaria in materia penale nell'Unione Europea dopo il trattato di Lisbona*, Milan, 2011, p. 286.
[194] Ibid. footnote 193, p. 287.
[195] Ibid. pp. 287-288.
[196] Ibid. p. 288.
[197] EUROJUST, Annual Report, 2013, p. 10.
[198] EUROJUST, Annual Report, 2014, p. 10.
[199] DE AMICIS, *Il "rafforzamento" di Eurojust nella prospettiva del pubblico ministero europeo: finis an transitus?*, in RAFARACI, *La cooperazione di polizia e giudiziaria in materia penale nell'Unione Europea dopo il trattato di Lisbona*, Milan, 2011, p. 290.
[200] Ibid. see footnote 199, pp. 291-292.

conducting investigations[201]. The institution of the European Public Prosecutor, supported by the creation of an adequate database, would certainly revolutionise judicial cooperation within the EU. Stefanou's studies, as well as the current post Lisbon regulatory framework, confirm the fact that the realization of an EU-wide judicial record is not an unrealistic option, yet much still depends on the political debate among EU institutions, Member States, and national judicial authorities. The report of the European Parliament promoted by Sonia Alfano MEP shows that at least the European assembly has the idea to move towards such enhancement of judicial cooperation – in particular of Eurojust's powers[202].

The wording of Decision 2009/426/JHA clearly demonstrates that Eurojust aspires to become a reference point for judicial cooperation in the EU, close to the model of the Direzione Nazionale Antimafia in Italy[203]. The idea of the evolution in the European judicial cooperation on footsteps of the Italian experience found its roots in the text of the Action Plan against organized crime by the EU Council of 28 April 1997[204], long before the establishment of Eurojust. The Action Plan, according to De Amicis[205], took seriously into account the experience acquired by the Italian anti-Mafia prosecutors to propose a model of common and harmonized countermeasures against forms of criminal organisations[206]. The impact of Eurojust in judicial cooperation can be considerably increased by a new approach on access to Member States' relevant criminal records and databases[207]. It is certainly true that Eurojust has already a Case Management System database[208], yet there cannot be enhancement of coordination and collaboration among States in the absence of ad hoc data stream for joint investigations and operations[209]. Eurojust was instituted to provide an effective answer to the phenomenon of criminal organisations; therefore, it is evident as the lack of direct data flow to and from Eurojust makes difficult for this agency to use its enormous potential[210], especially in the light of the planned establishment of a European Prosecutor.

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[201] COM(2009) 262 of 10 June 2009. For further information, DE AMICIS, *Il "rafforzamento" di Eurojust nella prospettiva del pubblico ministero europeo: finis an transitus?*, in RAFARACI, *La cooperazione di polizia e giudiziaria in materia penale nell'Unione Europea dopo il trattato di Lisbona*, Milan, 2011, p. 292.

[202] ALFANO, Risoluzione del Parlamento Europeo del 25 ottobre, *Per un contrasto al crimine organizzato e alle mafie*, 2011, Introduzione.

[203] DE AMICIS, *Il "rafforzamento" di Eurojust nella prospettiva del pubblico ministero europeo: finis an transitus?*, in RAFARACI, *La cooperazione di polizia e giudiziaria in materia penale nell'Unione Europea dopo il trattato di Lisbona*, Milan, 2011, p. 293.

[204] Ibid. see footnote 203, p. 299.

[205] Ibid.

[206] European Parliament, *Report on the Action Plan on Organised Crime*, p. 17.

[207] SPIEZIA, *Il coordinamento giudiziario sovranazionale: problemi e prospettive*, in RAFARACI, *La cooperazione di polizia e giudiziaria in materia penale nell'Unione Europea dopo il trattato di Lisbona*, Milan, 2011, p. 329.

[208] For further information, consult Eurojust 2014 Report in footnote 198.

[209] SPIEZIA, *Il coordinamento giudiziario sovranazionale: problemi e prospettive*, in RAFARACI, *La cooperazione di polizia e giudiziaria in materia penale nell'Unione Europea dopo il trattato di Lisbona*, Milan, 2011, p. 329.

[210] Ibid. pp. 326-327.

The most manifest issue to the enhancement of Eurojust is the negative attitude that most Member States and judicial authorities have towards cooperation. It is indeed difficult to convince some States to give up part of national sovereignty in criminal law enforcement. For instance, it is interesting to have a look at the case law by the German Constitutional Court on the European Arrest Warrant, which applicability has been considerably narrowed down to such an extent that is not found in other EU countries[211]. This indicates that the improvement of judicial cooperation faces more political limitations than practical constraints. Nonetheless, the lack of proper institutional means for cooperation did not prevent the growth of professional relationships amongst prosecutors all over Europe[212].

The spontaneous evolution is the result of a process which transformed the term 'mutual assistance' in criminal matters, of the Strasbourg Convention of 1959[213], into the current definition of 'judicial cooperation'. The shift from 'assistance' to 'cooperation' clearly denotes a change in the attitude with which magistrates team up. Indeed, the word assistance is more related to the concept of rogatory, where requests of evidence is made, but it is not necessarily followed by mutual exchange of information; whereas, the word cooperation immediately suggests a more complex relationship based on mutual exchange of information and cooperation in work[214]. What happened at the table of Eurojust, according to De Lucia, has certainly increased trust and acceptance of the procedures of international judicial cooperation. To put it in a sentence, there certainly are the preconditions to draft the project presented above, yet there is still much to do and talk about[215].

9. Conclusions.

In the previous paragraphs, this paper tried to demonstrate that, at least in theory, Eurojust has enough expertise, competence, and power not only to host a database such as ECRIS, but also to develop it using the example provided by the Italian anti-Mafia information system. This idea stemmed from Stefanou's study on the European Criminal Record – presented in paragraph two of this article – and it was inspired by the recent changes in the EU primary law, after the adoption of the Lisbon Treaty. In fact, EU agencies – such as Eurojust – gained more legitimisation and powers. The provisions contained in Lisbon, however, do not completely reflect the actual administrative practice, which has been giving upon agencies more and more regulatory tasks. Indeed, as it is explained in paragraphs three and four of this paper,

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[211] For further information see the judgement of the German Constitutional Court: Bundesverfassungsgericth, 2 BvR 2236/04 of 18 July 2005.

[212] As declared by Dr. Maurizio De Lucia, anti-Mafia prosecutor, in interview on 14 October 2014 at the premises of Direzione Nazionale Antimafia, Rome.

[213] European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20 April 1959.

[214] See footnote 212.

[215] Ibid. footnote 212.

European agencies do not enjoy proper constitutional recognition. Nonetheless, EU law seems to move towards the direction pointed out by Majone, who wished for the establishment and recognition of truly regulatory agencies. In fact, the Court's reasoning in ESMA case highlights the need to review and loose the constraints imposed by the old *Meroni* doctrine – see paragraph five above. Also, the reasoning of this article demonstrated how the right to privacy for data contained in ECRIS would be better safeguarded by a body like Eurojust, as it adopted a strict regime of data protection.

This article not only suggests that Eurojust should be the host of ECRIS, but it goes further by advising the development of ECRIS on the footprints of the Italian anti-Mafia database. In fact, the information system SIDDA-SIDNA would greatly increase Eurojust's coordination role, especially on the light of the establishment of the European Public Prosecutor's office. In such a manner, information would be readily accessible directly from Eurojust. The model given by SIDDA-SIDNA database was chosen because it fits with Eurojust's purposes and structure: data contained therein would be safe as they would be available only to public prosecutors and used solely for the purposes of criminal investigations – as it already happens at domestic level. Furthermore, the Italian anti-Mafia database operates with a system of information sharing, as data are held not only by a 'central' server: they are first stored in local servers based in different districts, and then they are shared through the national database. This system could certainly work in Europe, and it had been already pictured by Stefanou's study, which demonstrated the possibility to create a decentralised EU database, which could link together data flowing from domestic databases.

In conclusion, this article aimed at presenting the reasons why it is now time to deeply reflect about new means to enhance judicial cooperation, as Europe is facing deep security crisis. The proposal brought forward in the lines above is to export the model of the Italian anti-Mafia database. Transnational crime is on the rise, the menace of organised crime is not the only one, there are also terrorism, smuggling, drug trafficking, and much more: a database is enough flexible and has enough capacity to store all those pieces of information. Moving one step forward tools of judicial cooperation is certainly not an easy task, as Member States have rightfully concerns and doubts about sharing their sovereignty in criminal law matters with other countries. However, EU States decided long ago to create a common market to cooperate for mutual economic wealth; the same level of cooperation and trust could certainly be achieved in security matters. The way to the establishment of a database such as SIDDA-SIDNA at EU level is still long, yet it is worth to begin a dialogue, especially under the post-Lisbon legal framework, and before the adoption of the new Eurojust Regulation.