SECURITIZING JUSTICE AS A NEOLIBERAL PROJECT IN EUROPEAN UNION SINCE 1999

A THESIS SUBMITTED TO
THE GRADUATE SCHOOL OF SOCIAL SCIENCES
OF
MIDDLE EAST TECHNICAL UNIVERSITY

BY

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IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR
THE DEGREE OF DOCTOR OF PHILOSOPHY
IN THE DEPARTMENT OF
POLITICAL SCIENCE AND PUBLIC ADMINISTRATION

JULY 2020

Approval of the Graduate School of Social Sciences

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ABSTRACT

SECURITIZING JUSTICE AS A NEOLIBERAL PROJECT
IN EUROPEAN UNION SINCE 1999

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July 2020, 329 pages

In this study, the transformation of justice, as a policy area in the EU after 1999 has been elaborated by revealing the new regime of truth established by the securitizing politics shaped by neoliberal attempts. In this regard, policy field of justice in the Area of Freedom, Security, and Justice (AFSJ) of the EU, has been selected as the scope of analysis. The analysis is based on Foucault's conceptualization of neoliberal governmentality and contemporary literature of security. Neoliberal governmentality refers to the new form of power of which has the population as its target, political economy as its major form of knowledge, and apparatus of security as its essential technical instrument. In this sense, the individualizing and totalizing power of the neoliberal governmentality has been addressed in relation with freedom and dispositif of security; controlling, monitoring, managing, drawing optimal borders and circulation procedures. On this basis, in order to identify the new type of justice emerging in the EU the concept of "securitizing justice" has been introduced and the EU case has been analyzed accordingly. Securitizing justice is argued to be both a securitizing tool

and a policy area that is implicitly being securitized at the same time in the EU. And it is concluded that justice has begun to disappear as a value in the process of transforming into a facilitating tool of the economic-juridical order and the policies of securitization.

Keywords: EU AFSJ, neoliberal governmentality, securitization, securitizing politics, securitizing justice

ÖZ

NEOLİBERAL BİR PROJE OLARAK
1999'DAN İTİBAREN AVRUPA BİRLİĞİ'NDE GÜVENLİKLEŞTİREN
ADALET

DOĞAN ARSLAN, Elif
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Temmuz 2020, 329 sayfa

Bu çalışmada, neoliberal girişimlerle şekillenen güvenlikleştirici siyaset sonucu oluşan yeni hakikat rejimi çerçevesinde 1999'dan sonra AB'de adaletin bir politika alanı olarak dönüşümü incelenmiştir. Bu doğrultuda, AB'nin Özgürlük, Güvenlik ve Adalet Alanındaki (AFSJ) adalet politikası çalışma kapsamına alınmıştır. Analiz, Foucault'cu yönetimsellik kavramsallaştırılması ve çağdaş güvenlikleştirme literatürü temelleri üzerine kurulmuştur. Neoliberal yönetimsellik, temel hedefi nüfus, temel bilgi biçimi ekonomi politik ve ana teknik aracı güvenlik mekanizmaları olan yeni iktidar biçimini ifade etmektedir. Analiz boyunca, neoliberal yönetimselliğin bireyselleştirici ve totaliterleştirici gücü, özgürlük vurgusu ve güvenlik mekanizmaları ilişkisi ile; kontrol etme, denetleme, idare etme, optimal sınırlarda tutma ve döndürme prosedürleri bağlamında ele alınmıştır. Bu çerçevede, AB'de ortaya çıkan yeni adalet anlayışınının ana unsurları belirlenerek, "güvenlikleştiren adalet" kavramı tanımlanmış ve AB örneğinde incelenmiştir. Adaletin yasal/prosedürel bir araç

olarak güvenlikleştirme politikalarını meşrulaştırması ve kolaylaştırması; yanı sıra üstü örtük bir biçimde güvenlikleştirme politikaları arasında arka plana atılarak içinin boşaltılmasına dikkat çekilmiştir.

Anahtar Kelimeler: AB özgürlük, güvenlik ve adalet alanı, neoliberal yönetimsellik, güvenlikleştirme, güvenlikleştirici siyaset, güvenlikleştiren adalet.

To My Beloved Husband

and Deary Little Daughter

ACKNOWLEDGMENTS

My PhD story covers the period between 2014-2020. This period represents more or less an optimum duration for a PhD study; at the same time, refers to the hard years passed away full of wars, several financial and political crises, earthquakes and a pandemic; and also it means challenging six years of working with a happy ending for me.

For this story, first of all, I would like to express my deepest gratitude to my esteemed advisor Assoc. Prof. Kürşad Ertuğrul who made this path meaningful and bearable. Besides his contribution to my research by instant continuous guidance and constructive feedbacks with his profound academic competence; he also gave me an insight for the rest of my life with his everlasting optimism and solution oriented mindedness. I would always be proud of being a student of him.

I was so pleased to meet two precious professors in my Thesis Monitoring Committee during my study. First, I would like to present my special thanks to Assoc. Prof. Zerrin Torun, who gave her support as if she was my co-advisor. She acted as a mentor in giving me the ideas on the key aspects to shape this study and always motivated me since from the beginning till the end.

I would also like to express my sincere gratitude to Assoc. Prof. Cem Deveci who made me love political philosophy by cracking the doors in my mind during my undergraduate years. I consider myself so lucky to meet him years and years later and having benefited from his constructive criticism based on his brilliant brainstorming and inspiring contributions.

Besides, I would like to thank my dear mom and dad for their support by taking care of my daughter whenever I needed time to work. Finally, I would like to present my deepest thanks to my dear husband and my one and the only daughter,

Nergis, for whom I am grateful at every moment I live. Everything would be incomplete without them.

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LIST OF ABBREVIATIONS

AAR	Annual Activity Report
ADR	Alternative Dispute Resolution
AFSJ	Area of Freedom, Security, and Justice
AGS	Annual Growth Survey
BRIS	Business Registers Interconnection System
CEPEJ	Council of Europe Commission for the Evaluation of the Efficiency of Justice
CEPOL	European Union Agency for Law Enforcement Training
CoR	European Committee of the Regions
CJEU	Court of Justice of the European Union
DSM	Digital Single Market
DG HOME	Directorate General for Migration and Home Affairs
DG Justice and Consumers	Directorate General for Justice and Consumers
EC	European Commission
EU	European Union
EEC	European Economic Community
EES	Entry-Exit System
EMU	European Monetary Union
ESF	European Social Fund
ESI Funds	European Structural and Investment Funds
EASO	European Asylum Support Office
ECRIS	European Criminal Records Information System
ECRIS-TCN	Centralized system for the identification of Member

	States holding conviction information on third-country nationals and stateless persons
ECHR	European Convention on Human Rights
EDPS	European Data Protection Supervisor
eu-LISA	European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice
Eurodac	European Asylum Dactyloscopy Database
Eurojust	European Union Agency for Criminal Justice Cooperation
Europol	European Police Office
EUROSUR	European Border Surveillance System
EPPO	European Public Prosecutor's Office
ETIAS	European Travel Information and Authorisation System
FRA	Fundamental Rights Agency
Frontex	European Border and Coast Guard Agency
HRW	Human Rights Watch
JHA	Justice and Home Affairs
LIBE	Committee on Civil Liberties, Justice and Home Affairs
PNR	Passenger Name Record
SIS	Schengen Information System
SOC	The Section for Employment, Social Affairs and Citizenship
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
VIS	Visa Information System

CHAPTER 1

INTRODUCTION

1.1 A New Regime of Truth

The European Union (EU), with its flagship position in spreading basic liberal norms and values, has been the object of analysis in political research for a long time. Since the EU is neither a state nor an international organization, its supranational position is always questioned under the claims of the national sovereignty of the member states. By pulling away from the destructive years of war of the past, the first premise of the EU project is considered as economic integration. Subsequently, the Schengen Agreement (1995) and the Treaty of Amsterdam (1997) and the Treaty of Nice (2001) have deepened and consolidated the objective towards a European Monetary Union (EMU), EU citizenship and common policies in both economic and non-economic spheres. And finally, by the Treaty of Lisbon, signed in 2007, the EU has expanded its influence from the area of the economy to democracy and to the global challenges. By reflecting the rise of embedded neoliberalism, the Lisbon Agenda includes both the neoliberal competitiveness discourse and also "elements addressing concerns of the former neo-mercantilist wing of the European capitalist elite as well as of transnational social-democratic forces" (Van Apeldoorn, 2009:28). While neoliberalism has spread rapidly, the EU has always the attempt to embrace the "European" and "humanitarian" values based on the EU Charter of Fundamental Rights. Indeed, the EU has been setting its target "to promote peace, its values and the well-being of its citizens, offer freedom, security, and justice without internal borders,

sustainable development" (Europa.eu, 2017a). This target is based on "balanced economic growth and price stability, a highly competitive market economy with full employment" and also "social progress, and environmental protection" (Europa.eu, 2017a). Besides the EU also aims to "combat social exclusion and discrimination, promote scientific and technological progress, enhance economic, social and territorial cohesion and solidarity among EU countries" while aspires to "respect its rich cultural and linguistic diversity and establish an economic and monetary union whose currency is the euro" (Europa.eu, 2017a). In conclusion, the EU's impact has extended from the economic sphere to the political sphere.

Although the economic integration has almost always remained as the common denominator; the varieties of the countries' speed of economic growth, the differences on the magnitude of the public debts and degrees of commitment to the democratic standards, emergence of the global terrorist attacks, outbreak of migratory flows and the rise of rightist and nationalist ideology correspondingly and finally the demand of United Kingdom to exit the Union have started to aggravate the objective. The EU remains under both internal and external pressure, has started to act in many policy areas in order to bring many functions assigned to it at the same time. Consequently, the economic integration and a pragmatist perception for the functionality of the policy areas have appeared among the predominant concerns of the EU. This caused the EU's security concern for the sustainability of the Union to outweigh. At this point, these predominant concerns have started to contradict with liberal norms and values. Even so, the EU has not left its position of being the flagship of them. In such a way that, the founding values of the EU such as respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights have always maintained their importance. However, these values have had to be considered for the targeted and selected population but not for all as a result of this binary approach. Thus, this study asserts that a new regime of truth has been

established in the EU as a neoliberal project in the way that many policy areas are transformed. In this sense, it is important for political research to reveal this transformation of the EU as an outstanding political actor.

This thesis argues that the most salient area that this transformation can be analyzed is the policy field of justice. Indeed, justice, by its very nature, is a good example of the transformation of power during the period covered by this study. It is a tricky and arguable concept. It is one of the biggest and the most implicit pledges that an authority can provide. Actually, it is both a never fully satisfied end and the means to attain this end. It is both the "*L*aw" before which the countryman waits in his whole life in Kafka's story and the "doorkeeper" who doesn't let him enter at the same time (Kafka, 2009, p. 153-155). It is both a common "sense" for humanity and the set of rules written in hundreds of pages in the legal documents. It is the one that is expected "to come" one day and the one that is needed to come "immediately", "right away" (Derrida, 1992, p. 26-27). Justice is for both the sake of fairness and includes the legislation that might disrupt the balance of fairness. It is both the source and the consequence of the legitimacy serving for both the weak and the powerful. It is both perceived and implemented in the level of individuals, states and beyond the states ethically and politically. That's to say, justice can also be regarded as an arena of power struggle based on both moral and political contexts that turn it into a field of power struggle. While multifold perceptions of moral virtue have been experienced among societies during ages, the political connotations of justice have also been shifted concurrently. Thus far, justice has been re-invented again and again for everyone's share. But the "justice to come" has never come yet. Justice functions in this dual structure in the EU as well. It is a policy area on its own in the EU since the Amsterdam Treaty and in fact, one of the basic values to be sought for each and every policy area. Depending on the different constructions, the policy of justice both can include all the legislation that the rule of law requires; and it

can also touch upon democratic and egalitarian values to embrace all. It has the power of legislation on one side and the power of the discourse on the other. As Foucault argues, "…the idea of justice in itself is an idea which in effect has been invented and put to work in different types of societies as an instrument of certain political and economic power or as a weapon against that power." (Chomsky & Foucault, 2006, p. 54). Therefore, it appears both a policy area in itself and an instrument that cements and penetrates all other policy areas.

This study points to a transformation process in which justice is polished and brought to the fore as a policy area, but it is emptied as a core value by being overshadowed by security. In this frame, this thesis introduces the concept of "securitizing justice" on the basis of the Foucauldian perspective of neoliberal governmentality and post-structural conceptions of securitization. It both securitizes almost all other policy fields by penetrating them through legislation and is being securitized through the primacy of the concerns for the security of the newly constructed EU internal space. This space is first and foremost conceived as the single market, therefore its functioning toward economic growth is the basic objective of the EU. The security of this economic arena and the instrumental role of justice for this end is the basic dynamic which subsumes the justice policy under a securitizing logic. In this process justice functions as a set of procedural rules and it intrinsically acts as a securitizing practice by legitimizing the securitization to be conducted in various policy areas. Furthermore, the deficiency of justice is not concerned after fulfilling this legitimizing function. For instance, the controversies in terms of justice towards immigrants and third-country nationals are deemed as a matter of policy of security but not justice. In a similar vein, economic priorities, which are defined top-down and somehow included in each and every policy area, thanks to economic governance mechanism, disguise as justice policy. Having set the aim to promote effective justice and growth, the instruments of justice policy, in fact,

intend to standardize legal minimum criteria to create a favorable business environment, trust, and stability in the member states. At the end of the day, if the level of justice is measured as "poor", the bad practices of structural reforms are criticized, but not the social injustices caused by austerity policies. Since it is assumed that justice has completed its duty procedurally and instrumentally, the consequences and weaknesses of the securitizing practices are not questioned. Therefore, even though these weaknesses are justice deficits, they are not approached as a matter of justice policy. On the contrary, by ignoring this vulnerability in terms of justice, threatening factors are continuing to be securitized for the sake of the EU integration. Most of the studies on the AFSJ of the EU also reflects this perspective. That is to say, although there is a considerable number of studies on the securitization movements in the EU, none of them approaches the issue in terms of justice and none of them theorize the kind of justice which emerges in the EU as a result of the nexus between neoliberal governmentality and securitization. This approach would lead justice to be ignored, be instrumentalized and be undervalued. After all, while the actors of the securitization attain their policy goals, the audience of the securitization would silently accept the policy as it is. To be more specific, the securitizing policies of the EU, would not be perceived as a matter of justice but taken as the requirements of the European integration and security by the member states. And eventually, justice would itself implicitly be securitized by taking the backseat in the AFSJ. Thus, this transformation makes the EU's position, which is grounded on the values of "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities"[1], controversial. Furthermore, it is also considered that securitizing justice would spread to all member states and then to the international community, through the new regime of truth led by the EU. In this context, it is

[1]See Article 2 of TEU

important to draw attention to these implicit dynamics and transformation. Hence, this study contributes to the related literature by introducing a new foresight. And this new vision is considered to shed light on the main pillars to question the regime of truth which being created in the wake of the articulation between the neoliberal project and the ensuing securitization.

1.2 Objectives and Methodology

The main intention of this study is to demonsrate the transformation of justice, as a policy area in the EU after 1999 by revealing the new regime of truth established by the securitizing politics shaped by neoliberal attempts. Hence, the policy of justice in the Area of Freedom, Security, and Justice (AFSJ) of the EU, which has a multi-purposive, interwoven and all-pervasive structure has been selected as the most striking scope of analysis to demonstrate this transformation process. The period that has been explored indicates a process in which neoliberalism settled globally and the perception of security changed after the end of the Cold War and the power relations have been transformed accordingly. In this framework, this research has been conducted by a comprehensive qualitative analysis based on the review of the EU documentation supported by several interviews focusing on all-pervading power relations in all social, political and economic spheres.

This analysis mainly focuses on the EU Justice Agenda for 2020: “Strengthening Trust, Mobility, and Growth within the Union” (European Commission, 2014a), which was constructed following the release of the strategy of “EUROPE 2020: A Strategy for Smart, Sustainable and Inclusive Growth” (European Comission, 2010b). This leading document of justice reveals two articulations of the EU for the justice policy in this study. First one is the association of justice with the economic growth and the functioning of the market. As such, the main idea of the

EU Justice Agenda has been put as "strengthening the security of the economic growth and smooth functioning of the market economy and to establish common values and identity for the integration of the Union following the Amsterdam Treaty". Second is the conjoining of security and justice under the priority target of "justice and fundamental rights" of the European Commission. Indeed, the European Commission charges two policy departments for this target: DG Justice and Consumers and DG HOME. In this framework, these two associations made by the EU itself show that justice is not considered independent of economic freedom and/or security in the EU. Therefore, this study deals with the areas of "justice" and "home affairs" together, just as the EU does.

Within this construction, the analysis has been conducted by recognizing several limitations. The main objective of this analysis is to reveal the instrumentalization of the justice as a policy area by neoliberal attempts based on the systematic that the EU has set itself following the Amsterdam Treaty and mainly after the release of EU Justice Agenda for 2020. The scope of the analysis has been limited by the related policies, institutions and the legal documentation based on this articulation of the EU. The whole transformation has been tried to be revealed as the setting of a new regime of truth and the voiced alternatives, challenges and resistances to this neoliberal attempt have not been included in this analysis. Thus, the "counter-conducts" of this transformation have not been under focus nor the individual reactions of the member states at the policy level. It is acknowledged that the transformation of the policy of justice is not a smooth and unproblematic process. Indeed, it includes moving from intergovernmental policies to supranational order in which countless debates and counter-voices heard and still being heard. Uncovering these points and elaborating the individual cases require a different comprehensive analysis which has not been possible in this study. That is to say, the repercussions of these neoliberal attempts upon the member states, institutions and the people are not included within the scope of this study.

The EU justice policy analysis of the study is constructed on the pillars of the review of the conceptualization of Foucauldian governmentality and the contemporary literature of securitization. Thus, in the first stage, the theoretical and historical background, through which the conception of "securitizing justice" for the case of the EU is developed, will be explored. To that end, the concept of "governmentality", which is coined by Foucault and re-conceptualizations of the governmentality in the context of the "advanced" neoliberal societies in Foucauldian literature, has been visited. This includes both the original essays of Foucault and the secondary sources that are inspired by him. The primary resources have been used to describe the original denotation and the main references of governmentality attributed by Foucault. Secondary resources that are inspired by the Foucauldian conceptualization mainly establish the literature that uses neoliberal governmentality as a critical tool to address contemporary issues. In this sense, the secondary resources and the post-structural analysis of securitization have been benefited to construct a historical nexus between the governmentality and the post-structural perceptions of securitization in the advanced neoliberal societies.

Since the understanding of justice that emerged in the EU is claimed to be the outcome of such a nexus, the initial aim is to expose the conceptual and historical configuration which enables us to make such a point. What Foucault underlines by governmentality is that the state has been started to get de-governmentalized and the conduct of men and women has started to be done through their autonomy rather than coercion. In this frame, governmentality studies point out eluding state-centrism and focusing on power relations since the technology of power is all-pervading and embraces all social, political and economic spheres. Therefore, the regime of truth on governmentality can derive its power from any sphere, a discourse or practice. As Foucault underlines, a regime of truth does not mean that the politics or the art of government finally becomes rational or scientific.

What is meant by the regime of truth is "… the articulation of a particular type of discourse… that constitutes a set of practices as a set bound together by an intelligible connection and legislates on these practices in terms of true or false" (Foucault, 2008, p.18). So, the regime of truth that surrounds the politics can only be construed by dismantling it to pieces of discourses and practices. Therefore, it is considered that research on the EU and its constitution of the political through setting a new regime of truth requires studying governmentality. That's why governmentality has been addressed to demonstrate the transformation of justice in the EU.

In addition to this, the new regime of truth is set through many discourses and practices based on the main elements of the neoliberal governmentality within which the population is its target, political economy is its major form of knowledge, and apparatus of security is its essential technical instrument (Foucault, 2007:144). This systematic requires two-sided analysis. On the one side, the installation of the neoliberal economy, economic governance mechanisms, and the homoeconomicus rationality for the targeted population should be elaborated. Afterward, the discourses of securitization should also be scrutinized to reveal the ensuing use of the apparatuses of security. Indeed, the neoliberal governmentality appears as the art of government that both include sovereign and disciplinary power and the sum of free subjects that can conduct themselves. Rational and free subjects make choices and take all the responsibility that comes with it within the neoliberal order. In this sense, the system is constructed on the basis of individualizing and totalizing power of the neoliberal governmentality. And what's more, the sustainability of this order requires the use of dispositif of security to control, manage and circulate the population at the demanded level. Thereby, Foucauldian governmentality, which draws special attention to the technologies of security with its connection between the population and the political economy, has been analyzed from the perspective

of the studies of security as well. In this framework, to be able to expose the emerging role of security as a dispositif within neoliberal governmentality, the shift of the attribution of security since from the Cold War until today should be looked through. With this design, the new approaches to security after abandoning the traditional, state-centered outlook of the bipolar world of the Cold War have been put forth as well. The extended attributions of security resulting from the addition of the economic, societal, political and environmental risks to the agenda of military threats need to be emphasized here. In this respect, the realist, philosophical and sociological approaches to security have been briefly overviewed. The purpose of this mapping has not been to examine these theories in-depth, but to be able to associate the new network of power relations established by the neoliberal governmentality in terms of security approaches. Herewith, the extension of the notion of security to the non-security spheres leading to an "extreme version of politicization" (Buzan et al 1998, p.23) has been approached as the *securitizing politics* in this study. Securitizing politics has been focused as the object of analysis, which coincides with the post-Cold War period. In that era, the neoliberal governmentality and the securitization can be seen together. The main target of the first part of the study has been to derive and define the elements of securitizing politics and set the ground for defining the new understanding of justice which operates in the EU. Thereby, "securitizing justice" has been put forth as an outcome of this system. Exclusively, for this reason, the new power relations, instruments, actors and roles that are set by the new form of power have been analyzed.

Therefore, the analysis of the EU case in this study covers the elements of both neoliberal governmentality and the securitization and aims to present answers to the following questions:

- Can an analytics on the nexus between neoliberal governmentality and securitization be deployed to establish a regime of truth n the contemporary EU?
- Can the emerging form of justice be defined as "securitizing justice" on this analytical ground?
- Which theoretical and historical roots does the securitizing justice have?
- To what extent do the discourses and policies of "securitizing justice" effect the character of justice as a core value?
- To what extent does "securitizing justice" contribute to the goals of advanced liberal EU and legitimize its securitizing policies?
- What are the political reasons and implications of "securitizing justice" in the EU?

After setting the conceptual framework of securitizing justice and research questions, it is equally important to follow the elements of this conceptualization in the EU case to search for answers. So, in the next stage, the findings of the securitizing justice have been searched in the EU policy agenda. It requires, on the one hand, a historical review of the emergence of justice as a policy area among the other policies and the European integration correspondingly. On the other hand, it is also vital to overview the historical context of neoliberalism in the EU and put forth the consolidation of the logic of neoliberal governmentality throughout this process. It is considered that once the emergence of the legal institutional framework of the securitizing justice in the EU is established, it will be possible to analyze how the policy of justice, in its new form, works in the EU case. How this new form of justice, operates in the EU has been examined primarily on the basis of the relevant legislation and the activities of the main actors in the EU justice policy area. Therefore, the types of materials that have been used are; related legislation in the official open sources and databases of the EU; annual surveys, work programs strategic plans and activity reports belonging

to the economic governance circle; related policy instruments of the respective Directorate Generals and reports of independent institutions. Accordingly, related EU Communications, Regulations and Directives (1999-2019); Annual Growth Surveys (2011-2019); Commission Work Programs (1999-2018); DG Justice and Consumers's and DG HOME's Annual Activity Reports (2013-2017); DG Justice and Consumers Strategic Plan for 2016-2020; Justice Scoreboards and country-specific recommendations (2013-2020); Consumer Market and Conditions Scoreboards (2013-2020); various reports of Fundamental Rights Agency (FRA), European Data Protection Supervisor (EDPS) and Human Rights Watch (HRW) (2011-2019) and related websites and links from social media regarding all resources have been elaborated.

Throughout this analysis, originating from the Foucauldian discussion of the "crises of governmentality"; the tension between the freedom and the security has been searched. Especially, the discourses and policies for the establishment of a mechanism to arbitrate between freedom and security have been put into light. As such, neoliberal governmentality's individualizing and totalizing power with a scope of procedures of freedom as well as control, constraint and coercion has been elaborated. Indeed, the policy of justice has been focused as one of the most central fields to show the impact of the tension between freedom and security. Thus the extent to which the discourse and policies of justice contribute to the universal human rights and freedoms has been interrogated. Moreover, how it conceals the securitizing concerns of the "advanced liberal" EU is revealed. Next, possible political implications of the understanding of securitizing justice as a truth regime on non-AFSJ areas in the EU have also been questioned. The main motivations and the consequences to use the policy of justice as the mediator between freedom and security have been discussed multi-dimensionally. This analysis also includes elements that are "not shown" and "left silent" since the type of justice to be revealed in this study is argued to be both a securitizing

practice and a policy area that is implicitly being securitized at the same time in the EU. So, the discovery of the securitization and "those not mentioned" in the official discourse are particularly important to reveal this transformation. To this end, secondary sources have also been addressed and benefited from. In order to interpret the relationship between the official discourse and policy activities and outputs, relevant sources and reports of international independent institutions that might be related to the field of justice policy have been taken into consideration. From the same point of view, several interviews have been held. In this framework respective senior officer from the Unit for Justice Policy and Rule of Law at the Directorate General for Justice and Consumers (DG Justice and Consumers), the Head of Sector from e-Justice Policy and Grant Management Department at the DG Justice and Consumers, political officer responsible for Legal Issues and Head of Delegation of the EU to Turkey have been interviewed.[2] Although these interviews are limited in number, they are important in terms of revealing the official discourse featured in the documentation analysis on their own expressions of the EU representatives. In addition, the interviews are considered to be beneficial in terms of the opinions they provided, since they include both direct executives of AFSJ's policy instruments and high level political representation. Open-ended questions have been posed to these representatives to explore the official discourse on justice, and their answers and interpretations have been analyzed.

[2] Interviews: Aristotelis GAVRILIADIS, European Commission Directorate General for Justice and Consumers Unit for Justice Policy and the Rule of Law; Alexander IVANTCHEV, Head of Sector e-Justice Policy and Grant Management Directorate-General for Justice and Consumers; Christian BERGER, Ambassador, Head of Delegation, Delegation of the European Union to Turkey; Didem BULUTLAR-ULUSOY, Political Officer – Legal issues, Delegation of the European Union to Turkey, Various interactions have also been held with DG HOME and FRA, but the demand of interview has not been accepted due to their own institutional policies.

1.3 Outline of the Chapters

Oriented towards the delineated objectives above, the study has been constructed in six chapters. Following the introductory Chapter 1, the next two chapters have been designed to identify the conceptual and historical framework of the analysis before focusing on the EU case. With this overview, Chapter 2 is mainly centered on the historical context of the Foucauldian governmentality, post-structural definitions of security and the conceptualization of justice that is associated with these two works of literature. Afterward, the repercussions of them have been narrated through securitizing politics. Moreover, a new type of rationality and power that brings about the transformation of justice have been pointed out. Here, the transformed version of justice has been defined as "securitizing justice" and the discourses and the instruments of it have been underlined. Then, in Chapter 3, the elements of the neoliberal governmentality have been traced in the European integration process. To this end, firstly, the historical context of neoliberalism in parallel with the European integration has been underlined and then the points regarding the elements of neoliberal governmentality in the EU have been searched for. And, the emergence of justice as a policy field in the EU has also been inquired. After having introduced the motivations of both EU integration and the neoliberalism, the institutions and the basic elements of the EU justice policy have been mapped.

Based on the given conceptual and historical framework, the analysis of the EU case has been held in Chapter 4. The analysis is divided into three parts. In each and every part, justice has been analyzed in terms of a defining principle of the neoliberal governmentality and securitizing justice. This defining principle also characterizes one of the main priorities of the EU policy of justice at the same time. In the pursuit of revealing all the political impacts of the new regime of truth that is established by the neoliberal governmentality and the securitization

attached to it, the attempt has been to show the nexus between the policies of justice and home affairs in the EU. Therefore, the policies of justice, security, fundamental human rights, management of border and migration have all been associated in this chapter. In this context, all the related strategies, plans, policies, instruments and agencies of the EU concerning AFSJ, based on both official and primary resources of the EU have been investigated. Besides, this chapter also makes use of several interviews held with related EU representatives and the reports of the independent, international agencies.

In Chapter 5, the main findings of the analysis in terms of neoliberal governmentality and securitizing justice in the EU have been revisited. In this section, first, the recent studies in the area of justice research, which address a similar problematic but with a different approach, have been referred. In this way, the problematic that the new conceptualization of *securitizing justice* highlighted in this study, has been double-checked in these secondary resources. Following this part, the main findings of the analysis held in Chapter 4 have been clarified and associated with the theoretical framework of the thesis.

Finally, the main intention and the main findings of this study have been interpreted and the main conclusions have been put forth in Chapter 6. The emergence of "securitizing justice" as a part of a new regime of truth standing against a universal sense of justice has been emphasized. The process of targeting and selecting out as opposed to embracing all in the understanding of justice has been brought into the agenda once again.

CHAPTER 2

SECURITIZING JUSTICE AS AN ELEMENT OF NEOLIBERAL GOVERNMENTALITY

In this study, "securitizing justice" is purported to be a form of justice that can be derived from the Foucauldian literature of neoliberal governmentality analysis and the post-structural perspectives of securitization. Therefore, in order to reveal the process that gave shape to this kind of justice, first, the notion of neoliberal governmentality will be analyzed. The historical connection of the neoliberal governmentality together with its main elements will be put forth by excluding its further connotations out of the context of this study. Then, the securitization theory will be touched upon by addressing the extension of the definition of security and its all-pervading discourse and the respective approaches to the study of security within this chapter. Since the main concern of this study is securitizing justice and not the security itself, not all the approaches of security will be expounded deeply.

2.1 Historical Context of Foucauldian Governmentality

Having been inspiring many researchers, the notion of governmentality has been held in several ways in social and historical investigations. While François Ewald, Daniel Defert, Giovanna Procacci, Pasquale Pasquino and Jacques Donzelot carried out genealogical investigations of insurance technology, social economy, police science, and the government of the family by focusing on the transformations of governmental technologies in the 19th century, French

historians like Dominique Séglard, Christian Lazzeri, Dominique Reynié, and Michel Senellart used the notion of government to analyze state reason and early modern arts of government. Besides this, the notion has also been used as a tool for critical analysis to address contemporary forms of government, especially of neo-liberal rationalities and technologies as well, by the scholars like Colin Gordon, Graham Burchell, Thomas Lemke, Andrew Barry, Mitchell Dean, Susanne Krasmann, Nikolas Rose, Wendy Brown from an Anglo-Saxon background; by Ulrich Bröckling, Lene Koch, Sylvain Meyet from Scandinavia, Germany, France and in other countries (Lemke, 2016, p.77-78). These extended uses of the notion in divergent areas reveal the historical context of the notion which has several resources.

In fact, analyzing the notion of governmentality, which has been coined by Foucault, requires focusing on the lectures of Foucault between 1970-1984, at the Collège de France. The most remarkable annual courses among these lectures, in which Foucault reports his research results, are deemed to belong to the years 1977-1979; titled "Security, Territory and Population" and "The Birth of Biopolitics". These specific lectures are in fact the ones that he defined and explored the "governmental rationality" which he refers as "governmentality" (Gordon, 1991, p.1). More importantly, he considers governmentality as more important than the state as an entity; a composite reality and a mythicized abstraction and indeed he argues that what is important for our modernity is not the state's takeover of society so much as governmentalization of the state (Foucault, 2007, p.144). Jessop argues that, in the two volumes of his lectures of 1978 and 1979, Foucault makes a major intellectual change of direction, moving away from an analysis of power as the formation and production of individuals towards an analysis of governmentality, a concept invented to denote the 'conduct of conducts' of men and women, working through their autonomy rather than through coercion even of a subtle kind (Jessop, 2010, p.56).

The elements of the neoliberal governmentality of today can be found within different urban architectures and power relations in different historical domains that Foucault narrates. Throughout these lectures, Foucault applies his analysis in four historical domains: the theme in Greek philosophy and more generally in antiquity and in early Christianity-of the nature of government and the idea of government as a form of pastoral power, doctrines of government in early modern Europe associated with the idea of reason of state and the police state; the 18th-century liberalism as the art of government and post-war forms of neoliberal thought in Germany, USA, and France as the ways of rationality of government (Gordon, 1991, p.3). Having been aware of these several historical references, it is worth mentioning that Foucault neither draws a linear line of historical progress for his analysis of governmentality nor speaks of it as the new type of power that annihilates or completely replaces all the previous forms.

To be able to expose this new type of power, Foucault analyzes the mechanisms of power and introduces *the apparatuses of security*. Then he focuses on the emergence of the *population* and underlines the relation between the governmental rationality and population in a historical context, and by anchoring the roots of the governmentality from the 15th and 16th centuries to the 18th century, he unpacks modern western state in terms of political and pastoral elements. Accordingly, the former element is derived from the ancient polis and is organized around law, universality, the public, and so forth, the latter represents a Christian religious conception centered upon the comprehensive guidance of the individual (Bröckling, Krasmann and Lemke, 2010:3). So, he goes through the problem of government and governmentality. He emphasizes the totalizing and individualizing power in different forms of power and its connection with the governmentality. In line with this, he analyses firstly the technologies of security, then the problem of government through a deep analysis of pastoral power and the rationality of state.

In this framework, Foucault starts to the analysis of mechanisms of power in the first lecture of 1977 with an important notice that this kind of analysis is not a general theory of what power is or even the start of theory as such. Accordingly, this research simply involves investigating where and how, between whom, between what points, according to what processes, and with what effects, power is applied (Foucault, 2007, p. 16).

By putting remark on this, he focuses on three types of power mechanisms which are sovereign power, disciplinary power, and governmentality. In fact, he underlines the technologies of security as the connection between population and governmentality. So, he begins by defining the main methods to provide security. Whereas in sovereign power, the prohibited action and the punishment are defined within a legal or juridical code; disciplinary power aims to transform the subject via surveillance and correction. The third one that Foucault distinguishes from these two is the "apparatus (dispositif) of security", which has the elements of questioning the phenomena, calculating the costs and drawing optimal borders of what is acceptable. That is, the unwanted consequences are not abolished permanently but accepted within the calculated limits in this new type of power. Therefore, with this perspective, the approaches to the diseases of leprosy, plague, and smallpox are narrated as the main cases that reveal these types of powers in the first lecture of Foucault in 1977. In fact, while leprosy requires exclusion of the infected and can be associated with the judiciary mechanisms of sovereign power; the plague of the 16^{th} and the 17^{th} centuries is approached with the quarantine mechanism based on confinement and strongly connected with the disciplinary mechanisms of diagnosis, therapy, surveillance, and normalization. However, Foucault tells that the approach to smallpox in the 18^{th} century gives some clue about the apparatus of security and so about the governmentality within which the phenomena is calculated carefully and analyzed in terms of statistics, including birth and death rates etc, and kept in the acceptable borders. This kind

of apparatus of security brings about a different conception of space (milieu) and a relatively new type of normalization from the 18th century onwards in comparison with the models of sovereignty and discipline (Foucault, 2007, p. 20-26).

Another inspiring point of Foucault, which helps differentiate this new type of power, is on the urban architectures. Again, he associates different forms of spaces with different types of powers. In this respect, by indicating that the sovereignty is the power applied over territories, he underlines the significance of the maintenance of capital by giving the example of the 17th-century text (*La Métropolitée)* written by La Maitre dedicated to the king of Sweden (Foucault, 2007, p. 27-32). On the other side, in the 18th century, the traces of disciplinary power can be seen in the architectural design of the town called *Richelieu* with its form of a camp in a square or rectangle in shape and subdivided into other squares or rectangles (Foucault, 2007, p.31). Finally, from the 19th century onwards, he exemplifies the manifestation of the space of security apparatus. Nantes has become overcrowded with its administrative and economic functions and needs not to cut ties with the surrounding countryside as a result of industrialization (Foucault, 2007, p.32-33). Therefore, he introduces a new notion of this new type of space. And indeed, this new form of space and the power approached are the remarkable characteristics of governmentality.

In this sense, Foucault pays attention to the special notion representing the "space" of the security apparatuses. He uses the concept "milieu" by transferring it from biology and physics employed by Lamarck and Newton respectively. His main objective is to point out the original meaning of the notion: "…it is what is needed to account for action at a distance of one body on another. It is, therefore, the problem of circulation and causality that is at stake" (Foucault, 2007, p.36). With this terminology, he underscores the population that exists biologically and

is bound to a specific place and consequently the need to calculate, plan and circulate the uncertain events produced by this population. Hence, he both narrates the milieu and population in a historical context and exposes the relation between them. Concordantly, he focuses on the spatial, juridical, administrative and economic opening up and resituating the town in a space of circulation in the 18th century (Foucault, 2007, p. 27).

The emergence of the conception of milieu and the planning of this milieu through the art of government construct the main idea of the apparatuses of security. Foucault argues that from the 18th century onwards, the regulator of a milieu, didn't involve so much establishing limits and frontiers, or fixing locations, but essentially made possible, guaranteeing, and ensuring circulations of people, merchandise, and even air, etc. (Foucault, 2007, p. 51). With this overview, he argues that apparatuses of security plans a milieu in terms of events and possible elements and regulates the phenomenon; while the sovereign capitalizes a territory, raising the major problem of the seat of government; and whereas the discipline structures space and organizes it hierarchically (Foucault 2007, p. 35). Specifically, he analyses the problem of scarcity and the approach of French physiocrats and 18th-century economists, compares it to the disciplinary mechanisms found not only in earlier periods in his lecture dated 18th January 1978 (Foucault, 2007, p. 51-71).

Following the milieu, he also points out the changing connotation of the population after the 18th century. He indicates that the notion of the population was formerly understood as the movement by which a deserted territory was repopulated after a great disaster such as an epidemic, war, or food shortage (Foucault, 2007, p.95). However, beginning with the 17th century, mercantilists start to deem the population as a dynamic source of strength of the state since it is a source of wealth and productive force and ensures competition within the state

(Foucault, 2007, p. 97). In other words, mercantilists and cameralists as well took the population as a matter of productive source with its narrow meaning, and it is treated within the disciplinary mechanisms and in terms of the axis of sovereign and subjects. According to Foucault, after the physiocrats and the 18th-century economists, the population no longer appears as a collection of subjects of right and wills who must obey the sovereign's will through the intermediary of laws. On the contrary, it turns out to be a set of processes to be managed (Foucault, 2007, p.98). In other words, by referring to the importance of the notion of "public" in 18th century, he argues that the population isn't seen as the sum of subjects and biological genre but with their opinions, their ways of doing things, forms of behavior, customs, fears, prejudices, education, conviction, etc. (Foucault, 2007, p.105).

In such a framework, Foucault combines the milieu with the population by the apparatuses of security. He argues that the milieu appears as a field of intervention of affecting the individuals as a multiplicity of organisms, of bodies capable of performances and of required performances one tries to affect: a population. Indeed, the apparatuses of security fabricate, organize and plan milieu within which the circulation of causes and effects is carried out of natural givens: rivers, marshes, hills and set of artificial givens: individuals, houses, etc. (Foucault, 2007, p.35-37). He underlines that while the discipline regulates everything and allows nothing to escape, the apparatuses of security let things happen; such as allowing prices to rise, allowing scarcity to develop, letting people go hungry so as to prevent something else happening, etc. (Foucault, 2007, p.67-68). He gives the example of physiocrats of letting the free circulation of crops as opposed to the scarcity problem in the 18th century.

There is another point of discussion on governmentality, after summarizing the technologies of security that has been referred with respect to different historical

contexts and the associated notions such as milieu, population, and technologies of power. This is actually about the problem of "government". As can be seen in Foucault's respective lectures, he does not use the notion of government one-dimensionally. Indeed, beginning from the lecture 1 February 1978, Foucault starts his analysis on the problem of government with reference to the multiplicity of practices: government of self, the government of souls, the government of children, etc. and specifically the problem of the state. So, he seeks the archaic forms of governmentality which are attested in a historical process from the 16th century to the 19th century and narrates the transition from "government of subjects" to "government of things".

First of all, he points out to the relation between the dissolvement of feudalism, state centralization and the movements of Reformation and Counter-Reformation of the 16th century. That's to say, he indicates that while feudal structures were dismantling and the great territorial, administrative and colonial states were being settling; there was also religious dispersion and dissidence. Foucault asserts that the meeting point of these two different movements characterizes the dominant feature of the question of government for the 16th century: "how to be governed, by whom, to what extent, to what ends and by what methods" (Foucault, 2007, p.127). To be able to narrate these relations, he first scrutinizes the anti-Machiavelli literature which deconstructs the original analysis of Machiavelli and deeply analyses the issue of "government of oneself" and "souls" to analyze the pastoral power in the following lectures. What he finds interesting in anti-Machiavelli literature is actually the specific object, concepts, and strategy of them. Concordantly, this literature does not prefer to call the attempts of the Prince to maintain his power which is singular, fragile and transcendental. Instead, they mention a plurality of forms of government and the immanence of practices of government to the state, a multiplicity and immanence of this activity that radically distinguishes it from the transcendent singularity of Machiavelli's

Prince, from governing the people, family, the child to governing the state (Foucault, 2007, p. 131-132). This review refers to the extension of the notion of the "government" to the management of individuals, goods and wealth like the management of a family by a father by introducing the economy to political practice which is valid from the 16th to 18th centuries. He reminds the expression of the "economic government" of Quesnay to represent "good government" (Foucault, 2007, p.133). Together with this, Foucault also mentions Guillaume de La Perrière's text as a striking remark and underlines his attribution to the "government of things" rather than the government of the territory of the Prince of Machiavelli. He summarizes that La Perrière says, "the things government are men in their relationships, bonds, and complex involvements with things like wealth, resources, means of subsistence, and, of course, the territory with its borders, qualities, climate, dryness, fertility, and so on. 'Things' are men in their relationships with things like customs, habits, ways of acting and thinking. Finally, they are men in their relationships with things like accidents, misfortunes, famine, epidemics, and death" (Foucault, 2007, p.134).[3] And he puts a remark on the new definition of the government of La Perrière which is the right way of arranging things in order to lead them, not to the form of the common good but to a suitable end, an end for each of the things to be governed (Foucault, 2007, p.136). At this point, Foucault compares this with the end of sovereignty and highlights that whereas the end of sovereignty is internal to itself and gets its instruments from itself in the form of law, the end of government is internal to the things it directs; it is to be sought in the perfection, maximization, or intensification of the processes it directs, and the instruments of government will become diverse tactics rather than laws (Foucault, 2007, p.137). In other words, as opposed to the sovereignty which aims the salvation for itself and requires

[3] G. de La Perrière, Le Miroir politique, folio 23r: "Gouvernement est droicte disposition des choses, desquelles on prent charge pour les conduire jusques à fin convenable."

judiciary or religious code; the government's aim is internal to the things and it directs them via apparatus of security.

Although the historical context of governmentality as a new form of power characteristically emerges not earlier than the 18th century it has its traces and elements in preceding historical contexts. In fact, Foucault associates the art of government and the problem of the population with the period after the 18th century since the historical conditions of the 17th century are not favorable for this kind of power relations. Accordingly, the crises of the 17th century, the great peasant and urban uprisings and the crisis of means of subsistence which weighed on the policy of all the western monarchies prevented the spread of the art of government. He mentions that mercantilism is the first rationalization of the exercise of power as a practice of government and by this time knowledge of the state began to be formed that can be employed for "tactics of the government"(Foucault, 2007, p.139). Historically, the demographic expansion and the agricultural production of the 18th century and the emergence of the problem of the population lead to the release of the art of government (Foucault, 2007, p.140). However, he specifically adds that this historical context is not the simple replacement of a society of sovereignty by a society of discipline and finally by government. He argues that it is a triangle of three (sovereignty, discipline and governmental management), which has the population as its main target and the apparatuses of security as its essential mechanism (Foucault, 2007, p.143). From the analysis of types of power and their relation with population, he puts "governmentality" to a specific place. Accordingly, throughout the narrated period within which the government is pre-eminent among the sovereignty and discipline with its institutions, procedures, analyses and reflections, calculations, and tactics that allow the exercise of this very specific, albeit very complex, power that has the population as its target, political economy as its major form of

knowledge, and apparatus of security as its essential technical instrument (Foucault, 2007, p.144).

Other traces to be followed for shedding light on the notion of neoliberal governmentality include the "pastoral power of Christianity"; early modern Europe's "police state" and "the art of government" of 18th-century liberalism. Accordingly, Foucault argues that the governmentality has been born out of the archaic model of Christian pastoral; diplomatic-military techniques and art of government in the 17th century and 18th century police in Western history (Foucault 2007, p.145).

Firstly, the all-pervasive power of Christian pastoral power is narrated to give a clue about a government that extends beyond the political arena. This is the government that individualizes and totalizes at the same time and draws borders with the aim of salvation for their subjects. In his study to put forth the government of men, Foucault scrutinizes the East: the pastoral power and the direction of souls, by rejecting that it is a Greek idea (Foucault, 2007, p. 169). He broadly describes the pastoral power of the king, god, or chief as a shepherd of men, who are like his flock, is frequently found throughout the Mediterranean East, Egypt, Assyria, Mesopotamia and in the Hebrews. Accordingly, pastorate looks like the relationship between God and men and its only raison d'être is doing good and the main objective is the salvation of the flock (Foucault, 2007, p. 172). Just like the relationship of the shepherd with his flock, the shepherd's power is not exercised over a fixed territory as much as over a multitude moving towards an objective and his role is to provide the flock with its subsistence, to watch over it and ensure its salvation (Foucault, 2007, p. 471). By mentioning the paradox of the shepherd of valuing a single sheep as to the whole flock, he underlines the Christian problematic of the pastorate that the sacrifice of one for all and the sacrifice of all for one. Foucault links this kind of mentality with the

Christian Church which individualizes the multiplicities. He asserts that the Church is a religion that lays claim to the daily government of men in their real-life on the grounds of their salvation and the scale of humanity (Foucault, 2007, p. 199). Eventually, what is aimed by Foucault to handle the pastorate of the 18th century is to expose the transitivity and the common points with the governmentality. He argues that neither pastorate nor governmentality puts the principles of salvation, law, and truth into play. In fact, they rather establish types of relationships under the law, salvation, and truth. Secondly, both of them constitute a specific subject whose merits are analytically identified, who is subjected to continuous networks of obedience, and who is subjectified through the compulsory extraction of truth (Foucault, 2007, p. 239-240). In other words, as Dean summarizes; the individual is defined by the analytical dissection of his merits and faults at every moment. Second, he is put in a position of absolute servitude to another and is thus in a kind of complete subjection. And third, in relation to God's truth, he is made to produce an internal, secret and hidden truth: it is the technology of the constitution of subjectivity which makes it a prelude to governmentality (Dean, 2010, p. 92).

The pastorate analysis of Foucault deserves attention with its reference to the governmentality by the notion of "conduct" and the related conceptions following "the crisis of pastorate" in the 15th and 16th centuries. Hereunder, conduction is defined as the way in which one conducts oneself, and in which one behaves as an effect of a form of conduct as the action of conducting (Foucault, 2007, p. 258). Foucault highlights this notion as one of the main contributions of the Christian pastorate to the West. What is as much important as this notion is the one that is emerged with the crisis of pastorate. In fact, he mentions "revolt of conducts" against pastorate as well and indicates Luther's revolt as the greatest one of the Christian West (Foucault, 2007, p. 260). As a result of these revolt of conducts, conflicts, and resistances, the transition from the pastoral of souls to the political

government of men (Foucault, 2007, p. 304). He clearly underlines that the pastorate does not disappear in the 18th century with these revolts; neither there is a transfer of pastoral functions from Church to State. Instead, Foucault talks about an intensification of the religious pastorate in its spiritual forms and in fact, the Reformation and the Counter-Reformation give the religious pastorate much greater control on the spiritual life and hold on material, temporal and everyday life of individuals than in the past (Foucault, 2007, p. 305). In short, the governmentality in 16th century Europe reserves the traces of conduct and the revolt of conduct in itself. Hence, these traces and understanding of the counter-conducts are deemed important to be able to define the new modalities of struggle or resistance in every epoch, since it may be the symptom of "crisis of governmentality" as well (Foucault, 2007, p. 504).

Foucault combines his striking analysis of pastorate with other problems of conduct of the age to reveal the individualizing power through the government of souls and so to control over the spiritual and material life of the individuals. In parallel with the pastorate's government of conduct, the 16th century includes other aspects of government that are not in the scope of politics. One of them is the problem of children and the emergence of pedagogy in that century. According to Foucault it is located in the intersection of several types of government: conduction of oneself and one's family, religious conduction, and public conduction through the concerns or under the control of the government (Foucault, 2007, p.307). Besides the education of children, Foucault also refers to the problem of the government of oneself in the same age, which has the roots of Stoicism. And finally, he adds the problem of the government of the state by the prince (Foucault, 2007, p. 127). Together with the crisis of pastorate which does not mean a simple rejection of pastoral institution but a much more complex form; the above-mentioned new types of relationships between pastor and flock and the ways to govern children, family, domain and principality have emerged.

In conclusion, at the end of feudalism, a general questioning of the way of governing and governing oneself, of conducting (*conduire*) and conducting oneself (*se conduire*), accompanies the birth of new forms of economic and social relations and the new political structures (Foucault, 2007, p.472). Therefore, as Dean interpreted correctly that if morality is understood as the attempt to make oneself accountable for one's actions, or as a practice in which human beings take their own conduct to be subject to self-regulation, then the government turns out to be a moral activity as well (Dean, 2010, p.19).

With all these conceptions, Foucault puts across a notion called "*raison d'État"* and constructs the way to political governmentality. A transition has been underlined from the governing based on the traditional virtues such as wisdom, justice, liberality, respect for divine laws and customs or common skills of prudence, reflected decisions, care in surrounding oneself with the best advisers to art of government that is based on the rationality of the state. In other words, it is neither based on the virtue of the sovereign of justice nor that of Machievelli's hero (Foucault, 2007, p. 472). In fact, as Gordon points out Foucault uses the term of rationality of government almost interchangeably with art of government; so a rationality of government means a way or system of thinking about the nature of the practice of government, capable of making some form of that activity thinkable and practicable both to its practitioners and to those upon whom it was practiced (Gordon, 1991, p. 3). The historical context of the rise of this kind of rationality is correlative with the elimination of the Roman Empire. With this affair, a new period starts within which the states have to struggle against each other to survive and the knowledge and the development of a state's forces gain importance more than the legitimacy of the sovereign over a territory (Foucault, 2007, p.472).

As Gordon underscores, Foucault suggests that the style of political thinking which enables continental European *raison d'État* to outgrow its Machiavellian limitations and to become a knowledge of the state's strength can be found most fully embodied and articulated in the corpus of the theory, pedagogy and codification developed in German territories after Thirty Years War under the rubric of *Polizeiwissenschaft*, or science of police. As discussed by Gordon, one might say that the reason of state's problem of calculating detailed actions appropriate to an infinity of unforeseeable and contingent circumstances is met by the creation of an exhaustively detailed knowledge of the governed reality of the state itself, extending to touch the ways of being of its individual members (Gordon, 1991, p.10). Throughout the circle of problems and techniques of conduct and government, the sovereign is no longer restricted by merely ruling a territory but also to govern with state rationality (Foucault, 2007, p.357). As Brown underlines, the government in this broad sense, therefore, includes but is not reducible to questions of rule, legitimacy, or state institutions; it is not only a formally political matter but is applicable to self, family, workplace, or asylum as well as to public life and the state (Brown, 2006, p.73). In this sense, the state turns out to be a practice and inseparable from the set of practices by which the state actually became a way of governing, a way of doing things, and a way of relating to government (Foucault 2007, p. 357). Concordantly, the kind of power is underlined as the most fascinating and disturbing point of Foucault finds in the western history of western governmental practice and rationalities by Gordon. He argues that this type of power "takes freedom itself and the soul of the citizen, the life and the life-conduct of the ethically free subject as in some sense correlative object if its own persuasive capacity" (Gordon, 1991, p.5).

In this framework, Foucault mentions two elements that give shape to *raison d'État.* The first one is a military-diplomatic technology that secures and develops the state's forces through a system of alliances and the organization of an armed

apparatus. Accordingly, principles of the treaties of Westphalia which seek European equilibrium are the consequence of this political technology. And the second one is the "police" which is the set of means for bringing about the internal growth of the state's forces (Foucault, 2007, p.473). In fact, in the 16th century, *raison d'État* appears as an art of government, in which there was an implicit reference to the population. However, beginning from the 17th century to the middle of the 18th century, with the apparatus called "police" the notion of the population is transformed in order to make *raison d'État* function (Foucault, 2007, p.358). Foucault combines the technologies of military-diplomacy and police with commerce and monetary circulation. Indeed, these are two instruments that lead to an increase in population and production and export as well as equipping strong armies as in the mercantilism and cameralism (Foucault, 2007, p.473).

However, as is mentioned before, beginning with physiocrats the population is deemed beyond the sum of the subjects and indeed it is perceived as a variable dependent on tax system, the activity of circulation, and the distribution of profit (Foucault, 2007, p.473). And it is started to be analyzed as a political problem with its economic reflection, internal order, competitiveness and welfare objective which to be coordinated by the police. Therefore, Foucault summarizes the main striking points beginning from 17th century to 18th century as: an art of government, organized with reference to the principle of *raison d'État*, a policy of competition in the form of the European equilibrium; the search for a technique for the growth of the state's forces by a police whose basic aim is the organization of relations between a population and the production of commodities; and finally, the emergence of the market town, with all the problems of cohabitation and circulation as problems falling under the vigilance of a good government according to principles of *raison d'État*" (Foucault, 2007, p. 440). This economic government, police state or cameralism is seen in Germany in 1648 with the allied

knowledge of mercantilism and political arithmetic (Gordon, 1991, p. 11). Gordon argues that the police state has a pastoral power and universal assignation of subjects to economically useful life, so with this line of thought, police appears as a kind of economic pastorate (Gordon 1991, p. 12).

In conclusion, the context of governmentality includes various elements throughout history to combine the individualizing and totalizing power of modern liberalism. Although Foucault does not make a value-laden criticism on liberalism, his governmentality analysis paves the way to the followers to use this as an analytical tool for criticism. As Rabinow also points out, Foucault does not claim that this totalizing and individualizing power has empirically taken hold of everything, nor that it is ineluctable; in fact, he asserts that the political, ethical, social, philosophical problem of our days is not to try to liberate the individual from the state, and from the state's institutions, but to liberate us both from the state and from the type of individualization which is linked to the state (Rabinow, 1984, p.22).

Foucault's analysis of the neoliberal governmentality which has its roots in both the German Ordo-Liberal School and Chicago School will be gone through in the next section.

2.1.1 On Neoliberal Governmentality

Having approached the apparatus of security which come into prominence among sovereignty and discipline, and the emergence of a raison d'état, it is essential to go over neoliberalism and the neoliberal governmentality. In fact, the perspective and concepts of governmentality are shaped by several interconnected issues. These include the analysis of the emergence of forms of national government and administration, and its techniques, particularly from the time of the absolutist

regimes and their public policy in its cameralist, mercantilist, and liberal forms, and the emergence of forms of rational knowledge of principally, political economy, political arithmetic, vital and social statistics, and the moral or social sciences and economics (Dean, 1994, p. 179). In addition, for Foucault a complex and irreducible ensemble of elements of governmentality comprises the rationality and techniques of security, sovereignty, law, and discipline as well (Dean, 1994, p. 191). Within this multi-dimensional analysis, the limitations to the raison d'état and the new forms of neoliberalism in different geographies will shed light on the configuration of the neoliberal governmentality and the regime of truth that it has brought into agenda.

2.1.1.1 Limitations to the Raison D 'état: Establishing a Regime of Truth

The Foucauldian notion of neoliberal governmentality requires a special concern on the rationality of the neoliberalism. In fact, this rationality requires the analysis of limitations to the raison d'etat of Foucault. Therefore, the role of judicial practice and the emergence of political economy; together with the crises of governmentality that such a combination brought, should be taken under scrutiny.

As is indicated in the previous section, the type of rationality that Foucault tries to narrate enables the way of governing with the principle of raison d'état and a new type of government which is formed during the 16th century. This type of government was while actually respecting the divine, moral and natural laws, has to do with something other than ensuring the salvation of subjects and extend its paternal benevolence over its subjects. So, the state comes to exist through and for itself and only exists in plural interdependent forms. To be able to demonstrate the emergence of a new regime of truth, Foucault approaches the transformation

and limitations of raison d'état, by referring to the practices of three interdependent forms. He first mentions mercantilism as one of the forms of government, which is based on monetary accumulation, aiming at increasing the population and competing with foreign powers. Second, he demonstrates the police as the unlimited regulation of the country according to the model of tight-knit urban organization. And finally, he embraces the development of permanent army along with permanent diplomacy, that is the military-diplomatic apparatus that led to European balance (Foucault, 2008, p.4-5). After listing these three interdependent forms, Foucault speaks of two kinds of limitations to the raison d'état: external and internal limitations. To be able to explain the external limitation of raison d'état, Foucault puts the difference between the judicial practice of the Middle Ages and the understanding of the law of government exercised according to new raison d'état. Concordantly, throughout the Middle Ages, judicial practice was a multiplier of royal power. However, especially from the start of the 18th century, law provides the basis to limit the indefinite extension of raison d'État that is becoming embodied in a police state (Foucault, 2008, p. 8). In this sense, he argues that the opposition, by making the legal objection to raison d'état uses the juridical reflection, legal rules and legal authority against it and consequently re-shapes it. He gives examples of the French parliament, Protestants, nobility and British Bourgeoisie and religious dissidents of the 17th century (Foucault, 2008, p.9).

On the other hand, Foucault also underlines the emergence of political economy as the internal limitation of raison d'état in the middle of the 18th century. In fact, Foucault perceives Adam Smith's *The Wealth of Nations* as a turning point to lead a transformation in political and economic thinking and as well as a transformation in the relationship between knowledge and government (Gordon, 1991, p. 14). According to this view, as Gordon cites, for Cameralist thinkers, police science and state action are isomorphous and inseparable. However, for

political economy, scientific objectivity depends on the maintenance of relative distance and autonomy from the standpoint of the state, while the content of economic science affirms the necessary finitude and frailty of the state. Therefore, liberalism appears as a critique of reason in Kantian terms and a kind of limitation to the state reason (Gordon, 1991, p.15). In this framework, what is underlined by Foucault is that the political economy starts to present itself as a critique of governmental reason and provides a self-limitation to it. Therefore, he argues that the basic function or role of the theory of the invisible hand, which is the beginning of the political economy, is to disqualify the political sovereign and the possibility of the economic sovereign so that it challenges the idea of the police state which administers the subjects and the economic processes (Foucault, 2008, p.284). Accordingly, previously there was a sovereign as the representative of God and is eluded by the Providence but with the emergence of the political economy, the sovereign is equally eluded by the economic field. In that respect, it represents a political challenge to the traditional conception of the sovereign (Foucault, 2008, p.292-293). Moreover, Foucault argues that as opposed to the law-the external limitation of raison d'état-, the political economy shares exactly the objectives of raison d'état and the police state that mercantilism and the European balance of power had tried to realize (Foucault, 2008, p.14). In fact, it asserts a new regime of truth. Although this regime of truth shares some common practices and regulations such as collecting taxes, setting codifications, production principles, etc., the legitimacy of these practices are ceased to be moral, natural and divine laws or the sake of the sovereign's power or the strength of the state as in the raison d'état of 16th and 17th centuries. On the contrary, the governing is based on the limitations set by itself (Foucault, 2008, p. 18-19). This new regime of truth, which maintains, develops and perfects the raison d'état, establishes the main logic of the new art of government called liberalism according to Foucault.

Foucault comes up with a conception called “frugal government” by quoting from Benjamin Franklin when mentioning the liberalism. He associates the question of liberalism with this kind of government within which the extensive activities of the government are tried to be restricted in accordance with the new regime of truth: market. To be more specific, he differentiates the market in the 18th century with the ones in the 16th and 17th centuries. With all its regulations and procedures market, in fact, provides a degree of distributive justice for all and aims to prevent fraud. In this sense, the market, which was the area of justice previously, appears as “something that obeyed and had to obey spontaneous mechanisms” by the beginning of the 18th century (Foucault, 2008, p. 30-31). He argues that the market which functions according to the natural mechanisms creates a regime of truth. In fact, the natural mechanisms of the market as the standard of truth enables us to discern which governmental practices are correct and which are erroneous. So, the market turns out to be a site of verification of good government. Foucault remarks that from the 18th century onwards, the market determines that good government is no longer simply a government that functions according to justice; but it has to function according to the truth (Foucault, 2008, p. 32). Furthermore, the government starts to be exercised over the interests where the exchange determines the value of things rather than the territory composed of subjects (Foucault, 2008, p. 46-47). Thus, this calculus of the utility paves the way for the frugality of the unlimited and extended governmentality of the police.

Foucault argues that the veridiction of the market together with the limitation/frugality of the government can be perceived in the “idea of progress” of European liberalism in the 18th century. He mentions the “idea of progress” of Europe in the midst of the 18th century as a collective subject after the ideas of physiocrats and Adam Smith. He argues that Europe has the aim to advance in the form of unlimited economic progress through competition between states, and this idea of progress, of European progress, is a fundamental theme in liberalism

and completely overturns the themes of European equilibrium, even though these themes do not disappear (Foucault, 2008, p. 54-61). In this sense, he asserts that this may be the first time that Europe appears as an economic unit or considers the world as its possible economic domain (Foucault, 2008, p. 55).

What is also striking for the scope of this study is what Foucault indicates as the crises of governmentality. These crises both limit and let off the room for maneuverings of liberal governmentality and in the end, establishes a regime of truth. Firstly, these crises can be associated with the tension between freedom and security. Foucault defines liberalism as the new art of government which appears like the management of freedom. He notes that the formula of liberalism is not "be free" and it is not given; in fact, liberal freedom is something constantly to be re-produced and the challenges caused by this freedom should be taken up at the same time. At this point, he underscores the principle of "calculation of manufacturing the cost of freedom" and he denominates this set-up as "security" (Foucault, 2008, p. 63-65). In accordance with this argument, the problem of security is the protection of the collective interest against individual interests. And liberalism turns into a mechanism to arbitrate between the freedom and security of individuals by the "culture of danger" (Foucault, 2008, p.66). Foucault argues that this kind of culture of danger appears in the 19th century which is very different from the great apocalyptic threats of plague, death, and war of the Middle Ages till the 17th century. It sometimes appears as detective fiction and journalistic interest in crime, as a campaign against disease and for hygiene, around sexuality and degeneration of the individual, family, race and human species, etc. In conclusion, liberalism cannot exist without this culture of danger so that the liberal art of government cannot be conceived out of the scope of procedures of control, constraint, and coercion which are the counterpart and counterweights of different freedoms. Foucault exemplifies this with the "panopticon", which Bentham proposed as the formula of liberal government,

within which the supervision of the conduct of individuals is possible while increasing their productivity (Foucault, 2008, p.67). And during the following periods of liberalism, this control and intervention function will not only be a counterweight to freedom but its mainspring as in the case of Roosevelt's welfare policies starting from 1932 (Foucault, 2008, p.68).

2.1.1.2 Two Forms of Neoliberalism: German Enterprise Society and the American Neoliberalism as a Whole Way of Being

The extension of the Foucauldian neoliberal governmentality and its all-pervading rationality beyond the political domain require briefly looking into two forms of neoliberalism. Although these two forms have different characteristics, they both contribute to the pervasiveness of the neoliberal governmentality and define *advanced liberal* societies.

Foucault brings into question the economic freedom ideal of neoliberalism by asking how economic freedom can be the state's foundation and limitation at the same time, its guarantee and security (Foucault, 2008, p.103). It is in a way of questioning liberalism as an art of government. This discussion is exactly related to the tension of rejection of the intervention of the state to market and at the same time demanding a vigilant policy to keep the market free. Therefore, on the neoliberal governmentality analysis, he mentions two forms of neoliberalism which have different cornerstones and historical contexts however oriented to the same enemy called Keynes and the state-controlled economy, planning, and state interventionism. One of them is German *Ordo-Liberalism* which has links with the Weimar Republic and post-war construction; other is the liberalism of *Chicago School* that is based on the criticism of Roosevelt's New Deal policies and the interventionist and aid-oriented post-war policies of democrats such as Truman, Kennedy, and Johnson, etc. (Foucault, 2008, p.79). Within this

distinction, German neoliberalism has the characteristics that can be derived from the requirement of the re-construction after the war, relevant planning for this reconstruction and finally to avoid the renewal of fascism and Nazism threats in Europe (Foucault, 2008, p.79-80). A group of economists and jurists led by Ludwig Erhard namely Walter Eucken, Franz Bohm and Wilhelm Röpke formed the school of economists called the Freiburg School or the "ordoliberals" around the journal "Ordo" (Foucault, 2008, p.103).

By referring to Ludwig Erhard, Foucault underlines the emphasis of ordoliberalism on the legitimizing foundation of the state on the guaranteed exercise of economic freedom in the framework of a political consensus (Foucault, 2008, p.80-84). By taking Nazi experience as an adversary, Ordoliberals concluded that the Nazi policies led to the statification so instead of accepting a free market defined by the state, they adopted a free market as organizing and regulating the principle of the state (Foucault, 2008, p.116). What is different than the 18th-century liberals and Adam Smith is that Ordoliberals prioritized "competition" rather than the mere "exchange". Therefore, they asserted that the problem of neoliberalism is not how to cut or contrive a free space for the market within an already given political society. In this sense, they argued that the market can only function through free and full competition and the state should avoid establishing a monopoly, control, etc. (Foucault, 2008, p.118,119,131). However, this does not mean that the state will not intervene; on the contrary, as Röpke emphasizes the free market requires an active and vigilant policy (Foucault, 2008, p.133). The fact remains that neither the state works against economic policy nor compensates for it. Social policy in ordoliberalism is not to function as a compensatory mechanism for absorbing or nullifying the possible destructive effects of economic freedom on society or the social fabric (Foucault, 2008, p.144-160). The government's role is to organize a society and to establish what they call a "Gesellschaftspolitik" such that these fragile

competitive mechanisms of the market can function to the full and in accordance with their specific structure (Foucault, 2008, p. 240). In other words, rather than implementing the rules, the government is expected to ensure the formal mechanism for enabling competition.

Indeed, ordoliberalism envisages a society and an economy made up of enterprise-units but not of individuals (Foucault, 2008, p. 176). This social fabric is conceived as if it is composed of connected multiple enterprises. The function of generalization of the enterprise form firstly helps to extend the economic model for social relations. In addition, it aims to reconstruct a set of moral and cultural values that are presented precisely as antithetical to the mechanism of competition (Foucault, 2008, p. 242). So, avoiding the excessive policies of the state and threat of totalitarianism over the society, Ordoliberals supports the idea of a *Vitalpolitik to establish an enterprise society. They argue that* a Vitalpolitik designed to create a life worth living, a new set of ethical and cultural values should be created to enhance the power of individuals and families to shape their own lives. Accordingly, each person's relation to all his/her activities is to assume to be given the ethos of the enterprise form (Rose, 2004, p.138). Besides, state intervention or the social policy is not for the ideals of equality or justice, on the contrary, it must let inequality function and as Röpke underlines the inequality would be the same for all (Foucault, 2008, p.143). Indeed, what they propose as an instrument to create entrepreneurial forms within society is the law. Hence, by perceiving the juridical in the economic base rather than the superstructure, ordoliberals speak of an economic-juridical order (Foucault, 2008, p.162).

On the other side, the American form of neoliberalism, which helps neoliberalism penetrate into the society, has mainly arisen from Chicago School led by Simons, von Hayek, Friedman, and others. In fact, Foucault argues that American liberalism makes such a difference that it is not an economic and political choice

formed and formulated by those who govern within the governmental milieu but it goes further as a whole way of being and thinking (Foucault, 2008, p.218). In this respect, he lists three main motivations as firstly, the reaction against New Deal policies and criticism against Keynesian policies developed by Roosevelt from 1933-34; second Beveridge plan and all the projects of economic and social interventionism developed during the war and third is the programs on poverty, education, and segregation developed in America from Truman to Johnson administrations (Foucault, 2008, p.216-217).

One of the main striking features of American liberalism is the unlimited generalization of the market to the social system, to domains of behavior or conduct which are not belonging to the market such as marriage, education of children, criminality. According to Foucault, these problems revolve around the notion which changes meaning together with neoliberalism: "homoeconomicus". He argues that in the 18th century, the homoeconomicus is perceived as the one who pursues his own interest and so must be let alone as the object/subject to laisser-faire. It appears as intangible with regard to exercise of power. However, after the 18th century, homoeconomicus turns out to be someone governable who responds to systematic modifications artificially produced by the environment (Foucault, 2008, p.270). In other words, while it is considered as an abstract, ideal and purely economic element formerly, it becomes a concrete part of the government beyond the economy. That is, in one, homoeconomicus is the motor of the self-regulating economy; in the other, it is conceived as an element in the economy of government formed within the calculations of politicians, magistrates, and civil servants (Dean, 1994, p.190). Thus, the homoeconomicus who is an entrepreneur of himself, being for himself with its own capital of himself, his own producer and source for earnings and strives to improve all of them, becomes the part of economic analysis. At this point, Foucault puts forth the problem of applying the perception of homoeconomicus to every aspect of

society. In fact, the activities out of the domain of economy such as marriage, raising children, spending time with children, etc all turn out to be an economic activity to be calculated (Foucault, 2008, p.243-268). This gives way to a period that all aspects of social behavior are reconceptualized along economic lines – as calculative actions undertaken through the universal human faculty of choice (Rose, 2004, p.141). In fact, this is very well described by the new conception of Rose as "advanced liberal" that has the rationality within which the government must address the market, the family, the community, the individual and new ways of allocating the tasks of government between the political apparatus, intermediate associations, professionals economic actors, communities and private citizens (Rose, 2004, p.140).

As Walters and Haahr indicate, advanced liberalism is more than ideological; it has a technical basis that embeds it in the fabric of everyday life (Walters & Haahr, 2005, p.119). According to Rose, by the advanced liberalism, the citizen is also transformed into an entrepreneur of himself. Such that, the citizen is conceived as active, not in the republican sense but just like a consumer and his or her activity is to be understood in terms of the activation of the rights of the consumer in the marketplace. Therefore the rights and responsibilities are contractualized to make the parents consumers of education, to make the patients consumers of health, etc.(Rose, 2004, p. 165). It figures individuals as rational, calculating creatures whose moral autonomy is measured by their capacity for "self-care"—the ability to provide for their own needs and service their own ambitions. In making the individual fully responsible for her- or himself, neoliberalism equates moral responsibility with rational action; it erases the discrepancy between economic and moral behavior by configuring morality entirely as a matter of rational deliberation about costs, benefits, and consequences (Brown, 2005, p.42). Within this construction, the social policy as well appears as a control tool of the state. As Brown puts that "social policy is the

means by which the state produces subjects whose compass is set entirely by their rational assessment of the costs and benefits of certain acts, whether those acts pertain to teen pregnancy, tax fraud, or retirement planning (Brown, 2005, p.43). Moreover, Rose underlines that with this new rationality the citizenship is no longer realized in relation to the state but in a variety of private, corporate and quasi-public practices from working to shopping (Rose, 2004, p. 166). Thus, advanced liberalism means to be all about "governing in ways which seek to elicit agency, enhance performance, celebrate excellence, promote enterprise, foster competition and harness its energies" (Walters & Haahr, 2005, p.119). It is also argued that "it fragments the state or the firm into countless autonomous agencies and cost centers, then reassembles them through the mechanisms of markets, contractualism, consultation, and partnership" (Walters & Haahr, 2005, p.119). Furthermore, advanced liberalism also "governs in the name of, and through the mobilization of the freedoms, choices, and desires of its subjects" (Walters & Haahr, 2005, p.119).

Just like Brown, Lemke also criticizes the suffusion of the state and subject with the economic rationality and neoliberal governmentality's inevitable effect on the social policy. He points out that the economic rationality has the effect of radically transforming and narrowing the criteria for good social policy vis-à-vis classical liberal democracy. Not only must social policy meet profitability tests, incite and unblock competition, and produce rational subjects, it obeys the entrepreneurial principle of "equal inequality for all" as it multiples and expands entrepreneurial forms with the body social (Lemke, 2001, p.195). Thus, the entrepreneur state produces the moral subject as an entrepreneur and the social policy is materialized. Thereby, one might argue that the neoliberal governmentality establishes an alternative vision of justice for the society and its respective "individuals" as homoeconomicus, by providing nothing to do with equality, freedom or distribution of wealth. Eventually, the world of partnership

frameworks, benchmarking, league tables, best practice standards, and performance contracts is one that subtly constrains and shapes us, enjoining us to exercise our freedoms and liberties in particular ways, and towards particular ends (Larner & Le Heron, 2004; Power, 1994, in Walters & Haahr, 2005, p. 119).

2.1.1.3 Studying Neoliberal Governmentality

As is mentioned at the beginning of the section, the analysis of Foucault's notion of governmentality has inspired interest among several disciplines and has been used as a critical tool to address contemporary issues. Having narrated the historical context and the respective points regarding the neoliberal governmentality, it is worth remarking some issues and focus on the vitality of this tool in terms of this study. In fact, studying governmentality aims to avoid state-centrism and tries to focus on power relations since this technology of power is all-pervading and embraces all spheres of social, political and economic.

From the 8th of February 1978 onwards, Foucault begins analyzing governmentality deeply by underlining the reason to study governmentality. Indeed, he thinks that it is important to avoid state-centrism while elaborating on the problem of state and population. Therefore, he prefers to move beyond the institutional analysis and replace it with the overall point of view of the technology of power (Foucault, 2007, p.163). In addition, to be able to make this shift he suggests substituting the external point of view of strategies and tactics for the internal point of view of the function (Foucault, 2007, p.163). Thus, in his governmentality analysis Foucault aims to be able to free the relations of power from the institution, in order to analyze them from the point of view of technologies; to distinguish them also from the function, so as to take them up within a strategic analysis; and to detach them from the privilege of the object, so

as to resituate them within the perspective of the constitution of fields, domains, and objects of knowledge (Foucault, 2007, p. 164).

Tellman, in her assessment, argues that governmentality studies work towards understanding the forms of spatial, temporal and normative mechanisms that delineate the "history of the present" and; rather than focusing solely on the technical objects and their networks, governmentality attends to the fuzzy logic of "technologies of power." In this sense, she figures out that the notion of governmentality thus shows how the political technologies work by putting the moral and calculating individual at the center of visibility and intelligibility (Tellman, 2010, p. 290-298). Therefore, Foucault's analysis provides us a critical instrument to overview today's power relations. So, this kind of analysis not only aims "to cut off the king's head" (Foucault, 1980, p. 121 in Dean 1994, p.180) in political analysis and method, but also helps to make intelligible government as an ethical practice, to thematize the dangers of its rationality, and consider the rights of citizens in so far as they share the status of the governed (Dean, 1994, p. 180).

So indeed, the neoliberal governmentality appears as the art of governing that both include state action and the "free" subject's conduct toward itself. Rational and free subjects make choices and take all the responsibility that comes with it. As Brown indicates that neoliberalism carries a social analysis inside it. In fact, she argues that when the neoliberalism is deployed as a form of governmentality and it reaches from the soul of the citizen-subject to education policy it involves extending market values to all institutions and social action (Brown, 2005, p.39). Concordantly, neoliberal governmentality appears not only as an individual body but also a total of collective bodies and institutions such as public administrations, universities, corporations, and states, which have to be flexible and autonomous. So, regulation and domination can be manageable by reproducing the social

asymmetries, re-coding of social mechanisms of exploitation and domination on the basis of a new topography of the social (Lemke, 2002, p.13-14).

Hence, thus far, the neoliberal governmentality has been discussed as a complex matter, which comprises elements from pre-modern to contemporary societies, different technologies of power with several forms of instruments and multiple interlaced actors, and a phenomenon that should not be approached with a reductionist outlook. The next section will continue with the analysis of the extended definition of *security* as an offset of neoliberal governmentality.

2.2 Extended Definition of Security

There is a cruel irony in that meaning of secure
which is unable to escape.[4]

As is narrated in the former sections, the new art of government-neoliberal governmentality- has the population as its target, political economy as its major form of knowledge, and dispositif/apparatus of security as its essential instrument. In line with this Foucauldian analysis, despite not eliminating the power of sovereignty over territories and the disciplinary power of law as a whole; the governmentality became the prominent form of power in the neoliberal age. This prominence of governmentality can be analyzed from the perspective of the studies of security as well. In this framework, to be able to expose the emerging role of security as a dispositif within neoliberal governmentality, the change of the attributed meaning and the approach to security from the Cold War to today should be looked through.

[4] See BUZAN, B. (2016). *People, States & Fear, An Agenda for International Security Studies in the Post-Cold War Era*, ECPR Press: Colchester, UK, p.50.

2.2.1 Traditional Approaches to Security

The history of contemporary security studies can be traced back to the "traditional" understanding of the security of the Cold War. This traditional approach is mainly based on a bipolar world of the Cold War with the specific threats between states and the use/control of military force (Walt, 1991, p. 212). On the other hand, the "wideners" have added economic, societal, political and environmental risks to the military threats; and later on, the "deepeners" are concerned with adding new units of analysis to the traditional state-centric view (Cavelty & Mauer, 2010, p.1). In this sense, it is both the history of a transition from a world of military threats between states to a world of threats which encompass societal, political, economic and environmental spheres. At this juncture, the discussion of security requires the analysis of both the changing meaning of security and the approach to security. Since the threats are perceived to be spread from the level of states to nearly all the spheres of life, the struggle over security has extended too. In a sense, it turns out to be "not only struggles over security among nations but also struggles over security among notions" (Lipschutz, 1998, p. 9).

To be able to hold a discussion on such a transition, it is necessary to briefly overview the historical context of the approaches to security and debate the need for an objective of "security". Hence, some guiding questions might be asked such as "what is security?", "what kind of security is needed?", "whose security is targeted for what?", "can the meaning of security change over time and can it be reconstructed?" "what can be sacrificed for the security?" "can the discourse of the security conceal any other fundamental rights and freedoms?" "what can be the role of the homoeconomicus rationality of the advanced liberal communities to define this discourse?" Firstly, security refers literally to a "condition of being protected, free from danger, safety" and in fact, this meaning prevailed in the

great power diplomacy of the modern states-system (Der Derian, 1998, p.24). Furthermore, when the genealogy of the notion is analyzed, in its realist foundations that the term security meant a condition against a state of war or a hide-out which is to be protected from a collective threat. In other words, the security is born out of a primal fear, a natural estrangement and a condition of anarchy which diplomacy, international law and the balance of power seek, yet ultimately fail, to mediate (Der Derian, 1998, p.24).

Indeed, security has always been a part of an ideal situation in many theories. However, the conditions to ensure such an ideal and the type of security depend on the changing socio-economic structure and the respective discursive construction. In realist theory, the lack of security was equated with anarchy, so that anarchy renders security problematic, potentially conflictual and is a key underlying cause of war (Wohlforth, 2010, p. 10). In this line of thought, human affairs are characterized by groupism, egoism, and power-centrism, so that some central authority is needed to enforce the order (Wohlforth, 2010, p. 10). Europe during the 18th century is indicated as an exemplar of this kind of a realist view of the self-help consequences of life under anarchy (Buzan & Wæver, 2009, p. 253). However, throughout the history, there were periods structured by overarching conflicts that dominate this understanding such as the Cold War (Buzan & Wæver, 2009, p. 253). In this period, the conflict between the East and the West and the respective security policies were preeminent over the singular security policies of the countries. Therefore, one may conclude that the severe threat of anarchy and indeed the referent object of security are replaced by other conjunctural ones continuously. Throughout this change, as Buzan et al conclude security became "the move that takes politics beyond the established rules of the game and frames the issue either as a special kind of politics or as above politics" (Buzan et al., 1998, p. 23).

As Buzan reveals, since the state has several components such as the idea of the state (nationalism), the physical base of the state (population, resources, technology) and the institutional expression of the state (administrative/political system), it is hard to define common threats to each component at the same time (Buzan 2016, p. 65). And even if we consider changing the referent object of security and extending it to the borders of the state, the discourse of security becomes more complicated. Congruently, Wæver argues that the broadening of the agenda of security begins by the 1980s. While the security was before equated with the military issues and the use of force, it was moved out of the military sector. Since the structural features of international politics of the Cold War between 1947 and 1991 have mostly vanished, the meaning of security has been widened by leaving its traditional connotations. As from this period, the strict focus on the security of the state and thus the national security is extended towards a broader focus of individuals in numerous ways such as economic welfare, environmental concerns, cultural identity, and political rights (Wæver, 1998, p. 39-40). The security of society, the security of the individuals, the security of the cultural and ethnic communities, the security of the environment, the security of the market, etc has been brought into agenda besides the security of the states against other states. Wæver perceives this as a major problem, because such an approach, which has an endless scope, opens the way to define everything that is politically good and desirable based on security. So, whereas before the security was, in historical terms, the field where states threaten each other, challenge each other's sovereignty, try to impose their will on each other, defend their independence, and so on, it has lost its constant core now (Wæver, 1998, p. 40-42). Whenever the state has ceased to be the referent object of the security, and other concerns of advanced liberalism become prominent; the target of the security and what it sacrifices have been re-established. This approach,

which is criticized for extending and distracting the issue of security from its main focus, transforms the security into a tool of legitimization.

Both the traditional approach and the widened approach to security can be observed in the European case as well. The Cold War system in Europe is described as the "total exclusion of unwanted change, guaranteed stability of the status quo" (Wæver, 1998, p.47). However, after the Cold War, fragmented tendencies have appeared because of the diversification of the referent objects. In another analysis of Buzan and Wæver, they ask the question of "what kinds of security problems do actors in the EU part of Europe articulate?" (Buzan & Wæver, 2003, p.356). The points that they highlighted are worth mentioning within this discussion of traditional versus extended approaches to security. Accordingly, the actors in the EU and its near-abroad relations set an intriguing example with two peculiar dimensions. First, the states are deemed to establish a peaceful order while at the same time numerous non-state forms of securitization may enter into this order. The second feature is the form of a security system that is built on de-securitization but works by mixing a dose of re-securitization in the form of the strong metanarrative of historical development of Europe, past, present, and future (Buzan & Wæver, 2003, p. 375-376).[5] Based on this argument, Buzan and Wæver list several factors that might shape the common points of security discourse of the states in the post-wall Europe. The listed factors are conflictual in themselves but put forth the peculiarity of this period. First of all, the security of individual states in Europe has the main concern to escape from its notorious past of wars, so European integration is aimed. On the other side, this integration can also be conceived as a threat to the national identity of the states. Besides, there are many specific dynamics such as the local conflicts of Northern

[5] Buzan and Waever indicate that although the argument of Europe returning to its past is no longer real possibility but it is invoked by the elites to legitimize the project of EU. In this sense, according to this view, the uncertainty about the possibility or not of a return to balance-of-power behavior and war is thus central to both European political reality and the present interpretation.

Ireland, the Basque region, etc; as well as the ethnic conflicts in the Eastern Europe, the instability of Russia and the Mediterranean, the flow of immigrants, global terrorism, international organized crime, drug trafficking, environmental security, regional conflicts and traditional state to state conflicts, etc. all belong to the discourses of the security within Europe (Buzan & Wæver, 2003, p. 358-361). Therefore, the primary motive for the security has been continuously re-defined according to the existing and potential threats. As Wæver asserts, in the current European situation, security has, in some sense, become the name of the management problem, of governance in an extremely unstructured universe (Wæver, 1998, p.59).

Within the framework of this historical conjuncture, the realist and neorealist approaches to security have been challenged by the approaches that attribute security extended meanings. To be able to explore these, the philosophical and sociological approaches of securitization will be explained in the next section.

2.2.2 Securitization

The challenges to the traditional approaches to security mainly argue that security is not state-centered and not restricted mainly with military relations; in fact, it might be re-invented discursively and practically. Hence, security can be extended to any area such as economic, societal and environmental, etc. beyond its familiar military-political scopes. At this point, by referring to its relation with the language as "innovative", Balzacq defines securitization as "a set of interrelated practices, and the processes of their production, diffusion, and reception/translation that bring threats into being" (Balzacq, 2011, p. xviii). He argues that as different from the traditional security approaches, the threats are intersubjective representations but not the objective entities and can be constructed continuously. In other words, he asserts that according to the

securitization theory nothing is essentially a menace or threat but it is constructed discursively.

But yet, to construct a discourse and to create securitization requires additional assumptions according to different perspectives. Depending on the adopted approach to securitization, the assumptions may vary. The first assumption argues that an issue is securitized only if and when the audience accepts it as such (Buzan et al., 1998, p. 25). Balzacq mentions this assumption as the "centrality of audience" and indicates that "an empowering audience must agree with the claims made by the securitizing actor" and it is the audience which "has a direct causal connection with the issue and has the ability to enable the securitizing actor to adopt measures in order to tackle the threat." (Balzacq, 2011, p. 8-9). In this sense, the securitizing actor needs to have moral and formal support from the audience (Balzacq, 2011, p. 9). The second assumption of Balzacq is that there should be "co-dependency of agency and context" within which knowledge of the notion acquired through language and the cultural meaning would be combined in the discourse (Balzacq, 2011, p. 11). This reveals the fact that the context is as significant as the semantic. And finally the third element of the securitization is "the dispositif and the structuring force of practices" which highlights the securitization as a field of struggles, practices, intersubjective understandings framed by tools and the habitus (Balzacq, 2011, p. 15). By referring to Foucault's term of "dispositif", that is, "the apparatus of security", this assumption underlines that, the securitization is the sum of policy tools and practices in which the discourses and ideologies are hard to disentangle; the differences between the securitizing actors and the audiences are blurred (Balzacq, 2011, p. 15). He mainly argues that the security tools embody practices. And finally, these tools vary from one program to another; shape social relations; reconfigure the public action and at the same time embody a specific image of the threat (Balzacq, 2011, p. 16).

Based on the different combinations of these assumptions, two interrelated approaches might be associated with the studies of securitization. The first one is what Balzacq calls “philosophical” approach to securitization: the securitization as the *speech act* which belongs to the Copenhagen School. The representatives of the Copenhagen School, Ole Wæver being in the first place, develops this approach which asserts that security threats are socially constructed and so the security issues come into being through discursive processes (Léonard, 2010 , p.235). It is mostly based on the Derridean reappropriation of Austin’s philosophy, which prioritizes the “enunciation” rather than the context of the utterance or the speaker’s intention (Balzacq, 2011, p. 21). Moreover, by avoiding a view of security that is given objectively, they emphasize that security is determined by actors and it is intersubjective and socially constructed (Buzan et al., 1998, p. 31). The intersubjectivity is underlined in such a way that there is nothing "objective" and the security grows out of the mutual interpretations and responses to one another by the actors constituting the system (Lipschutz, 1998, p. 161).

According to the speech act approach, there are three types of units; “the referent object, the securitizing actor” and “the functional actors” (Buzan et al., 1998, p. 36). The referent object is the thing that is seen to be existentially threatened and has a legitimate claim to survival. Next, the securitizing actors are the ones who securitize issues by declaring something. And finally, functional actors are actors who affect the dynamics of a sector. While in the traditional approaches the referent object was the state or nation; survival is about the sovereignty or for an identity; in this approach, the securitizing actors can attempt to construct anything as a referent object (Buzan et al., 1998, p. 36). Although underlining the constructed meaning of security and the significance of the language, Copenhagen School insists on sticking to the traditional referent of security. In this sense, Wæver accepts that security is influenced in important ways by dynamics at the

level of individuals and the global system, but he does not propagate unclear terms such as individual security and global security and associates the security with the state (Wæver, 1998, p.41). So, although the scopes of the security may vary, the issue of securitization is perceived as the discourse of the state and the state elites. In addition, the methodology of the speech act approach is mainly based on the assumption that the discourse materializes the text; therefore this approach conceives that textualism is the best method for security analysis. In this sense, the representatives of this school of thought are often criticized for having skirted the distinctive role of the audience, while an over-emphasis on textualism neglects the impact of the context on securitization (Balzacq, 2011, p.19).

The dependency on the discourse analysis and the omission of the practices are the main points that are opposed to the speech act approach. With respect to this, the "sociological" approach to the securitization has come to the fore. The scholars led by Didier Bigo have developed this approach to the study of securitization processes, which emphasizes the importance of practices in addition to discourses (Léonard, 2010, p.235). This approach is primarily influenced by Bourdieu and Foucault's works and underlines that securitization is a web of practices and mainly embodied in dispositifs (Balzacq, 2011, p.22). Therefore, to analyze the securitization, policy tools should also be elaborated. Huysmans argues that in this approach the acts of the bureaucratic structures or networks linked to security practices and the specific technologies that they use may play a more active role in securitization processes than securitizing speech acts (Huysmans, 2004, p.294-318). Balzacq indicates that the choice of a policy instrument is typical "a locus of intense power games"; therefore, he argues that discourse usually pre-dates a policy tool (Balzacq, 2008, p.78). In other words, to be able to develop and enhance a strategy of securitization, the policy tools should be constructed beside the discourse. And the study to analyze securitization requires focusing on both. Thus, following the challenges to the traditional

approach, the new outlook for securitization which combines the discourse and practice has been developed. As Balzacq concludes the securitization theory appears as janus-faced by pertaining to discourse and a practice instantaneously (Balzacq, 2010, p.17).

In conclusion, both of the securitization theories, whether the philosophical or the sociological approaches, remark the extended meaning of the security and expose its all-pervading discourse and concealed objectives inside societal, political and economic spheres. This point of view constructs one of the main layouts of the securitizing politics. In addition, the approach to security as "dispositif" puts forth a methodological reference to this study that centers on the importance of tools and practices as well as discourses and ideologies. In this context, Bigo's sociological outlook and "banopticon" will be referred in the next section.

2.3 Securitizing Politics

The advocates of the securitization theory understand security as "the move that takes politics beyond the established rules of the game and frames the issue either as a special kind of politics or as above politics" and therefore they perceive securitization as a more "extreme version of politicization" (Buzan et al., 1998, p.23). One might conclude that one of the main consequences of this extended discourse of security is the emergence of securitizing politics with its penetration to non-security spheres. In fact, this idea can be read in parallel with the Foucauldian governmentality analysis. In other words, the dispositif of security embodies the forms of power from sovereignty to disciplinary and governmentality. Thus, security involves a complex network of meanings correspondingly from the history of the state as a territorial political community to the liberal government that deals with the circulation of the populations, goods, and services. In this sense, with the rise of the new form of power, that is,

governmentality, the modern state not only assigns membership in the political community and ensures the survival of the community but also becomes in charge of the well-being of the population as well through governing of the individuals (Aradau & Munster, 2010, p.76). As such, it is argued that a governmental mode of power unpacks security as a specific type of ordering of polis based on the practices of inclusion and exclusion with the desire to make its members conform to ideal images of what they should be (Hindess, 1998, p. 59). Indeed, the necessities of the neoliberal order and the requirements of the homoeconomicus mainly define the borders of this circulation and what should the population be. With this stance, the extended meaning of security turns out to be a dispositif for the "management of unease" (Bigo, 2008, p.15). Under these circumstances, the security overreaches its discursive meaning and goes a step further from a speech act and converges on various spheres.

By analyzing the security approaches after the 2000s, Bigo underlines this convergence with a Foucauldian sociological outlook. In this sense, he exposes both the discourse and the practices within which the security may be manifested and underscores it as a dispositif as such. This apprehension of Bigo involves the discourses of the possible actors, the role of the habitus and the extent of administrative and scientific measures and regulations as well; and he calls this structure as "ban-opticon" (Bigo, 2008, p. 37). He explains that the selected groups are exempted from the majority by means of control and surveillance. And indeed, this mechanism functions as a dispositif of interconnected elements (Bigo, 2008, p. 37-38). The first element is the discourse that establishes the link between threat and the protected object such as narratives of police, military, customs, and judicial institutions, etc. The next one is the architectural facility that is for separating out the outsiders such as the detention zones within international airports. The third one is the regulatory decisions to determine access for specific areas and services. Similarly, the administrative measures to

detent and restrict access is also used. Finally, scientific discourses on the reasons behind exclusion, statements on their relation to the individualization and transnationalization of violence, and philosophical and moral propositions, etc. all are grounded. Therefore, contrary to the design of Bentham's panopticon, this dispositif no longer depends on immobilizing bodies under the analytic gaze of the watcher but on profiles that signify differences, on exceptionalism with respect to norms and on the rapidity with which one evacuates (Bigo, 2008, p.38). Hence, this is not the panopticon but a "ban-opticon". Indeed, this mechanism channels the flows and controls the movements rather than controlling the stocks in a territory and dissecting bodies. Moreover, according to Bigo, by producing knowledge on the threats and security, the management of the "abnormals" has been handled at a distance by giving the impression of providing freedom (Bigo 2008, p.38). The threats, fears, and unease are all managed in this structure. Therefore, the politics of security turns out to be securitizing politics within which non-security spheres are all embedded for the sake of the extended target of security.

Bigo associates this with liberalism and its operation in a society of risk by reminding Foucault's words on liberalism as a new art of government and as a technique of governmentality. Bigo quotes that according to Foucault liberalism "aims to consume liberties and by virtue of this, manage and organize them, then the conditions of possibility for acceding to liberty depend on manipulating the interests that engage the security strategies destined to ward off the dangers inherent to the manufacture of liberty, where the constraints, controls, mechanisms or surveillance that play themselves out in disciplinary techniques charged with investing themselves in the behavior of individuals . . . from that point on the idea that living dangerously must be considered as the very currency

of liberalism".[6] In this sense, the construction of securitization in terms of liberal order brings about a range of spheres of sacrifices. Again, as Foucault emphasizes by opposing Klaus Croissant's extradition[7] in 1977, the problematization of securitization was one of the consequences of such securitizing politics in liberal societies to enforce the functioning of the order. To recall, in this affair, Foucault supported Croissant and emphasized the prominence of the discourse of security for the sake of priorities of the liberal government and he pointed out that "from now on, security is above the law".[8] He underlined the transition from a territorial pact and guaranteeing borders to "pact of security" between the state and the population (Foucault 2007, p. 481). Within this pact of security and the new form of governmentality, guarantees are given to the individuals and populations against irruptive trammels of life and this pact appears to demand a politics of negotiation and adjustment rather than straightforward denunciation (Osborne, 2015, p.73). Thus, this structure does not directly force a control or surveillance mechanism but governs, circulates and manages through the liberal freedom and allocates a room for maneuver.

In this regard, following the emergence of the dispositif or apparatus of security as a form of governmentality; the security studies started to attract the attention of various professions. Indeed it was not limited with the professionals from law and order but also from "politicians, national police organizations, the military police,

[6] See interview with Deleule and Adorno,: 'L héritage intellectuel de Foucault', Cités, 2000, 2, 95–107 in BIGO, D. (2008). "Globalized (in)security: the field and the ban-opticon", Terror, Insecurity and Liberty Illiberal practices of liberal regimes after 9/11, (2008) edited, Routledge.

[7] According to the Croissant case, Croissant who was an attorney of the imprisoned members of Red Army Faction (RAF), was accused of aiding and abeting the Red Army Faction (RAF) by Germany and sought for political asylum from France.

[8] See OPITZ, S. (2010), "Government Unlimited: The Security Dispositif of Illiberal Governmentality" in *Governmentality: Current Issues and Future Challenges*. Ulrich Bröckling; Susanne Krasmann; Thomas Lemke eds., Routledge.

customs officers, border patrols, secret services, armies, judges" and also "some social services (health care, hospitals, schools), private corporations (bank analysts, providers of technology surveillance, private policing), journalist, a significant fraction of general public opinion" (Bigo, 2002, p.63). As Bigo points out this wide range of interest was not merely the result of the expression of traditional reaction to insecurity, crime, terrorism, etc. In fact, it has mostly emerged as the consequence of the creation of a continuum of threats and general unease in which many different actors exchange their fears and beliefs in the process of making a risky and dangerous society (Bigo, 2002, p.63). Hence, the security is constructed simultaneously with securitizing politics, the professionals that are in charge of the management of risk and together with the relevant policies. Consequently, "a structural unease framed by neoliberal discourses in which freedom is always associated at its limits with danger and security" (Bigo, 2002, p.65) and the securitizing politics that embraces all other feasible areas to be exploited have come out.

2.3.1 Securitizing Justice as an Element of Neoliberal Project: Discourse and Instruments

Justice, with its lexical meaning, is the "fairness in the way people are dealt with." Obviously, "being fair" is an ambivalent notion with a high degree of relativity that can be articulated according to the intention of the parties. And indeed, it can be claimed in each and every scope of life. Everyone needs justice and everyone demands their share. It can be "personal, interpersonal, sectoral, institutional, polity-holistic or global" (Rose, 2004, p. 284.) It is one of the biggest and the most implicit pledges that an authority can provide. The generosity of the share that is to be given may scale up depending on the justice definition. Is it committed to freedom, equality, and welfare for everyone? Or is

justice a kind of freedom to define all of them and give everyone his due arbitrarily? Indeed, justice is one of the major horizons for which one can sacrifice other values. That is why it is an arena of power struggle and sacrifices and so it is usually mentioned with its "deficits".

The search for justice; the relation between the just human and just order is usually grounded in the philosophy of the politics originated by Plato[9]. For Plato "the constitution of justice is nothing else than the constitution or recognition of the just man and the constitution of the just man" and it is "nothing else than the emergence of the just order" (Balibar, 2012, p.21). In that sense, accordingly, to "transform the social structure is to change human nature and, conversely, either pass from justice to injustice, in the sense of degeneracy or pass from injustice to justice, in the sense of perfection" (Balibar, 2012, p.21). Therefore, Kelsen argues that the question as to the nature of justice thus resolves into the question concerning the nature of the good (Kelsen, 2000, p. 101). In other words, there is the realization of "good" inside the notion of "justice" according to Plato. The fact that justice is drifted away from the realization of a philosophical good and identified with the legal contract and associated with other concepts such as the concern of security begins with Hobbes[10].

Although justice is deemed as the "highest political-moral virtue by which legal, political and social conditions as a whole can be measured" (Forst, 2002, p.xi), it inevitably appears as a contentious, incommensurable notion upon which no one can easily agree. The contextual nature and its references from both moral and political sources help justice being established as a consequence of a power

[9] See Platon (1973), *The Republic and Other Books, translated by Benjamin Jowet,* Anchorbooks: Toronto

[10] See Hobbes, T. (2011), *Leviathan*, Pasific Publishing Studio: US.

struggle. In fact, the re-constitution of a notion, which has strong ties with morality, requires a strong hegemonic discourse that embeds the re-constitution of the political. That is, if the security is prioritized for a stable market, justice comes to mean to protect the insider from the outside threats irrespective of the universal human rights requirements. Justice, which was envisaged as a "categorical imperative" before, turns into an element of Foucauldian "governmentality". And it is mainly reduced to a legal and procedural framework within which both the rulers and the ruled are supposed to be satisfied.

As it has been already pointed out, the extended definition of the security led to "not only struggles over security among nations but also struggles over security among notions" (Lipschutz, 1998, p. 9). A new notion which might be derived from the practices of securitizing politics as such is "securitizing justice." Following the Foucauldian neoliberal governmentality analysis together with the sociological approach to securitization led by Bigo, the main object of this study, *securitizing justice*, will be dug out throughout this research as both a discursive and policy tool. In this sense, both the neoliberal discourse underlying the securitizing justice and the security practices and/or instruments should be looked through.[11]

Securitizing justice has peculiar characteristics. First of all, securitizing justice is paradoxical because it reproduces itself. In other words, the securitizing justice and the system that securitizing justice contributes, feed each other. In fact, the relation between justice and the neoliberal discourse has a deep conflict from the beginning. The interpretations of Karl Polanyi in 1944 on the meaning of freedom reveal the conflict of neoliberalism very well. And indeed, this opens an inspiring road to us to be able to understand the relation between neoliberal governmentality, securitizing politics, and justice. Polanyi points out two kinds

[11] Bigo uses the term security "practice" and Balzacq uses security "instrument/tool"

of freedom which are good and bad in the neoliberal order. The main conflict is that, the "good" types of freedom also the source of "bad" ones. Such that "the freedom of conscience, freedom of speech, freedom of meeting, freedom of association, freedom to choose one's own job" etc., are all to be existed side by side with the "the freedom to exploit one's fellows, or the freedom to make inordinate gains without commensurable service to the community, the freedom to keep technological inventions from being used for public benefit, or the freedom to profit from public calamities secretly engineered for private advantage" (Polanyi, 1954, p.256–8). And within this system "the freedom that regulation creates is denounced as unfreedom; the justice, liberty, and welfare it offers are decried as a camouflage of slavery"(Polanyi, 1954, p.256–8). As a matter of fact, in neoliberal governmentality, this conflictual situation does not lead us to the sacrifice of the basic freedoms and values. However, these values are transformed in the way that the neoliberal order can benefit. Therefore, the conflict between justice and the neoliberal order leads to the re-invention of justice. As Sandel indicated, "for justice to be the first virtue, certain things must be true of us" (Sandel, 1998, p. 175). He argued that "we must be creatures of a certain kind, related to the human circumstance in a certain way" (Sandel, 1998, p. 175). So he concluded that "we must stand at a certain distance from our circumstance, whether as the transcendental subject in the case of Kant or as essentially unencumbered subject of possession in the case of Rawls." (Sandel, 1998, p. 175) Thus, "we must regard ourselves as ...independent from the interests and attachments we may have at any moment, never identified by our aims but always capable of standing back survey and asses and possibly revise them" (Sandel, 1998, p. 175). This being the case, the securitizing justice appears as the result of the conflict between the distant individual independent from the interests and the ends of the homoeconomicus in the neoliberal order. In other words, this

kind of justice is built on the distance between the Self, which is capable of conducting itself and the Self which is conducted by the neoliberal order.

Moreover, securitizing justice keeps the ideal values of the neoliberal order in itself. Both the discourses of the Ordoliberal and Chicago School include the hints of securitizing justice in terms of aiming to establish such a neoliberal order. These discourses are generally concentrated on the ideal of enterprise society and the homoeconomicus rationality. Therefore, this means a new understanding of equality, freedom, and distribution of wealth both in the respected institutions and a strong discourse which either conceals it or makes it accepted in its cover. With this understanding, the securitizing justice either targets the consumer instead of the citizen or defines a consumer-citizen by embracing both. In this sense, social rights come to exist as the rights of consumers or those which are gained by contracts. The parties of the contract have the right to define the conditions of justice as the conditions of a legal contract irrespective of justice as a sense. Since it is nothing but a mechanical and a practical regulation for the circulation, management, and regulation of a population, securitizing justice does not have to address the human rights and universal values. However, since it embraces both the individual with its both "good" and "bad" freedoms, this kind of justice needs to refer to universal values by combining them with the requirements of the neoliberal order. Thus, the "ideal" justice is established by making easier for citizens to exercise rights and allow businesses to make use of the market. What is ideal is nothing but the competitive order to attain justice for all. Anything that breaks the competitiveness is the injustice itself. In such a system, justice is not perceived as the "realization of good" but "access" to a certain legal framework for the sake of the "security" of the neoliberal order. In other words, rather than the idealization of the values, the legal practices oriented toward security gain importance. Therefore, the opposite of justice appears not the injustice but "unjudicial".

Another remarkable feature of securitizing justice is its institutional/political comprehensiveness with all its governing professionals and legal base. Indeed, securitizing justice as one of the basic pillars of the neoliberal governmentality includes both sovereign power and disciplinary power in itself. So, both the prohibited actions and punishments are well-defined in juridical code and the subjects are subject to surveillance and correction as well. As a matter of fact, this requires all-pervasive institutional and political infrastructure. As Larner emphasizes well, neo-liberalism is both a political discourse about the nature of rule and a set of practices that facilitate the governing of individuals from a distance (Larner, 2000, p.7). In fact, neither the neoliberalism nor the securitizing politics are only about the discourse. The system to be described is a complete whole with professionals, policies, tools, institutions bounded by legal contracts and continuously renovated discourses. Concordantly, the well-functioning of the order is guaranteed and everything is tried to be defined and given a role; nothing is left out of the contract. Accordingly, any exclusion or inclusion cannot be deemed unfair because it is the part of the contract with the will of the parties. Besides, all the elements that are idealized as the "justice" within this structure can be guaranteed in terms of this contract, no matter what the consequences might be with respect to the excluded ones or sacrificed values; even if the sacrificed value is justice.

In this framework, both the discourse and the instruments of justice as such should be looked through. Therefore, to this end the professionals of securitizing justice, respective institutions, policy documents and the legal basis will be analyzed to understand securitizing justice.

2.4 Chapter Conclusion

In this chapter the securitizing politics and the securitizing justice which is an element of the neoliberal project have been introduced. To be able to construct the nexus between neoliberal governmentality and the securitization, both literatures have been elaborated. First, the historical references of the concept of Foucauldian governmentality has been explained in detail. Governmentality has been examined as a new type of power having the particularities from various centuries. It has been associated with neoliberalism through the Ordo-liberal and American conceptualizations. And then, the importance of studying neoliberal governmentality has been mentioned. In the second part of this chapter, the extended definition of the security has been explicated from traditional approaches to the discourses of securitization. Finally, in part 2.3, securitizing politics has been exposed as the form of politics that includes the elements of neoliberal governmentality inside. And indeed, securitizing justice has been highlighted as an outcome of securitizing politics as such.

The conceptual framework that has been drawn, will be mainly used in the following two chapters. In Chapter 3, the emergence and the functioning of the neoliberal governmentality in the EU will be tried to be exposed based on the narrated literature. The historical context of establishing the enterprise society in the EU and the social construction of the homoeconomicus rationality in the legal basis of the Union will be put into light. In parallel to this process, the emergence of the justice as a policy field will be reviewed by focusing on the constituents of the securitizing politics. In this sense, the constitution of this policy area under the influence of the extended security concerns will be elaborated. Following this, the main analysis of the EU case for the securitizing justice will be done in Chapter 4. Here, especially, the elements of this kind of justice will be used as a template to be searched in the EU discourse and policy instruments.

But first, the next chapter will aim to look for the neoliberal governmentality framework in the EU and the development of the policy area of justice in parallel to this process. To be able to portray the justice agenda of the EU, the shift of the approaches of the EU from intergovernmental to the supranational will be put forth through analyzing the programs, strategy documents, and related legislation. And also the related institutions of the EU justice policy will be mapped to expose the basic roles, strategies and neoliberal governmentality network within the established system.

CHAPTER 3

NEOLIBERAL GOVERNMENTALITY AND THE JUSTICE AS A POLICY FIELD IN THE EU

The evolution of justice as a policy area in the EU is actually about the story of the economic and the political integration of the Community and the consolidation of the neoliberal governmentality as well following the historical neoliberal context of the world order. Therefore, this chapter first aims to put forth this process and to highlight the elements of neoliberal governmentality in the functioning of the EU structure. And to be able to put forward the positioning of the justice as a policy area within this structure, the significant milestones will also be addressed in this chapter. In this way, the emergence of the legal institutional framework of securitizing justice in the EU will be portrayed.

3.1 The Dynamic of Neoliberal Governmentality in the European Integration

This part is divided into two sub-sections since the dynamic of neoliberal governmentality requires firstly the analysis of historical context of neoliberalism and then its repercussions in the EU.

3.1.1 Historical Context of Neoliberalism

The establishment and the enlargement of the EU can be narrated according to different integration approaches by dividing into the periods within which the European countries historically have various economic and political objectives. In

this sense, whatever the approach related to the integration process was (as a spillover, or as an intergovernmental/supranational/ local process), the initial common ground was deemed to be a peaceful Europe. Indeed, it is declared proudly in most of the EU literature that "the longest period of peace and stability in Europe's written history started with the formation of the European Communities." (European Political Strategy Center, 2017). And although the initial aim of the cooperation can be identified with the idea of not turning back to the destructive years of war of the past, the main premise was establishing an "economic" union. Besides, the EU project was considered as neoliberal rather than simply liberal because it required the intervention of strong executive and judicial EU authority to break the power of the nation-state to regulate markets and capital and to enforce the competitive market allocation of resources (Moss, 2005, p.29).

Following the Schuman Plan of French Foreign Minister Robert Schuman for a deeper cooperation; Germany, France, Italy, the Netherlands, Belgium, and Luxembourg established the European Coal and Steel Community (ECSC), by signing the Treaty of Coal and Steel in 1952 to run their heavy industries of coal and steel under a common management. In this way, none of them would make weapons of war to turn against the other (Europa.eu, 2019). Having been inspired by this idea and based on the success of the Treaty of Coal and Steel, these six countries expanded the cooperation to other economic sectors and signed the Treaty of Rome and created the European Economic Community (EEC) and also the European Atomic Energy Community (EURATOM). The primary objectives of this community were to promote the freedom of goods and services and to ensure the peaceful and safe use of nuclear energy (Europa.eu, 2019). By setting these principles of competitive allocation, non-national discrimination, and the free movement/circulation of goods, services, capital, and labor this treaty was

deemed to set integration on a neoliberal course that precluded the development of truly social, regulated or planned economies (Moss, 2005, p.30).

The Community extended its policy areas from the economy to the policy areas of climate, environment, health, external relations, security, justice, and migration (Europa.eu, 2019). The historical context within which the integration takes place is also worth mentioning. In fact, the 1960s became synonymous with a period in which a wide range of social movements emerged, from feminist and youth movements to environmentalist and anti-nuclear war movements and also the beginning of the Cold War years. Actually, it was both period of the student movements of "68 generation" initiated by the protests against the Vietnam War and the nuclear arms race and also the construction of the Berlin Wall by the German Democratic Republic of East Germany. In such a period, the Merger or Brussels Agreement was signed in 1965 and setting out the ECSC, EEC, and EURATOM as European Communities and adopting a single Council and Commission for all. And the common agricultural and trade policies that were created for the first time in the 1960s led the European Communities (EC) to the removal of customs duties on goods imported from each other and allowing a free cross-border trade by July 1, 1968 (Europa.eu, 2019).

Having attained the objective of establishing the customs union, the EC extended its objectives towards common currency and common market while enlarging itself by including Denmark, Ireland and the United Kingdom by 1973. It was during the years of stagflation and economic crisis beginning by the end of the 1960s which was followed by the abandoning of Bretton Woods system of fixed exchange rates backed by gold reserves, Arab-Israel war and oil embargo. In fact, the system which brought high rates of growth to at least the advanced capitalist countries after 1945 was deemed exhausted and some alternative was called for (Harvey, 2005, p.12).

Although the neoliberal theory began to exert practical influence in a variety of policy fields throughout the 1970s, the dramatic consolidation of neoliberalism as a new economic orthodoxy regulating public policy at the state level in the advanced capitalist world occurred in the United States and Britain in 1979 (Harvey, 2005, p.22). And, the process of consolidation and the reaction against neoliberalism was not the same in all over the world. In fact, the Keynesian policies of the 1960s in the US were not deemed close to the achievements of social democratic states in Europe, thus, the opposition to Reagan was not as hard as Thatcher's (Harvey, 2005, p.88). There were various strong models adopted by the main actors in Europe. As John Zysman analyzes, in the post-war years, UK adopted a capital-based system by allocating resources by competitively established prices, France as using a credit-based financial system with government-administered prices by encouraging government intervention and Germany had a credit-based system dominated by financial institutions in a negotiated style of capitalism (Zysman, 1983, p. 18: in Macartney, 2011, p. 6). Although the economic stagnation in the end of the 1970s has spread in waves, these post-war Keynesian settlements have transformed at a relatively slow rate. In the following years, the attempts to liberalize and integrate markets for goods, services, investment, and labor were to reform these three models of capitalism and finally neoliberalism would be pivoted on a finance-led mode of accumulation (Macartney, 2011, p. 11). In this sense, unlike countries such as France and Sweden that had intention towards expansionary policies during the early 1980s, Germany had remained rooted in its ordo-liberal monetarist economic policy (Alain, 2005, p. 215). In addition, inspiring with the glory of the East Asian tigers and West German model, many European states continued to resist neoliberal reforms for a period (Harvey, 2005, p. 89). Therefore, although the single market was created in 1986 by the Single European Act (Europa.eu,

2019); there was still a long way to go when the membership was brought to 12 with Spain and Portugal at the end of the 1980s.

Three milestones can be highlighted regarding the rapid rise of the neoliberal order after the 1980s. In this sense, Harvey puts "financialization" at the head of this list that allows neoliberalism to settle as a world order. Indeed, the financialization that began in the 1970s accelerated during the 1990s and foreign direct investment and portfolio investment rose rapidly throughout the capitalist world (Harvey, 2005, p.90). In addition to this, diminishing transport and communication costs led to the increasing geographical mobility of capital. And third, the domination of the Wall Street-International Monetary Fund (IMF) and Treasury complex of the economic policy through the structural adjustment programs of IMF coerced the developing countries to take the neoliberal road as well. As a consequence, all these came together with the Washington Consensus of the mid-1990s (Harvey, 2005, p.92,93,95). The hallmark measures are counted as the floating currency markets, reducing trade barriers, privatizing public sector activities and deregulating industry- in the lead of international institutions such as the World Bank and the IMF to ensure compliance with the Washington Consensus on neoliberal governance and economic development principles (Cahill, Edwards & Stilwell, 2012, p. 3). In short, following the pull-down of the Berlin Wall and the reunification of Germany in 1989 and 1990 respectively, these milestones helped the consolidation of the neoliberal order.

The creation of the European Monetary Union (EMU), which was the result of complex political decisions (Bouin, 2018, p. 32), is one of the major repercussions of the world conjuncture to the EU. The primary objective of European integration was the establishment of a common market from the beginning. To this aim, the Single European Act was signed in 1986 for the objective of establishing a single market and European political cooperation and

economic and monetary integration. It was indeed the forerunner of the European Union's Common Foreign and Security Policy[12] and the Treaty on European Union was signed in 1992 in Maastricht. By the Maastricht Treaty, the European Union has been recognized officially, setting clear rules for the future single currency as well as for foreign and security policy and closer cooperation in justice and home affairs (Europa.eu, 2019). Thus, by this agreement, the essentially neoliberal content and social purpose of the European integration was affirmed. In that, the Economic and Monetary Union would be organized to mobilize the disciplinary force of global financial markets and thereby to create an institutional framework of macroeconomic governance based on the ideas of finance (Van Apeldoorn et al. 2003, p.18). Besides, The Stability and Growth Pact of 1997, led the nineteen EU members to use the Euro as their currency and agree to "strengthen the monitoring and coordination of national fiscal and economic policies to enforce the deficit and debt limits established by the Maastricht Treaty"[13].

The following legal developments by the Schengen Agreement which was signed in 1995 and The Treaty of Amsterdam in 1997 and the Treaty of Nice in 2001 have deepened and consolidated the objective towards a European Monetary Union (EMU), EU citizenship and common policies in both economic and non-economic spheres. Finally, by the Treaty of Lisbon, signed in 2007, the EU consolidated its presence over the areas from economy to democracy and in response to global challenges. It is asserted that the rise of embedded neoliberalism is reflected in the Lisbon Agenda. On the one side, it has the

[12] See https://eeas.europa.eu/topics/common-foreign-security-policy-cfsp_en

[13] See https://ec. europa. eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/stability-and-growth-pact/history-stability-and-growth-pact_en

elements of the neoliberal competitiveness discourse and on the other side, it "contains elements addressing concerns of the former neo-mercantilist wing of the European capitalist elite as well as of transnational social-democratic forces" (Van Apeldoorn, 2009, p.289). Thus, by trying to wear more than one hat, while emerging as "the largest trade block in the world and the biggest exporter of manufactured goods and services"[14], EU has set ambitious goals by trying to embrace the "European" and "humanitarian" values based on the EU Charter of Fundamental Rights. In fact, EU aims:

> to promote peace, its values and the well-being of its citizens, offer freedom, security, and justice without internal borders, sustainable development based on balanced economic growth and price stability, a highly competitive market economy with full employment and social progress, and environmental protection, combat social exclusion and discrimination, promote scientific and technological progress, enhance economic, social and territorial cohesion and solidarity among EU countries, respect its rich cultural and linguistic diversity, establish an economic and monetary union whose currency is the euro[15].

Indeed, these ambitious aims summarize the history of the EU's impact extending from the economic sphere to the political sphere.

3.1.2 The Elements of Neoliberal Governmentality in the EU

In the analysis of Foucauldian governmentality, Dean underlines the central concern of government as "how we govern" and "are governed" within different regimes. Accordingly, these "how" questions have four dimensions to express related to the government. These are the characteristic forms of visibility and perceiving; definite vocabulary and production of truth; specific ways of acting and types of rationality and finally the characteristic ways of forming subjects,

[14] See https://europa. eu/european-union/about-eu/eu-in-brief_en

[15] See ss

actors or agents (Dean, 2010, p. 33). In other words, the axes of visibilities, knowledge, techniques, and practices and identities are co-present within each regime of practices. In the same manner, neoliberal governmentality manifests itself in various fields, institutions and policies of the European integration process. With respect to the followed Foucauldian methodology and the highlighted points analyzed above, several elements of the neoliberal governmentality in the EU might be drawn attention within this section.

As is narrated before, whereas in sovereign power, the prohibited action and the punishment are defined within a legal or juridical code; the disciplinary power aims to transform the subject via surveillance and correction (Foucault, 2007, p. 20-26). On the other hand, the dispositif of security, which is the instrument of governmentality, entails both of the powers to install freedom. In the EU case, these two powers are guaranteed by several treaties and legal arrangements; and the respective surveillance implemented by various actors and institutions.

In fact, the important legal steps have been taken following the establishment of EMU to calculate the "cost of non-Europe" and thus to accelerate the passage of legislation towards financial market integration (Macartney, 2011, p. 11) by the Cecchini Report of 1988 and the reports of Committee of Wise Men. In this way, the single market for goods, services, investment, and labor has been tried to be combined with the financed-led mode of accumulation. The main idea was to remove the national inconsistencies and taking steps towards the desire of the member states of having domestic comparative advantages. In the process, certain domestic advantages are agreed to be sacrificed and the concern for liberalization and integration has been increased (Macartney, 2011, p. 12). These steps led Europe emerge as a sort of economic region, located in a globalizing economy and embroiled in a condition of permanent competition with other world-regions (Walters & Haahr, 2005, p. 138). And it is argued that the EU's security and well-

being become framed within a language of competitiveness and enterprise (Walters & Haahr, 2005, p. 138).

In this framework, the major agreements can be highlighted at legitimizing neoliberalism by means of European integration: the first one was the Maastricht Treaty and then the Stability and Growth Pact and the Treaty of Lisbon. In this process, while the EMU was adopted by member states despite imposed principles of monetary restraint and budgetary austerity, the Treaty of Lisbon was accepted as a sort of "constitution" drawing the functioning of the EU. And finally, the Treaty on Stability, Coordination and Governance (TSCG) in the Economic and Monetary Union of 2013, obliges the countries to have firm rules to guarantee balanced public budgets and it strengthens the governance of the euro area (EUR-lex, 2012). In a sense, the truth produced by this way has created the common rights and obligations that are binding on all the EU member states as can be seen in the logic of all European acquis.

The intermeshing relations of the sovereign and disciplinary power can be seen within the deep-rooted juridical code of the EU and the surveillance/ correction/implementation mechanisms that are implemented by the actors and institutions of the Union. In that respect, the European Parliament and the European Commission have various roles. The European Parliament is a co-legislator in setting rules for multilateral surveillance[16]. Besides, the European Commission first monitors economic developments in the EU's member states and in the global economy in detail through regular analysis of a broad range of national and international economic data. Then it forecasts for a wide range of economic indicators such as GDP growth, inflation, and unemployment, assessments of national budgets and assessment of stability or convergence

[16] See Article 121(6) of the TFEU, http://www.europarl.europa.eu/factsheets/en/sheet/90/macroeconomic-surveillance

programs and national reform programs (Ec.europa.eu, 2016). To these ends and within the framework of surveillance, the European Commission produces two key economic reports (Annual Growth Survey and Alert Mechanism Report) that help to identify and address economic problems (Ec.europa.eu, 2016). Moreover, in terms of correction, the Commission uses the tools of "The Excessive Deficit Procedure" and "The Excessive Imbalance Procedure" to ensure that they are enforced and governments take effective action to correct economic problems (Ec.europa.eu, 2016). Finally, to support the single monetary policy delivering price stability and thereby sustainability and smooth functioning of the EMU, EU surveillance of economic policies of the member states is organized in an annual cycle called European Semester.[17]

The next element of neoliberal governmentality in the EU is the emphasis of competition coming from the ordoliberal background. This logic of competitiveness not only takes part in the economic policies and the institutions of the EU but also embedded in non-economic fields as well. It is usually argued that the foundations of the structure of the EU and the European Central Bank have the origins of the federalist structure for the competitive market with low external tariff and sound currency and the Bundesbank of German ordo-liberalism. To recall, the ordoliberals aim in securing the proper functioning of the price mechanism on the basis of a functioning monetary order and desirable forms of competition (Biebricher & Vogelmann, 2017, p.8). In the same manner, distortion of the competition is deemed unintended for the functioning of the internal market and become one of the major horizons in the founding treaties of the Union. So, the EU sets its agenda to fight against anti-competitive behavior, to review mergers and state aids, to encourage liberalization and to promote a

[17] See https://www.ecb.europa.eu/ecb/tasks/europe/emu/html/index.en.html

competition culture in the EU. [18] The main actors of the competition are considered to be the European Commission (the Directorate-General (DG) for Competition) and the national competition authorities who directly enforce EU competition rules stated in the Articles 101-109 of the Treaty on the Functioning of the EU (Lisbon) and the multilateral organizations such as the International Competition Network (ICN), the Organisation for Economic Cooperation and Development (OECD), United Nations Conference on Trade and Development (UNCTAD) and World Trade Organisation (WTO). The main objective is underlined as making EU markets work better, by ensuring that all companies compete equally and fairly on their merits, such that the consumers, businesses and the European economy as a whole benefit.[19]

Another main indicative point of the EU in terms of neoliberal governmentality is the form of the functioning of the dispositif of security, which has been explained above. Actually, not only the legal axis to prevent the dysfunction of the market and the policies and actors of surveillance/correction is well-designed; but also the processes of the functioning of these mechanisms are also deemed important. The uses of quantitative analysis, statistics, performance tables, best practice summaries, scoreboards, regular numerical measurements, etc are the most common forms at this point. As underlined in the analysis of Foucault, the unwanted consequences are not abolished permanently but accepted within the calculated limits by questioning the phenomena, calculating the costs and drawing optimal borders of what is acceptable. *European Semester*, *Scoreboards*, *Alert Mechanism Reports*, *In-Depth Reviews*, Excessive Imbalance Procedures, and *Country-Specific Recommendations* are all examples of these kinds of economic governance processes for surveillance, prevention, and correction.

[18] See http://ec.europa.eu/competition/general/overview_en.html

[19] See http://ec.europa.eu/dgs/competition/index_en.htm

The final remark to be noted is the type of society governed by the EU neoliberal governmentality and transformation of the subjects and actors within it. What was also emphasized before, an enterprise society emerges after the 1980s and mainly from the 1990s with its network of institutions, embedded within the bonds of homoeconomicus oriented individual as a feature of the neoliberal order. So, it is also worth mentioning this type of enterprise mentality of the EU institutions and the actors in such a competitive system to be maintained. As is argued before the EU's neoliberal program is constituted by the political project of marketization. And indeed this marketization aims at maintaining the regulatory pre-conditions such as property rights, the free operation of the price mechanism and equal rules of exchange for markets and thereby extending the market mechanism to new areas of social life (Van Apeldoorn, 2009, p.27). Within this process, the marketization policies begin to dominate non-economic areas by adopting a dual mission. When the Lisbon Treaty is considered it will be seen that "*the social"* is defined mainly in terms of "the adaptability of the labor force to the exigencies of competitiveness in a globalized world economy" (Van Apeldoorn & Horn, 2007a, p. 5, in Van Apeldoorn, 2009, p.29). In such a framework, while the institutions are expected to work as enterprises, individuals are expected to enter into the market as the actors of competition towards the ideal of economic growth. Since economic growth will create a butterfly effect on other spheres of society, no policy will be needed other than the proper functioning of the market. Thus, articulating "competitiveness with social cohesion, combining the push for financial market liberalization with concerns emanating out of the industry, this neoliberal project has manifested itself as an asymmetrically embedded neoliberalism" (Van Apeldoorn, 2009, p.31). The repercussion of this neoliberal logic is the consumer-oriented services regardless of the "social" content. This analysis will be conducted deeply by approaching the "securitizing justice" in the EU in the next sections.

Thereby, the dynamic of neoliberal governmentality in the EU penetrates diverse policy areas with all the juridical production of truth, assumed the rationality of the actors and institutions, the strategic functioning of the quantitative and visible tools and the ex novo defined actors or agents.

3.2 Emergence of Justice as a Policy Field in the EU

How the justice was positioned as a policy field within the narrated neoliberal structure has a process in parallel with EU integration. Setting the aim of establishing the area of "freedom, security, and justice without internal frontiers"[20], many successive steps have been taken on various legal and institutional grounds. In fact, the determination of "justice" as a policy area is based on the Treaties of Maastricht (1992), Amsterdam (1999) and Nice (2001); however, the EU Area of Freedom, Security and Justice (AFSJ) has made significant progress on policy developments since the late 1990s as a result of major treaty revisions[21]. As such, this area appears as one of the most dynamic policy fields in European integration (Kaunert, Leonard, Occhipinti, 2015, p. 2). Hence, today the EU justice policies are gathered in a policy field and many institutions have been established. In this framework, this section will focus on the development of "justice" as a prioritized policy area in the EU within which decision and policy-making gradually shifted from limited intergovernmental cooperation towards supranationalism.

[20] See Lisbon Treaty, Article 3

[21] Revisions decided in these respective treaties and more recently in Lisbon (2009), as well as an increased political impetus through European Council Summits in Tampere (1999), The Hague (2004) and Stockholm (2009).

3.2.1 Historical Context of Justice as a Policy Area

3.2.1.1 From Intergovernmental to a Supranational Approach

The process of establishing the area of freedom, security, and justice without internal frontiers, in fact, requires more than the intergovernmental cooperation. The situations in which national interests conflict with the ideals of international justice, security, and freedom, and of course the requirements of the neoliberal global economy ultimately require a supranational approach that goes beyond national priorities. Particularly as for the EU case, the increasing demands for the enlargement and the rising terrorist attacks have strengthened the need for this supranational approach. In order not to jeopardize the internal functioning of the free movement of goods, services, and people and to secure the price stability, the supranational values and policies have been gradually adopted throughout the European integration process. This direction can be seen in the evolution of justice as a policy area in the EU. Furthermore, this process has been strengthened and accelerated by the serial terrorist attacks broken out in Europe.

Before the Maastricht Treaty, the cooperation within the area of security and justice was mainly conducted through ad hoc working groups at the intergovernmental level. One of these networks was the TREVI group, which was established to counter-terrorism and to coordinate policing in the EC in 1976 following a number of intergovernmental meetings on terrorism in 1971 and 1972 after the terrorist attacks such as the 1972 Olympic Games in Munich (Bunyan, 1993). Similarly, the Police Working Group on Terrorism (PWGOT) was established after the shooting of Sir Richard Dykes, the UK Ambassador to the Netherlands, and his Dutch footman in The Hague in March 1979 (Bunyan, 1993). Beginning with the Maastricht Treaty, this kind of intergovernmental ad hoc group covering immigration, asylum, policing and law were integrated into

various structures based in the Council (Bunyan, 1993). And indeed, although the EU set itself the objective "to develop close cooperation on justice and home affairs"[22] in Maastricht Treaty, the formal creation of the European Union's AFSJ was not until the Amsterdam Treaty of 1999. According to the pillar structure that the Maastricht Treaty put forth, the third pillar was the cooperation in the field of "Justice and Home Affairs (JHA)" according to Title VI of the Treaty. The cooperation areas included the rules and the exercise of controls on crossing the Community's external borders; combating terrorism, serious crime, drug trafficking, and international fraud; judicial cooperation in criminal and civil matters; creation of a European Police Office (Europol) with a system for exchanging information between national police forces; controlling illegal immigration and common asylum policy. Moreover, Titles V and VI provided for intergovernmental cooperation using the common institutions, with certain supranational features such as involving the Commission and consulting Parliament.[23] and by Article K.3 the Council was given the responsibility to implement the provisions of the third pillar.[24] And in return, the European Parliament has been assigned the responsibility to ask questions of the Council or make recommendations to it. In addition, each year, the Parliament shall hold a debate on the progress made in the implementation of the areas referred to in this Title.[25] Although the Articles K.3 and K.4 suggested that the Commission has a role to play, as Bunyan quotes from Jacques Delors that in the new system

[22] See Maastricht Treaty, Article B.

[23] See http://www.europarl.europa.eu/factsheets/en/sheet/3/the-maastricht-and-amsterdam-treaties

[24] See Maastricht Treaty, Title VI, Article K.3

[25] See Maastrict Treaty, Title VI, Article K.6

"member states will inform and consult each other within the Council; the Council may adopt joint positions, decide on joint operations and draw up conventions and the Commission has no power of initiative in this area."[26] Accordingly, the Commission's power of initiative was limited with the area of immigration policy related to visas. However, for the areas of judicial cooperation in criminal matters, customs cooperation, and police cooperation, only the member states have the right of initiative. As a result, despite the steps taken, it was argued that the new structure remained intergovernmental (Bunyan, 1993). Basically, the pillar structure and the unmanageable problems of the third pillar were criticized. In this structure certain problems have been underlined; "the legal instruments were to some extent inappropriate, the working structures in the Council were cumbersome" and also it has been indicated that "the objectives described in the Treaty as matters of common interest were not clearly defined and the unanimity rule was a severe handicap" (Elsen, 2007, p.15).

To be able to overcome the challenges in the JHA of the Maastricht Treaty, significant progress has been made within the framework of the Amsterdam Treaty. First of all, it was declared in the Treaty that the EU has the objective of establishing an area of freedom, security, and justice "to facilitate the free movement of persons while ensuring the safety and security of their peoples."[27] And in fact, it was considered that the developments within the AFSJ are the part of a realization that the member states need to act together to better face new challenges to peace and internal security while ensuring respect for democracy and human rights (Holzhacker & Luif, 2014, p.1). To this end, several decisive

[26] See European Parliament, written answer, 5.11.92 in http://www.statewatch.org/news/handbook-trevi.pdf

[27] See Amsterdam Treaty, Article 1.

changes have been made through the Amsterdam Treaty. One of these changes was the transfer of cooperation on asylum, immigration, and frontiers from the Third to the First Pillar. So, while the first pillar instruments were strengthened, the competences of the European Parliament and the European Court of Justice were increased as well (Elsen, 2007, p.15). Thus, the Community method applied to some major areas which had hitherto come under the third pillar such as asylum, immigration, crossing external borders, combating fraud, customs cooperation, and judicial cooperation in civil matters, in addition to some of the cooperation under the Schengen Agreement, which the EU and Communities endorsed in full.[28] Additionally, new legal, binding instruments called "decision" and the "framework decision", which were more efficient than the Maastricht type "joint action" and "conventions" were created within the Third Pillar (Elsen, 2007, p.15). And finally, annexing the Schengen Protocol was a considerable step in the Amsterdam Treaty. In this way, the Schengen acquis, established mainly under the Schengen Agreement in 1985 and in the implementing convention of 1990 and a whole range of decisions taken by the Schengen ministers, was integrated into the European Union. Elsen argues that this meant the Schengen cooperation which had been intergovernmental cooperation among the several EU Member States, ceased to be an independent activity (Elsen, 2007, p.16). To this end, several policies were declared to be adopted within Title IV of "Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons" of the Amsterdam Treaty. The following Articles from 61 to 69 referred to these measures, minimum standards and procedures to create the AFSJ within five years.

To be able to define the priority objectives for the next five years and set out a timetable of measures necessary for achieving the area of freedom, security, and justice envisaged by the Treaty of Amsterdam, the Vienna Action Plan (European

[28] See http://www.europarl.europa.eu/factsheets/en/sheet/3/the-maastricht-and-amsterdam-treaties

Union, 1998) was prepared by the Council and the Commission in 1998. In the first part of the Plan, the areas of freedom, security, and justice were defined. Accordingly, the "wider concept of freedom" was defined beyond as free movement of people. It was defined as to "live in a law-abiding environment that public authorities are using everything in their individual and collective power to combat and contain those who seek to deny or abuse that freedom" and so to provide "the freedom to be complemented by the full range of fundamental human rights" (European Union, 1998). So, negative freedom was defined by clearly restricted laws. What also underlined and continued until the present, was the emphasis on data protection. It was indicated that the respect for privacy and the protection of personal data were the parts of the definition of fundamental freedom (European Union, 1998). The meaning of security was also widened and redefined in this Action Plan. It was clearly stated in the document that the Amsterdam Treaty "… provides an institutional framework to develop common action among the Member States in the indissociable fields of police cooperation and judicial cooperation in criminal matters". Thus, it not only to offers "enhanced security to their citizens but also to defend the Union's interests, including its financial interests." By adding the security of financial interests to the definition of the "area of security", the objectives were declared as "to prevent and combat crime … in particular, terrorism, trafficking in persons and offenses against children, illicit drug trafficking and illicit arms trafficking, corruption, and fraud" (European Union, 1998). It was also highlighted that the aim of the Treaty was not to create "European security area in the sense of a common territory where uniform detection and investigation procedures would be applicable to all law enforcement agencies in Europe" (European Union, 1998), but to create a smooth communication and cooperation between the Member States who are independent in their internal security matters. Moreover, the justice was approached as "the access to justice and full judicial cooperation among the

member states", which has different judicial systems (European Union, 1998). And in principle, this was going to be achieved by the safeguards of the European Convention on Human Rights and Fundamental Freedoms and their dynamic interpretation by the European Court of Human Rights.

In the second part of the Action Plan, the priorities and measures in the fields of asylum and immigration policy and police cooperation and judicial cooperation in criminal matters were set towards implementing the Amsterdam Treaty effectively and creating the area of freedom, justice, and security within five years. In this sense, setting minimum standards for asylum and immigration issues and defining measures to combat illegal immigration have been aimed. Besides, police and judicial cooperation in civil and criminal matters and well integration of the Schengen acquis into the framework of the European Union for the free movement were underlined.

Upon the goals set by the Vienna Action Plan, the steps have been quickly taken towards the implementation of the Amsterdam Treaty. Actually, until the Treaty of Lisbon, which "widened the competences of the Court of Justice and converted the EU Charter of Fundamental Rights into a legally binding bill of rights for Europe" (Guild & Carrera, 2010, p.4), a couple of programs shaped the justice as a policy field and boosted it. These were five-year political programs that aimed to systematically develop the institutional elements of the EU's justice policies from 1999 to 2014. The Tampere Programme in October 1999 was the first one that was adopted under the Finnish Presidency. Recognizing the importance given to the Amsterdam Treaty, the Finnish Presidency decided to devote the entire European Council to be held in Tampere to the Justice and Home Affairs cooperation; and it was the second time in the history of the EU that a summit was devoted to one single item (Elsen, 2007, p.16). It was stated in the Conclusions of this Programme that the challenge of the Amsterdam Treaty was

to ensure that freedom, which includes the right to move freely throughout the Union, could be enjoyed in conditions of security and justice accessible to all. And strikingly, it was underlined that this freedom should not be regarded as the exclusive preserve of the Union's own citizens and it will embrace others worldwide.[29] This remark paved the way to develop common policies on asylum and immigration. Besides, the creation of a "Genuine European Area of Justice" in which the individuals and businesses enjoy their rights was aimed. Better access to justice, recognition of judicial decisions, fight against crime, combating trafficking in drugs and human beings as well as terrorism, setting clear priorities, policy objectives and measures for the Union's external action in Justice and Home Affairs were other milestones that were underlined in the Tampere Programme. Tampere Council was also remarkable with regard to initiating drafting the Charter of Fundamental Rights in the European Union. And the resulting charter was formally proclaimed by the Presidents of the European Parliament, the Council of the EU and the European Commission at the European Council meeting in Nice 2000 (Eurofound.europa.eu, 1999). Furthermore, it was the Tampere Programme that the idea of the establishment of a judicial cooperation unit was first introduced. This unit was going to be named *Pro-Eurojust* on 14 December 2000, on the initiative of Portugal, France, Sweden, and Belgium; and after the attacks of 11 September in the USA, it was going to move from the regional/national sphere to an international context.[30] Besides, in Tampere, it was decided to follow up on the progress of the members in the area of freedom, security, and justice by a tool called "Scoreboard" (European Commission, 2004a). So, with the Commission Communication of 24 March 2000, the use of an instrument called "Scoreboard" to review progress on the

[29] See Tampere European Council (15 and 16 October 1999) Presidency Conclusions, https://www.europarl.europa.eu/summits/tam_en.htm

[30] See http://www.eurojust.europa.eu/about/background/Pages/History.aspx

creation of an area of "Freedom, Security and Justice" in the EU was adopted (European Commission, 2004a). The various elements of the Scoreboard were similar to the milestones of the Tampere Programme. In this sense, the titles mainly include the “common EU asylum and migration policy”, “better access to justice in Europe”, “fight against crime”, internal/external border management, etc with the relevant responsibilities, the timetables to achieve progress and the state of play. Although this Scoreboard with its original version is not being used anymore and remains very simple when compared to the new Justice Scoreboard, it is worth mentioning as to give the idea of the monitoring methodology of the EU governmentality. As compared to the aggressive reforms proposed by the Amsterdam Treaty, the impact of the Nice Treaty was not that considerable in the AFSJ. The significant points that can be underlined were the attached “23. Declaration on the Future of the Union” within which some reforms were proposed towards the future functioning of the Union. These included the delimitation of powers between the EU and the member states, reflecting the principle of subsidiarity, bringing into agenda the status of the Charter of Fundamental Rights of the European Union proclaimed in Nice, a simplification of the Treaties with a view to making them clearer and better understood without changing their meaning and the role of national parliaments in the European architecture.[31] What was also addressed in the Treaty was the recognition of “the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States.”[32] Although these were set as objectives, the terror attacks led to a change in the direction of the priorities.

[31] See Nice Treaty 2001

[32] See Nice Treaty 2001

One of the most significant terrorist attacks that influenced the agenda of security and consequently puts security in a higher priority than other policies was the 11 September 2001 attack. Then, the European Council met in an extraordinary session on 21 September 2001 in order to analyze the international situation following the terrorist attacks in the United States and to impart the necessary impetus to the actions of the European Union (Consilium.europa.eu, 2020). The main idea of the meeting was the intention of the EU to cooperate with the US in "bringing to justice and punishing the perpetrators, sponsors, and accomplices of such barbaric acts" (Consilium.europa.eu, 2020). However, the document on the conclusions of the meeting included milestones not only to support US and combat terrorism (Enhancing police and judicial cooperation, developing international legal instruments, putting an end to the funding of terrorism, strengthening air security, coordinating the European Union's global action, developing the Common Foreign and Security Policy (CFSP) and by making the European Security and Defence Policy (ESDP) operational at the earliest opportunity) but also towards remaining "vigilant" and to support the world economic prospects which might be slow downed because of this attack (Consilium.europa.eu, 2020). So that, while a couple of precautions and restructurings have been followed in the agenda of AFSJ, the EC also set a series of steps in its economic agenda. As such, the EC welcomed the concerted action by European Central Bank, the US Federal Reserve Bank, and other central banks to provide the financial markets with further leeway; reaffirmed its commitment to respect the framework, rules and application in full of the Stability and Growth Pact and welcomed the decision of OPEC to ensure the continuity of oil supplies (Consilium.europa.eu, 2020). Hence, the securitarian concerns have not evolved alone but brought economic policies and decisions in the road to the economic integration of the EU. In fact, the dynamics of the eleventh of September and the transnational security threats led to the argument that the non-operational borders

would gradually undermine collective trust and lead to the reintroduction of internal controls and so jeopardize the entire single market (Consilium.europa.eu, 2020).

In this framework, the EU tried to turn towards supranational policies from the intergovernmental approach to take a common position in response to the threats and manage the single market. The intention towards more integration had indeed articulated the basic humanitarian and social values with the renovated legal structure. At this point, it is worth mentioning that the European Council's meeting in Laeken in December 2001 and the European Convention's Working Group X as the remarkable milestones. The Laeken Declaration, within which the impact of the eleventh of September has been penetrated, highlighted Europe as "the continent of humane values, the Magna Carta, the Bill of Rights, the French Revolution and the fall of the Berlin Wall" as well as "the continent of liberty, solidarity and above all diversity, meaning respect for others' languages, cultures and traditions" (Cvce.eu, 2017). In addition, the EU has been indicated with its boundary of democracy and human rights, claiming that it is "open only to countries which uphold basic values such as free elections, respect for minorities and respect for the rule of law" (Cvce.eu, 2017). Thus, the idea to include the Charter of Fundamental Rights in the basic treaty has been mentioned also in the Laeken Declaration (Cvce.eu, 2017). By adopting a global and universal position, the EU also at the same time emphasized reforming its legal structure by "simplification of the Union's instruments" and acknowledged the potential superiority of common management of the external border, by requesting the Council and Commission to devise cooperation arrangements and to examine the conditions in which a mechanism or common service to control external borders could be created (Hobbing, 2010, p. 65). Besides, the European Convention's

Working Group X[33] of November 2002 was a formation sharing similar concerns. By referring to the establishment of the AFSJ, the Convention pointed out that the policies within this area should be rooted "in a shared commitment to freedom based on human rights, democratic institutions and rule of law" to make the citizens feel a proper sense of "European public order".[34] So, freedom was defined on the basis of conditions of security and justice and the need for collective action against the terror attacks was highlighted. It was also underlined that both the legislative procedures and the operational collaboration in the EU should be strengthened as "the golden rules"[35]. In this direction, they proposed a legal re-structuring within which the adverse effects of pillar structure would be overcome and the "Third Pillar" provisions would be brought under a common general framework.[36] So that, it was recommended, firstly, to be able to implement the vision of the Amsterdam Treaty and Tampere Programme and to establish the common legislative ground for the asylum, refugee and displaced persons, the unanimity voting has to be left and the qualified majority should be adopted[37]. With the same concern, it was offered that Framework Decisions, Decisions, and Common Positions should be replaced by regulations, directives, and decisions.[38] It is considered that all these dynamics paved the way for the

[33] See European Convention 426/02 (WG X) Retrieved from http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00426.en02.pdf

[34] See ss.

[35] See ss.

[36] See ss.

[37] See ss.

[38] See ss.

rapid establishment of the common Union policies and legal structure that will, in the end, abolish the pillar structure of the EU.

The Hague Programme, which was the subsequent policy action against the terror attack of Madrid on 11 March 2004, was the second five-year program in November 2004 in the Dutch Presidency. In the program, firstly the achievements and the intentions of the Tampere Programme were appreciated. It was emphasized that "the foundations for a common asylum and immigration policy have been laid…the harmonization of border controls has been prepared" (EUR-lex, 2005). Furthermore, "police cooperation has been improved, and the groundwork for judicial cooperation …has been well advanced" (EUR-lex, 2005) since from the Tampere Programme. And afterward, the element of security was defined as a new urgency in the light of 11 September 2001 and 11 March 2004 terror attacks and the prevention and suppression of terrorism were set as a priority.

So, the EU's mission was determined as on the one side "… guaranteeing respect for fundamental freedoms and rights" (EUR-lex 2005). And it was also missioned "to take a more effective, joint approach to cross-border problems such as illegal migration, trafficking in and smuggling of human beings, terrorism" (EUR-lex 2005). The objective of the Programme was very extensive and based on the safety of the Union. These aims are listed as follows:

> To improve the common capability of the Union and its Member States to guarantee fundamental rights, minimum procedural safeguards and access to justice, to provide protection in accordance with the Geneva Convention on Refugees and other international treaties to persons in need, to regulate migration flows and to control the external borders of the Union, to fight organized cross-border crime and repress the threat of terrorism, to realize the potential of Europol and Eurojust, to carry further the mutual recognition of judicial decisions and certificates both in civil and in criminal matters, and to eliminate legal and judicial obstacles in litigation in civil and family matters with cross-border implications. (EUR-lex, 2005).

It is worth underlining here that whereas the fundamental freedoms and rights were always targeted as part of the humanitarian values that the EU has devoted itself, the aim of establishing the AFSJ always reserved its own conceptions in line with the aims of the EU. In this sense, the freedom was approached as the "freedom in the EU", so that the respective policies were defined as such. In the Hague Programme, under the title of the "strengthening freedom", the freedom of movement and residing freely was mainly aimed by policy recommendations within the subtitles of "*Citizenship of the Union", "Asylum, migration and border policy", "A Common European Asylum System", "Legal migration and the fight against illegal employment", "Integration of third-country nationals", "The external dimension of asylum and migration", "Partnership with third countries" and "Management of migration flows"* (EUR-lex, 2005). Common policy-making and common action compromised by each and every member state was the general framework of all these recommendations. Besides, the transparency, regular monitoring, exchange of up-to-date information, sharing of responsibility-including financial implications and harmonization of the legislation were key issues to be emphasized. Furthermore, as being an economic oriented union, the contribution of all these policies to economic development was well-explained. For instance, the legal migration was intended to push the knowledge-based economy and advance economic development by preventing the informal economy.

Security, which was dominant in the document, was also well-grounded and interconnected with the aims of the EU. Previously in the European Security Strategy, the security was deemed as a "... a precondition of development" (Council of European Union, 2003), so it was associated with conflict and poverty. Thus, it was argued that "… conflict not only destroys infrastructure, including social infrastructure; it also encourages criminality, deters investment and makes normal economic activity impossible" (Council of European Union,

2003). Following this argument, in the Hague Programme, the security was handled in a multi-dimensional outlook. Under the part of "strengthening security", again the smooth exchange of information with the principle of "availability" was underlined. So that, a law enforcement officer in one of the member states requiring information in order to do his duties can get this from another member state; and that the law enforcement agency in the other member state holding this information can make it available for the indicated purpose, taking into account the requirement of ongoing investigations in that state. (EUR-lex, 2005). The establishments of a body like EU Situation Center (SitCen) for sharing the national intelligence data for the terrorist threats; joint action of Europol and the European Border Agency; a common policy for the border and aviation security and action to combat financing terrorism were recommended in the document (EUR-lex, 2005).

As the third part of this Programme, "strengthening justice" was pointed out to be able to create the European Area of Justice. The need for judicial cooperation both in criminal and civil matters based on mutual trust and by the progressive development of a European judicial culture based on diversity of the legal systems of the Member States and unity through European law. And then, the important role of the European Court of Justice and its functioning of speedy and appropriate handling of requests, the need for judicial training to standardize the European judicial culture were also indicated. Again, within the framework of justice, the combat with terrorism was focused and the need for cooperation and coordination of investigations, concentrated prosecutions by Eurojust, in cooperation with Europol was emphasized (EUR-lex, 2005).

Consequently, the developments following the Amsterdam and Nice Treaty, the decisive Tampere and the Hague programs which were attached importance after the global terrorist attacks, gave shape to the agenda of the AFSJ. Although, The

Hague Programme "invented the metaphor of a *balance* between freedom and security" (Guild & Carrera, 2010, p.4). It underlined the need to strike the right balance between law enforcement purposes and safeguarding the fundamental rights of individuals. And also it pointed out to the political elements of the EU's AFSJ agenda vulnerable to political demands for more security cooperation within and outside Europe. (Guild & Carrera, 2010, p.4). On the other hand, the intergovernmental structure of the third pillar regulations of the Maastricht Treaty gradually gained a supranational feature (despite not entirely) after transferring these elements to the first pillar through these agreements and programs. While from 1999–2004, there was shared competence to introduce legal proposals as between the Commission and member states, a limited consultation role for the European Parliament and mostly unanimous voting in the Council, after the end of 2004, many immigration, asylum and civil law issues were already subject to the usual first pillar rules; a Commission monopoly over making proposals, qualified majority voting in Council and co-decision for the European Parliament over legislation (Peers, 2014, p. 18). However, there were still some steps to go for an entirely supranational approach. For instance, the jurisdiction of the Court of Justice over these issues was restricted and there were also opt-outs for the UK, Ireland, and Denmark, which had been the quid pro quo for applying the 'Community method' to these issues (Peers, 2014, p. 18). Similarly, several areas remained subject to unanimity in Council with consultation of the Parliament "(family law, legal migration), or to qualified majority voting in Council and consultation of the Parliament (visa lists and visa formats) and the issues of policing and criminal law remained in the reformed third pillar" (Peers, 2014, p. 18). Therefore, the fragmented structure has caused confusion about jurisdiction in practice. These shortcomings would be tried to be overcome with the Lisbon Treaty.

3.2.1.2 From the Lisbon Treaty and Stockholm Programme to the Present

The Lisbon Treaty which was signed on 13 December 2007 and entered into force on 1 December 2009 is one of the breaking points as regards the AFSJ. This treaty which started as a constitutional project by 2001 with the European Council declaration on the future of the European Union, or Laeken Declaration, was followed up in 2002 and 2003 by the European Convention which drafted the Treaty establishing a Constitution for Europe. In fact, it was after two negative outcomes of two referenda on the Constitutional Treaty in 2005, and following the Berlin Declaration in March 2007 and Intergovernmental Conference in June and October 2007; the Treaty was signed at the European Council of Lisbon.[39]

The reason why the Lisbon Treaty was deemed as a breaking point is its attempts to resolve the problems that came before it. In this sense, "one of the main deficits that has characterized EU cooperation on the AFSJ during the last ten years has been the first/third pillar divide, which presented a loose institutional structure favoring intergovernmental approaches that often resulted in less than clear legal outputs, especially concerning police and judicial cooperation in criminal matters" (Guild & Carrera, 2010, p.3). This fragmented structure was criticized for leading to ineffective policies. So, the Lisbon Treaty put an end to these vulnerabilities "through the abolition of the pillar structure provided new legal bases for enacting far-reaching European legislation, widened the competences of the Court of Justice and converted the EU Charter of Fundamental Rights into a legally binding bill of rights for Europe" (Guild & Carrera, 2010, p.3) Hence, whereas previously, the European Council was the prime actor, after the Lisbon Treaty, the European Parliament and the Council have become the co-legislators in most areas of judicial cooperation in civil and criminal matters. (European

[39] See http://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon

Commission, 2014a). To compensate the shortcomings of the previous regime where unanimity and the absence of direct effect and primacy raised concerns in terms of efficiency and effectiveness, the EU measures concerning the AFSJ took the form of *regulations*, *directives*, and *regulations* adopted by the EU Council by a qualified majority according to the ordinary legislative procedure after Lisbon Treaty (Bazzocchi, 2011, p. 180). As well as these changes, another important remark was the decision of the president of the European Commission, José Manuel Barroso, to split up the justice, freedom and security portfolio and to create a separate portfolio for justice when the new European Commission convened in February 2010 (Lieber, 2010, p.18). Afterward, the responsibility of the AFSJ was allocated between two Commissioners: Home Affairs (Cecilia Malmström) and Justice (Viviane Reding) and then the AFSJ Directorate General (JLS) was eventually split into a DG Home and DG Justice (Rijpma, 2014, p.58). Accordingly, Commissioner Viviane Reding was taking charge of the justice portfolio- more specifically, justice, fundamental rights, and citizenship and Commissioner Cecilia Malmström the home affairs one to ensure the effective implementation of regulations in both spheres (Guild & Carrera, 2010, p.5).

In parallel with this momentum, the Stockholm Programme, which was the third multi-annual program of the European Council, was drafted in the Swedish Presidency in December 2009 for the period 2010-2014. Just like the Lisbon Treaty, the Stockholm Programme was also designed to challenge the frustrations of the previous programs. As Barrot, who served for the European Commissioner for Justice, Freedom and Security in 2008-2010 argued, the Stockholm Programme was the "EU's response to open questions about the ways in which people's rights are respected and empowered and their security protected" (Elspeth & Carrera, 2010, p. 4-5). So he distinguished this Programme from its predecessor. He argued that "the challenge will be to ensure respect for fundamental freedoms and integrity while guaranteeing security in Europe"

(Elspeth & Carrera, 2010, p. 4-5,18-19). Such that "the law enforcement to safeguard individual rights, the rule of law, and international protection" are aimed to be reinforced as having equal importance (Elspeth & Carrera, 2010, p. 4-5,18-19). In this framework, firstly, the points that were achieved so far underlined in the document. These were, the removal of the internal borders in the Schengen Area and the manageable external borders; migration policy focusing on dialogue and partnerships with third countries through the development of Global Approach to Migration and Mobility; steps taken towards the creation of a European Asylum System; operational maturity of the European agencies such as Europol, Eurojust, the Fundamental Rights Agency and Frontex; the cooperation in civil law to facilitate the everyday life of the citizens and the law enforcement cooperation to enhance security (Council of The European Union 2009, p. 2). Then a very detailed program was put forth with the rationale to both develop this success further and overcome the challenges that Europe faced. In this direction, the main focus was determined as the "interests" and "needs" of the citizen and the challenge was the building up of fundamental freedoms and integrity while guaranteeing security in Europe (European Commission, 2014a). As a matter of fact, this binary structure concerning both the interests and needs; and addressing both the business and the citizens on the basis of law enforcement measures and the rule of law was the prevailing understanding of the program.

In the Stockholm Programme, justice was approached to promote the rule of law and human rights, good governance, fight against corruption, the civil law dimension, promote security and stability and create a safe and solid environment for business, trade, and investment (Council of The European Union 2009, p. 76). In this regard, the remarkable titles of the Stockholm Programme were, in fact, drawing the lines of the ideal European identity to be reached. In this framework, the political priorities were set under several titles as ", "a Europe of rights: promoting citizenship and fundamental rights", "a Europe of law and justice", "a

Europe that protects", "access to Europe in a globalized world", "a Europe of responsibility, solidarity, and partnership in migration and asylum matters", "the role of Europe in a globalized world – the external dimension".

In the first part, "a Europe of rights" (Council of The European Union 2009, p. 11-20) was described on a wide scale. The beginning was intrinsically the fundamental rights and freedoms- from the full exercise of the freedom of movement to the protection of personal data. At this point, reinforcing the creation of a uniform European fundamental and human rights system based on the European Convention on Human Rights (ECHR) and those set out in the Charter of Fundamental Right were emphasized. It was expressed that the Union is an area of shared values, values which are incompatible with crimes against humanity, genocide and war crimes, including crimes committed by totalitarian regimes (Council of The European Union 2009, p. 12) Within this area, to make full use of the expertise of the European Union Agency for Fundamental Rights was recommended. Measures to tackle discrimination, racism, anti-Semitism, xenophobia, and homophobia were underlined as well. Rights of the child, vulnerable groups (such as women victims of violence or of genital mutilation or persons who are harmed), victims of crime and terror, the rights of suspected and accused persons in criminal proceedings, etc were also touched upon (Council of The European Union 2009, p. 13-17).

The second part was introducing the sense of justice of the program, which was named as "making people's lives easier: a Europe of law and justice" (Council of The European Union 2009, p. 20-35). So, developing a European judicial culture was targeted based on the diversity of legal systems and unity through European law. The superiority of the law through mutual trust and cooperation was highlighted. Another significant concern was the raising overall awareness of rights and by facilitating their access to justice. "Access to justice" in fact was not

commonly used as legal terminology and not used in the ECHR or the Universal Declaration of Human Rights (UDHR) (FRA, 2010, p.15). Instead, ECHR contained provisions on fair trial and right to remedy[40] and similarly, UDHR indicates "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law" (FRA, 2010, p.15). However, with the Treaty of Lisbon, a specific reference to access to justice was introduced in Article 67(4): "the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters" (FRA, 2010, p.15). Thus it involved the rights to an effective remedy before a tribunal; right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law; right to be advised, defended and represented; and right to legal aid for those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice (FRA, 2010, p.15). This understanding of justice as a facilitating tool would not only benefit citizens but also would be expected to support the economic activity in the single market by creating a common framework of the law.

The third qualification of this European identity was the "protection" from outside; that is "a Europe that protects" its citizens. Within this objective, internal security was underlined in a wide perspective from border management, trafficking and smuggling of human beings, protecting children against the danger of sexual abuse, fight against cybercrime, reduction of supply and demand of drugs, to the reduction of the number of opportunities available to organized crime as a result of a globalized economy and terrorism. Hence, it was indicated that developing, monitoring and implementing the internal security strategy should become one of the priority tasks of the Internal Security Committee (COSI) set up under Article 71 of the Lisbon Treaty. Thus to ensure the effective

[40] See Article 6 and 13 of ECHR

enforcement of the internal security strategy, it shall also cover security aspects of integrated border management and, where appropriate, judicial cooperation in criminal matters relevant to operational cooperation in the field of internal security (Council of the European Union, 2009, p. 35-36). To concretize this aim, very comprehensive policies were listed in the document. First, the Internal Security Fund (ISF) was set up for the period 2014-20, with a total of EUR 3,8 billion for the seven years, enabling the implementation of the Internal Security Strategy, law enforcement cooperation and the management of the Union's external borders (Ec.europa.eu, 2019b). In addition, the idea of forming a group of "security professionals" who would share a common culture, pool of information and technological infrastructure devoted to them was mentioned in the program (Council of the European Union, 2009, p. 37). Besides, the EU information management strategy based on business-driven development, a strong data protection regime, a well-targeted data collection, guiding principles for a policy on the Exchange of information was described (Council of the European Union, 2009, p. 38). One of the results of these recommendations was the EU Passenger Names Record System, which was adopted by Directive (EU) 2016/681 on the use of passenger name record (PNR) data for the prevention, detection, investigation, and prosecution of terrorist offenses and serious crime (The PNR Directive) in 2016 (Ec.europa.eu, 2019b). Similarly, the European Criminal Records Information System (ECRIS) was established in April 2012 in order to improve the exchange of information on criminal records throughout the EU (Ec.europa.eu, 2019b). And finally, the disasters were also put into agenda as manageable affairs that affect the security of Europe. It was expressed that "natural and man-made disasters such as forest fires, earthquakes, floods, and storms, as well as terrorist attacks, increasingly affect the safety and security of citizens" and thus "continued efforts are necessary to strengthen the Union Civil Protection Mechanism and the Monitoring and Information Centre (MIC) should

be reinforced in order to improve the coordination of Member States" (Council of the European Union, 2009, p. 53-54).

The fourth milestone was the "access to Europe in a globalized world". While securing the internal borders, the management of external borders and the visa policy is also taken into consideration in the globalized world. In this sense, firstly the European Council calls for the further development of integrated border management, including the reinforcement of the role of Frontex in order to increase its capacity to respond more effectively to changing migration flows (Council of the European Union, 2009, p. 55). Moreover, the development of the European Border Surveillance System (EUROSUR, which is a multipurpose system for cooperation between the EU Member States) and Frontex in order to improve situational awareness and increase reaction capability at external borders, was highlighted. And like in each and every policy, the role of the technology was emphasized. Indeed, it was agreed in the document that the setting up of an administration for large-scale IT systems could play a central role in the possible development of IT systems in the future (Council of the European Union, 2009, p. 57). In terms of visa policy, it was indicated that the impact of the Visa Code which was enacted in 2009 will be seen and a broader vision that takes account of relevant internal and external policy concerns will be implemented (Council of the European Union, 2009, p. 58).

Finally, the last European vision to be remarked in the Stockholm Programme was "a Europe of responsibility, solidarity, and partnership in migration and asylum matters". To begin with, it was underscored that the Union in the future can demand labor in the face of important demographic challenges; therefore well-managed migration with flexible policies can be beneficial to all stakeholders and will make an important contribution to the Union's economic development and performance in the longer term (Council of the European Union,

2009, p. 59). This concern of double-sided benefit to the EU's competitiveness and economic vitality and the migrants' own ends led to keep the immigration in the "legal" borders and the emphasis of "legal immigration". Therefore, while the balance between the labor markets and the social situation of the migrants is taken into consideration, the fundamental human rights are also touched upon. In this sense, to organize the legal immigration and take account of the priorities, needs and reception capacities of the member states a couple of measures that were listed in the "European Pact on Immigration and Asylum" were recalled:

> to control illegal immigration by ensuring that illegal immigrants return to their countries of origin or to a country of transit; to make border controls more effective; to construct a Europe of asylum; to create a comprehensive partnership with the countries of origin and of transit in order to encourage the synergy between migration and development (Council of the European Union, 2009, p.59).

Furthermore, the balance between promoting mobility and legal migration; optimizing the link between migration and development and preventing and combating illegal immigration should be maintained to promote the positive development effects of migration within the scope of the EU's activities in the external dimension and to align international migration more closely to the achievement of the Millennium Development Goals (Council of the European Union, 2009, p. 62).

In a nutshell, the tools for these priorities aimed to guarantee the implementation, to make sure to conduct the best practices, exchange of information, monitor the progress and evaluate the results. To this end, the tools were determined as mutual trust; effective implementation; new qualified legislation that address proportionality and subsidiarity, including prior impact assessments and identifying needs and financial consequences and using Member States' expertise and fully compatible with internal market principles; increased coherence and improved coordination between the EU agencies (Europol, Eurojust, Frontex,

CEPOL, the Lisbon Drugs Observatory, the future European Asylum Support Office and the Fundamental Rights Agency); periodical evaluation of the effectiveness of the legal instruments adopted at Union level in order to understand best practices; setting up training system (including e-learning programs, common training materials, Erasmus style exchange programs) on EU-related issues to train judges, prosecutors, judicial staff, police and customs officers, and border guards; better communication through the use of new channels such as E-Justice and the E-Justice Portal; an open, transparent and regular dialogue with representative associations and civil society through specific mechanisms, such as the European Forum for Justice; finance mechanisms and use of existing instruments and funds more effectively (Council of the European Union, 2009, p. 2-11). By indicating these political priorities and tools, it was also stated that the concrete steps and the timetable would be constituted in an Action Plan soon.

Consequently, the Action Plan Implementing the Stockholm Programme was published as a Communication document by the Commission in 2010 to be able to concretize all of these. The Action Plan was structured under eight titles covering all the items of the Programme comprehending fundamental rights, security, to fight all forms of discrimination, racism, xenophobia, and homophobia to be able to apply a "Zero Tolerance Policy" (European Comission, 2010a) as regards violations of the Charter of Fundamental Rights of the European Union. And also, it included an annex that had a 59-page list of actions to be completed by the end of 2014. However, the attempt of the European Commission of setting an aggressive Action Plan was perceived somehow as "an act of provocation and even as a shameful practice" since it was seen to go far beyond the policy priorities envisaged by the Council's Stockholm Programme.[41]

[41] See Council of the European Union Press Release, 2010, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/113967.pdf

Thus, the European Council reminded the Commission to use the Stockholm Programme as "the only guide frame of reference" for the political and operational legislative agenda of the EU's AFSJ.[42] It was also one of the inter-institutional struggles of the change of structure in the administration of AFSJ after the Lisbon Treaty.

In parallel to these discussions and the legal regulations, some further remarks can be mentioned as influencing the agenda. In March 2010, the Commission published a Communication called "EUROPE 2020: A Strategy for Smart, Sustainable and Inclusive Growth ". Although there was no specific reference to the AFSJ, the type of governance together with the main milestones adopted in the document were going to be mentioned later on in the respective policies of AFSJ. In fact, in the face of the financial and sovereign debt crisis, the sustainable economic growth, the stronger economic governance, and economic security, digitalization, innovation for growth and fighting poverty through these methods of economic growth, etc were some of the main headlines to be highlighted (European Comission, 2010b). The post-Stockholm Programme would be shaped by this mentality.

Just like the Europe 2020 Strategy, following the end of the Stockholm Programme in 2014, the Commission drafted a Communication, envisaging the agenda and strategy for 2020, this time for the scope of EU Justice namely "Strengthening Trust, Mobility, and Growth within the Union". Herewith, this document might be considered as the main ground that would shape the mature form of the "securitizing justice". To begin with, the justice area was deemed to aim to strengthen trust, mobility, and growth within the Union (European Commission, 2014a, p. 1-5). As it was clearly underlined in the EU Justice Agenda for 2020, the justice as a policy area was considered to have "a major role

[42] ss

to play in enforcing the common values upon which the Union is founded, in strengthening economic growth and in contributing to the effectiveness of other EU policies." (European Commission, 2014a, p. 10). Such that it was intended that "individuals and businesses, notably those who make use of their free movement rights, effectively benefit from a trusted and fully functioning common European area of justice" (European Commission, 2014a, p. 10). Therefore, the understanding of justice was defined as a facilitating tool rather than an end or a fundamental value. In this framework, justice was approached under four titles in this Communication. These were; "Enhancing Mutual Trust", "Justice for Growth", "Justice for Citizens: Making Justice Simple for Citizens" and "Protecting Fundamental Rights".

Under the title of "Justice for Growth", by pointing out the financial crisis, it was declared that "the EU Justice policy has become also support for economic recovery, growth and structural reforms" (European Commission, 2014a, p. 3). In this sense, the justice policy was presented as a tool to support EU economic recovery, growth and tackling unemployment. Therefore it was stated that structural reforms needed to be pursued so "to ensure that justice systems are capable of delivering swift, reliable and trustworthy justice, which would notably reduce the length of judicial proceedings thereby supporting the effectiveness of other policies" (European Commission, 2014a, p. 5). Accordingly, this was the only way for businesses and consumers to be confident and can effectively enforce contracts and handle litigation in court, or where possible out of court throughout the EU (European Commission, 2014a, p.5). Following this pattern, as of January 2015, the Directorate General for Justice (DG Justice and Consumers) was also made responsible for the policy concerning consumer protection and

called DG Justice and Consumers.[43] The mission of European Commission DG Justice and Consumers was stated as:

> to uphold and strengthen the rights of people living in the European Union, whether they are acting as consumers, entrepreneurs or workers and the rights of EU citizens in the European Union and abroad. The policies and daily work are based on core values and principles of freedom, democracy, and the rule of law, equality, tolerance, and respect for human rights (Ec.europa.eu, 2017c).

In addition, DG Justice and Consumers was assumed to make a contribution to; jobs, growth and investment, justice and fundamental rights, democratic change and digital single market (Ec.europa.eu, 2017c).

Furthermore, justice policies started to be put as a complementary step in various economic programs. From this standpoint, improving the independence, quality and efficiency of national justice systems have been considered as part of the economic adjustment programs and of the European Semester (European Commission, 2014a, p.3). Similarly, the EU Justice Scoreboard has been designed to assist member states and the EU institutions by providing data on the effectiveness of the national justice systems. Besides, as one of the results of the enhanced cooperation within this area, European Public Prosecutor's Office (EPPO) has been established in 2017 to better protect the financial interests of the EU and the taxpayer's money against fraud.[44]

Next, in the title of "Justice for Citizens: Making Justice Simple for Citizens", the emphasis was on the mobility of the citizens between member states and the reduction of the legal paperwork and abolition of the outdated rubber-stamping formalities (European Commission, 2014a, p. 3-4). It was about to make the

[43]See https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vignbufe1tch

[44] See https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office_en

justice system simple for citizens and so to ensure the full use of their right to move, buy goods and services and live in any of the member states. And finally, the "Protecting Fundamental Rights" of the document made a reference to the EU Charter of Fundamental Rights as the only binding compass for all EU institutions (European Commission, 2014a, p.4). Notwithstanding that, following the fundamental rights that have to be respected; consumer protection and the protection of the personal data were also touched upon with special attention.

As is, the construction of justice in the context of EU appears as both a policy framework for strengthening the security of the economic growth and smooth functioning of the market economy and as well as one of the main tools to establish common values and identity for the integration of the Union following the Amsterdam Treaty. Therefore, to the extent that "the individual liberty is tethered to the EU discourse of the internal market as the primary signifier of the European policy"(Roy, 2015, p. 90) the policies guaranteeing each of them stay interconnected. So, the logic of the internal market of the EU is deemed to overlap with the fundamental values of the Union on the common denominator of the neoliberal governmentality of *securitizing justice*.

3.2.2 Mapping of the Institutions and the Basic Elements of the EU Justice Policy

In parallel with the above-mentioned historical context, the economic and the political integration of the Community consolidated the neoliberal governmentality in the functioning of the EU. And within this context, the justice policy also has been constructed in a peculiar form, which secures the neoliberal governmentality underneath. In this process, this assurance of justice was sometimes based on either internal or international security, sometimes associated with the freedom, equality or effectiveness related to the market.

In this framework, the EU with its complex governing structure involves many institutions and bodies focusing mainly on or referring their activities to justice anywise. As a matter of fact, in parallel with the above-narrated context, it is seen that the priorities and policies are intertwined in these agencies which have determined justice as the main policy objective and in others whose priorities only refer to justice. In other words, one might argue that the main distinguishing feature of the EU justice policy is its versatility. That's to say, as is mentioned in the section above, justice as a policy area was considered both to enforce the common values of the EU and also to strengthen economic growth, security and to contribute to the effectiveness of other policies as well. Based on the discourse of the securitization and the securitizing politics that embraces any feasible area to exploit in the sake of the neoliberal order; it is argued in this study that the instruments listed under the EU justice policy do not serve only in the field of justice but also in the neoliberal governmentality as well.

To be able to analyze this interwoven structure and to be able to position it in the scope of securitizing politics, first the main institutions and bodies in the AFSJ of the EU will be portrayed in this section. Through this mapping, the basic elements, policies, and priorities of the EU justice policy will be introduced. This mapping and framing will ground the analysis of the securitizing justice in the EU in the next chapter. In fact, the EU justice policy has many pillars from legislative to executive bodies and to the agencies that establish links with civil society. All bodies operate in a manner that respects the founding values of the EU, fundamental human rights and the functioning of the market. Additionally, the mapping of the institutions of the EU aims primarily to put forth the respective organs and their policies and priorities in brief. The deeper policy analysis of the selected bodies that underscores the elements of securitizing justice will be held by examining the main documents/tools and discourses of these actors.

To begin with, the European Parliament, which represents the EU's citizens and is directly elected by them, has a standing committee called the Committee on Civil Liberties, Justice and Home Affairs (LIBE). LIBE Committee is responsible for the vast majority of the legislation and democratic oversight of Justice and Home Affairs policies and it indeed ensures the full respect of the Charter of Fundamental Rights within the EU, the European Convention on Human Rights and the strengthening of European citizenship (Consilium.europa.eu, 2019a). In particular, LIBE is also responsible for the legislation of the measures needed to combat gender discrimination in the labor market, data protection, free movement of persons, asylum and migration, management of borders, coherent Union approach to criminal law, police and judicial cooperation and all the related bodies and agencies (please see the figure 1) in the area of freedom, security, and justice (Consilium.europa.eu, 2019a). While all these agencies (Eurojust, eu-LISA, EIGE, EASO, ENISA, FRONTEX, EMCDDA, CEPOL, Europol and FRA) work independently within the scope of their functioning, they also support the respective body of the EU as well.

As is stated before, the Lisbon Treaty tasks the European Council with defining the strategic guidelines for legislative and operational planning within the area of freedom, security, and justice. So, the European Council, which defines political direction and priorities, develops multi-annual programs such as the ones in Tampere, The Hague, and Stockholm which have been narrated before and/or strategies for this area.

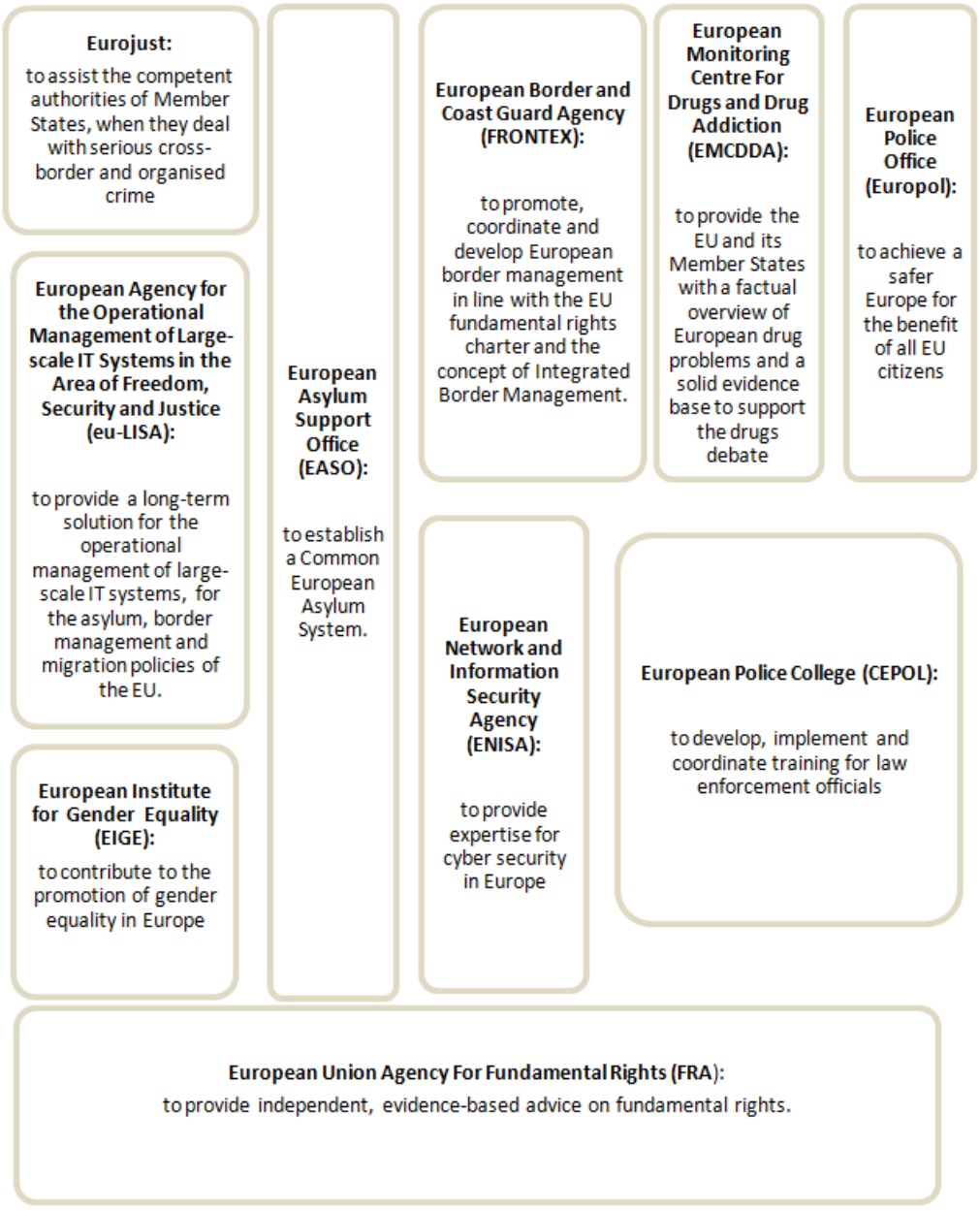

Figure 1 European Agencies in the Area of Freedom, Security, and Justice

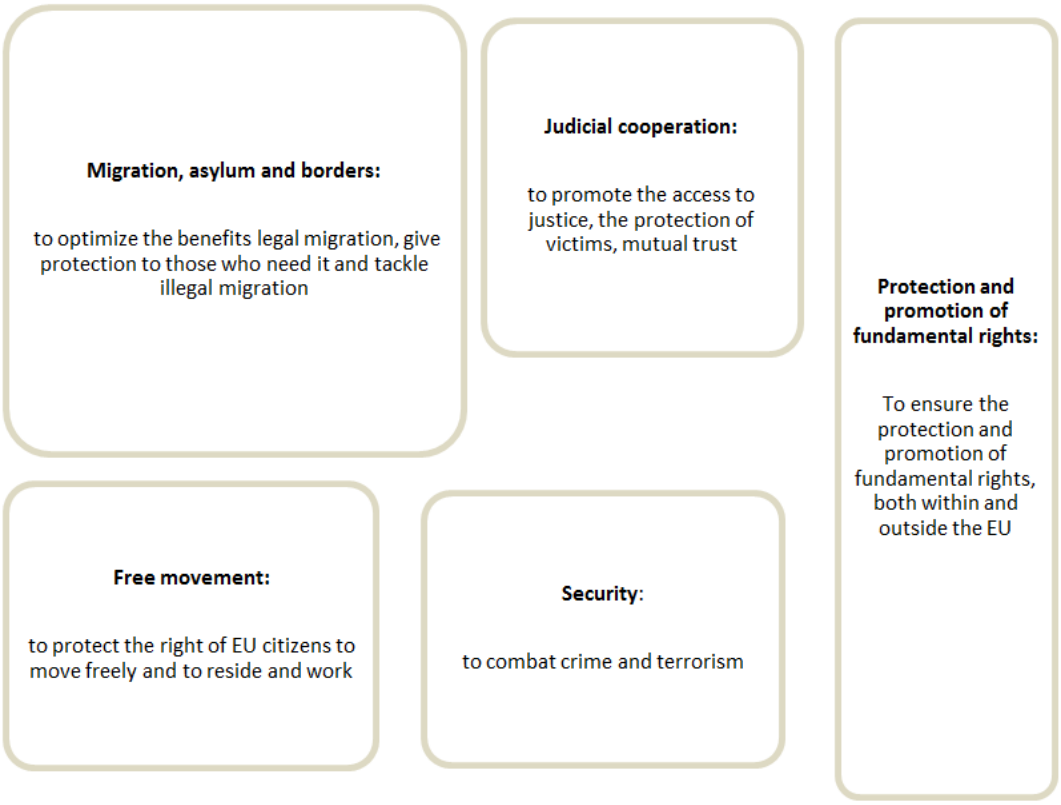

Figure 2 The main priorities of the European Council for the different areas of justice and home affairs.[45]

According to the strategic guidelines that the European Council adopted in 2014, five main priorities (please see the figure 2) have been adopted by underlining the need to improve the link between the EU's internal and external policies (Consilium.europa.eu, 2019a). This emphasis on the priorities of the European Council is important for understanding general policies.The next organ of the EU; which negotiates and adopts legislative acts with the European Parliament, coordinates member states' policies, develops the EU's common foreign and security policy, concludes international agreements and adopts the EU budget, is the Council of the European Union (Consilium.europa.eu, 2018a). In fact, the

[45] See https://www.consilium.europa.eu/en/policies/strategic-guidelines-jha/

Council of the EU is a single legal entity, but it meets in 10 different 'configurations', depending on the subject being discussed. In this sense, there is the Justice and Home Affairs (JHA) Council, which is made up of justice and home affairs ministers from all the EU member states. In general, justice ministers deal with judicial cooperation in both civil and criminal law and fundamental rights, while home affairs ministers are responsible for migration, border management, and police cooperation, among other matters. In this framework, the JHA Council develops cooperation and common policies on various cross-border issues, with the aim of building an EU-wide area of freedom, security, and justice (Consilium.europa.eu, 2018a).

The European Commission, which is the executive body of the EU, plays a key role by being responsible for drawing up proposals for new European legislation, implementing the decisions of the European Parliament and the Council of the EU (Europa.eu, 2017b). Based on the policy direction and the defined priorities, the work programs are drafted and implemented annually. The main actors for the implementation of these are the 28 Commissioners (1 from representing each member state) taking a decision on the political and strategic direction for different subjects and the 53 Directorate-Generals (DG) functioning as the policy units under the respective Commissioner. In this framework, priorities are set to make the “College” of the Commissioners work together in a close and flexible manner.

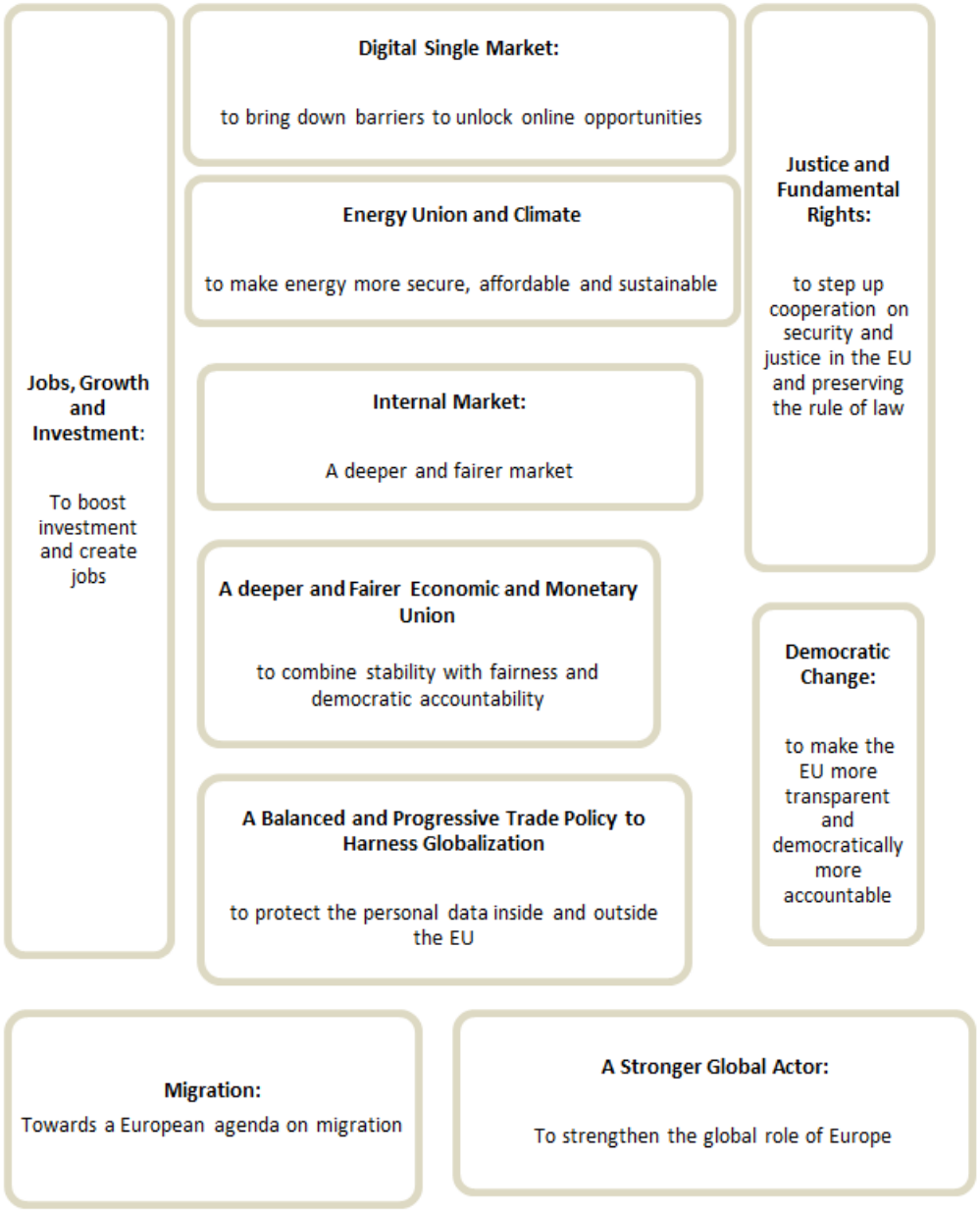

Figure 3 Ten Commission Priorities for 2015-19 [46]

Ten priorities have been defined for the years 2015-2019. (Please see the figure 3)[47] These priorities were designed to serve a purpose in themselves, and at the

[46] See https://ec.europa.eu/commission/priorities_en

same time, in close cooperation with the EU's main objectives. This interconnectedness will be analyzed in the next chapter.

As a priority area of the Commission, "the justice and fundamental rights" targets the cooperation on security and justice in the EU and preserving the rule of law. Thus, it points out the policy areas of "security union", "judicial cooperation", "fundamental rights", "data protection" and "consumer protection" (Ec.europa.eu (2017a). Within this structure, the main Commissioner working in the area of security, justice, and freedom is called "the Commissioner of Justice, Consumers and Gender Equality".[48] Hence, above all, the European Commission ensures respecting the European Charter of Fundamental Rights in all Commission proposals and concluding the EU's accession to the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe and it has several other missions. These include fighting discrimination, promoting gender equality, simplifying consumer rules, ensuring the policies of data protection, setting up an independent European Public Prosecutor's office and reinforcing judicial cooperation on criminal matters (Ec.europa.eu, 2017b).

One of the two main related policy departments, which is responsible for EU policy on justice, consumer rights and gender equality, is DG Justice and Consumers (DG Justice and Consumers). Indeed, of the Commission's 10 political priorities, DG Justice and Consumers contribute to "jobs, growth and investment", "justice and fundamental rights", "democratic change" and "digital single market" (Ec.europa.eu, 2017c). Therefore, DG Justice and Consumers develops and carries out the Commission's policies on mainly "justice and fundamental rights" and "consumers" to build "a European Union area of justice,

[47] See https://ec.europa.eu/info/about-european-commission/organisational-structure/how-commission-organised_en#commission-offices

[48] The Commissioner is Věra Jourová for the years between 2014-2019.

which will make it easier for citizens to exercise their rights and allow businesses to make full use of the EU single market" (Ec.europa.eu, 2017c). (Please see the figure 3) The sub-policies of "justice and fundamental rights" area are towards maintaining international gender equality, international human rights, EU citizenship, civil justice, criminal justice, data protection, international anti-discrimination action, effective justice, combating discrimination, rights of the child and gender equality. Besides, the sub-topics of the area related to "consumer" policy are "transport emissions", "circular economy", "consumer protection"," solving consumer disputes" and international cooperation on product safety". (Please see the figures 4 and 5)

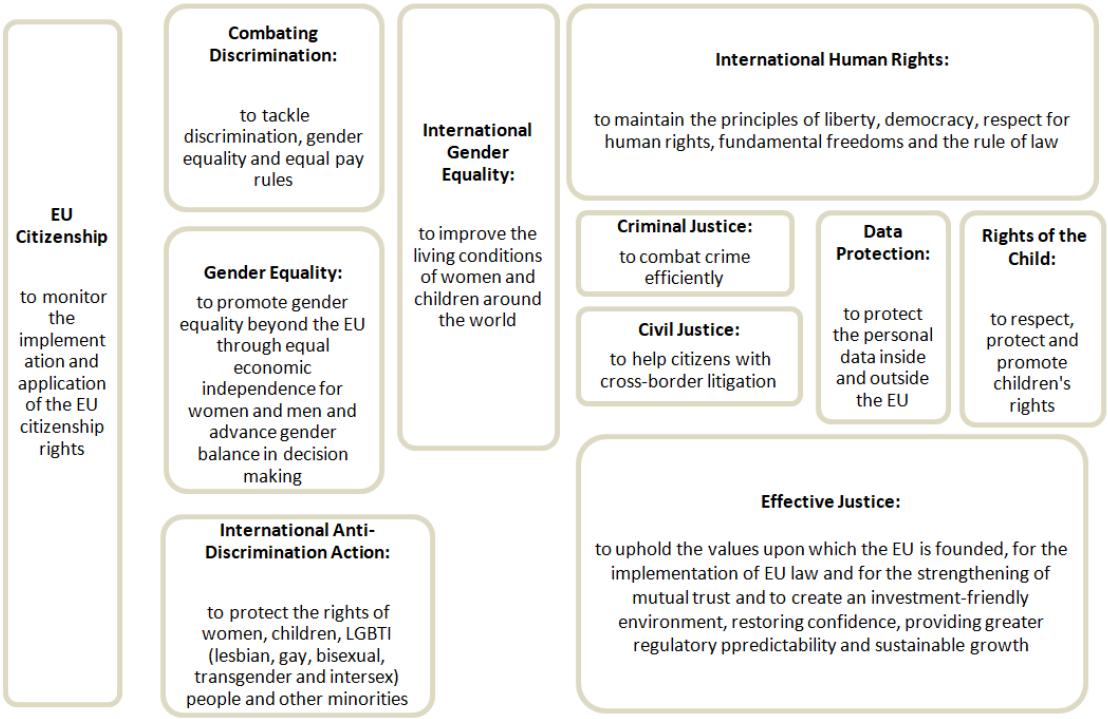

Figure 4 Policy Area: Justice and Fundamental Rights: sub-policies[49]

[49] See https://ec.europa.eu/info/policies/justice-and-fundamental-rights_en

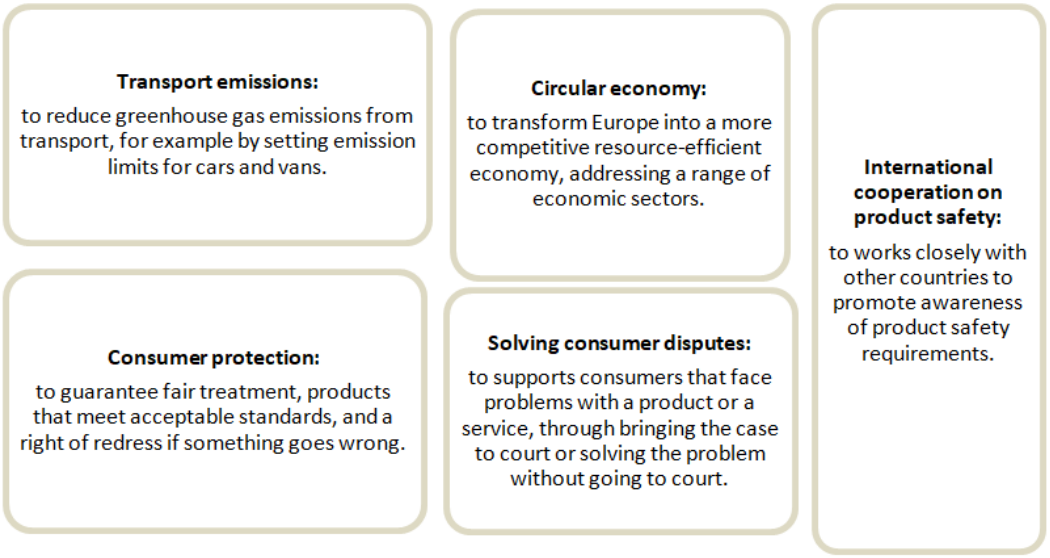

Figure 5 Policy Area: Consumers: sub-policies[50]

Although not functioning under the Commissioner of Justice, Consumers and Gender Equality; and in fact belonging to two different Commissioners[51] in terms of the policy areas, there is one more policy department which is listed under the priority area of "justice and fundamental rights". It is DG Migration and Home Affairs (DG HOME) and mainly works to attain the objective of cooperation on security and justice in the EU. DG HOME develops and carries out the Commission's policies on "migration and asylum" and "borders and security".

Besides the priority of "justice and fundamental rights", DG HOME contributes to the priority areas of "jobs, growth and investment", "migration", "EU as a global actor" and democratic change" (Ec.europa.eu, 2017e). (Please see the figure 3) DG HOME works on "the migration and asylum" policy to attain "a new approach to better manage all aspects of migration and aims to combat

[50] See https://ec.europa.eu/info/policies/consumers_en

[51] Dimitris Avramopoulos, Commissioner of Migration, Home Affairs and Citizenship and Julian King, Commissioner of Security Union for the years 2014-2019.

irregular migration and smuggling, save lives and secure the EU's external borders, while still attracting talent and skills" (Ec.europa.eu, 2017f).

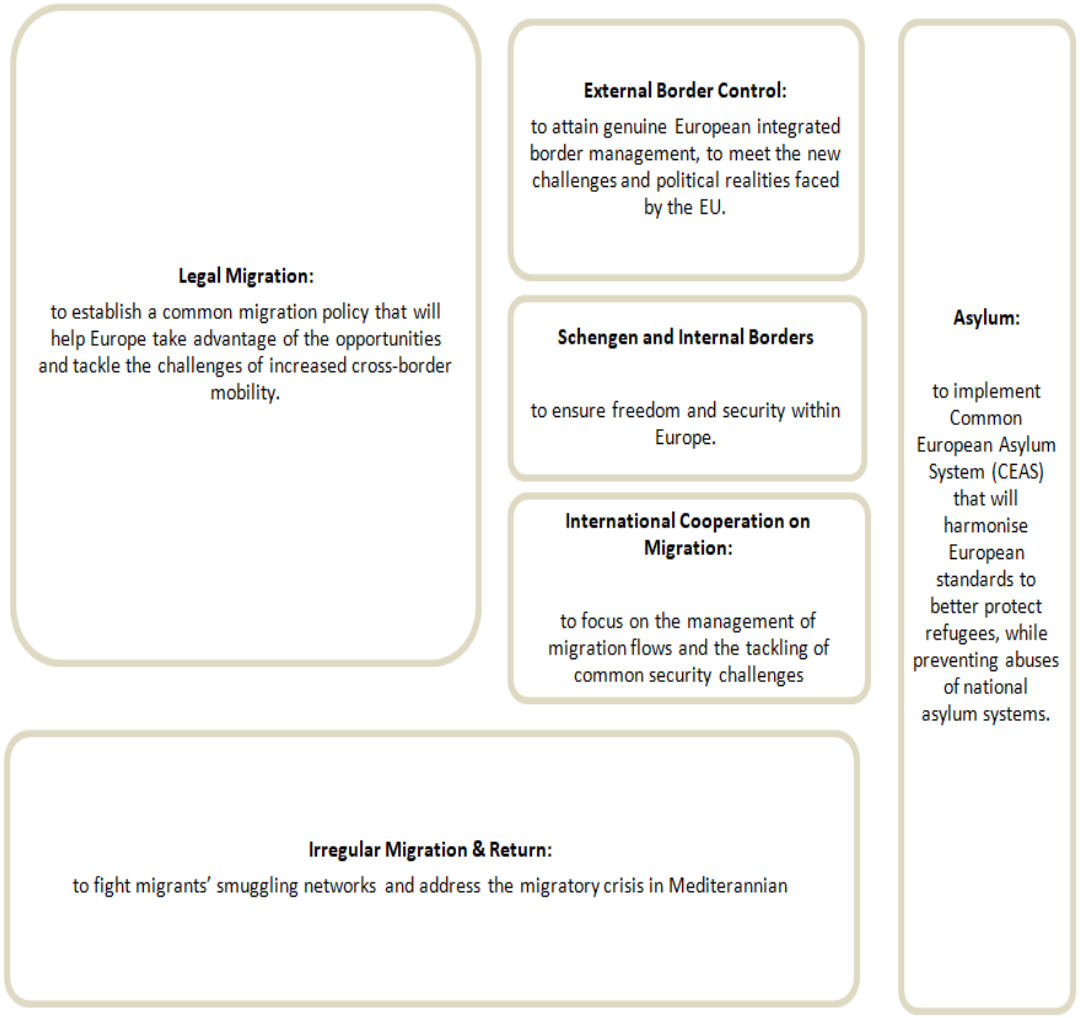

Figure 6 Policy Area: Migration and Asylum Policy: sub-policies[52]

The sub-policies to reach this objective are about the legalization of migration, controlling the external and internal borders, implementing a common asylum policy, cooperating on migration and fighting against irregular migration. On the

[52] See https://ec.europa.eu/info/policies/migration-and-asylum_en

other hand, on “the borders and security” policy, DG HOME aims to fight serious cross-border crime and terrorism more effectively by facilitating common action and cooperation between national police and customs authorities (Ec.europa.eu, 2017g). Indeed, to be able to implement this policy effectively, several sub-policies are conducted such as cooperating with Frontex, implementing Schengen procedures, combating organized crime, supporting global security, developing certification of the security technologies and assisting police cooperation. (Please see figures 6 and 7)

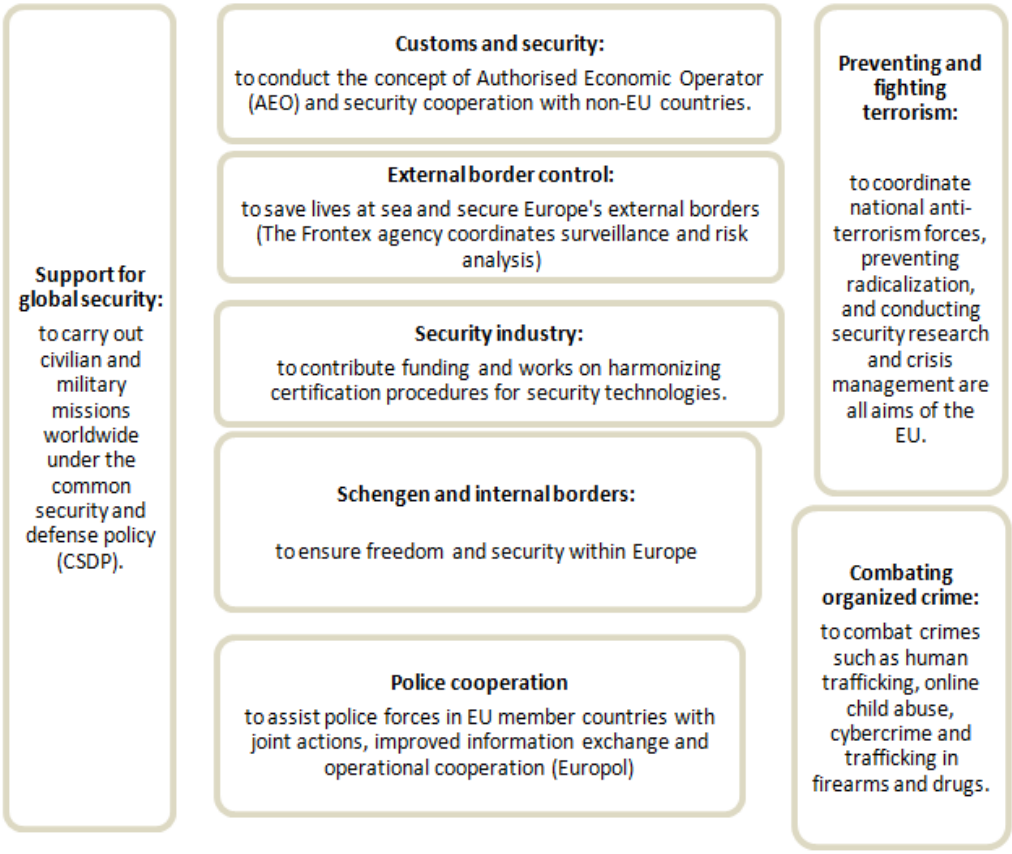

Figure 6 Policy Area: Borders and security: sub-policies

On the mapping of the respective institutions related to the EU justice policy, two more institutions can be mentioned. One of them is the "The European Economic and Social Committee (EESC)" which is known as the voice of the organized civil society in Europe (eesc.europa.eu, 2018a). This body has six sections, specializing in concrete topics of relevance to the citizens of the European Union, ranging from social to economic affairs, energy, environment, external relations or the internal market (esc.europa.eu, 2018b). The respective area which EESC is doing is related to its specialized section which is called "The Section for Employment, Social Affairs and Citizenship (SOC)". It mainly prepares the EESC's work in a variety of policy areas (employment and working conditions, education and training, migration and asylum, fundamental and citizens' rights, and other social affairs issues such as social policy and poverty, gender equality, disability issues, Roma inclusion, health, justice and home affairs, including immigration) (esc.europa.eu, 2018b). Based on the Treaty on the Functioning of the European Union (TFEU -Article 300), EESC is consulted by the European Parliament, the Council or the Commission on predefined policy areas (eesc.europa.eu, 2018c); therefore, by publishing opinions and information reports, EESC/SOC has a significant role to influence the respective policy agenda. In this sense, the EESC issues between 160 and 190 opinions and information report a year by analyzing these policies (eesc.europa.eu (2018c).

Finally, there is the "European Committee of the Regions (CoR)" which intervenes at several stages of the EU law-making process.[53] In fact, there are respective CoR commissions, which draft opinions on EU legislative proposals and have members gathering in plenary to vote and adopt those opinions. Specifically, there is a sub-commission of CoR, called the Commission for Citizenship, Governance, Institutional and External Affairs (CIVEX) , which covers the fields of Area of Freedom, Security and Justice, Immigration Policy,

[53] See https://cor.europa.eu/en/our-work/Pages/default.aspx

asylum and visas, EU Charter of Fundamental Rights, Active Citizenship, Devolution, Constitutional Affairs, Governance, better Law-Making, Subsidiarity and Proportionality, External Relations, including administrative external cooperation and capacity building, International Treaties and negotiations, terrorism and border controls, Neighbourhood Policy (including Eastern Partnership and Euro-Med cooperation), decentralized cooperation for development and EU enlargement issues.[54]

3.3 Chapter Conclusion

The elements of the neoliberal governmentality, which has been conceptualized in the previous chapter, have been traced in the EU integration process in this chapter. The reflections of the historical context of neoliberalism to the European integration have been put forth and then the functioning of the neoliberal governmentality within this system has been underlined. Following this, the positioning of justice as a policy field within this neoliberal structure has been described. The steps that were taken towards the aim of setting the area of freedom, security, and justice without internal frontiers in the Lisbon Treaty, have been elaborated. Besides founding treaties, European Council Summits and the respective programs focused on AFSJ, have been looked through. The mapping of the related institutions in AFSJ was introduced to give an overview of the organizations and the related policy network. Thus, the development of "justice" as a prioritized policy area in the EU and the shifted approach from limited intergovernmental cooperation towards supranationalism has been exposed.

Throughout the first section of this chapter, the EU integration in parallel to the global expansion of the neoliberalism has been narrated. It was significant to demonstrate how the EU structured itself with the rise of neoliberalism in the

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world in terms of showing the elements of neoliberal governmentality. First of all, it has been found that there has been a great emphasis of competitiveness on the legal founding treaties of the Union even for the policies in social spheres. Thus, this section has outlined the juridical basis of the EU competitive structure. This section is very important to show how this enterprise rationality based on competition and marketization juridically pervaded the policy frameworks of the EU. In this context, the neoliberal logic in the consumer-oriented services regardless of the "social" content will be analyzed in the next section through the developed prism of "securitizing justice".

Second, the intermeshing relations of the sovereign and disciplinary power have been tried to be shown in the respective legislation of the EU. In that sense, some important roles of the European Parliament and the European Commission regarding surveillance, correction and implementation have been pointed out. Two economic reports of the European Commission for surveillance (Annual Growth Survey and Alert Mechanism Report); tools to correct ("The Excessive Deficit Procedure" and "The Excessive Imbalance Procedure") and the mechanism to support sustainability of the functioning of the EMU and surveillance of the members states (European Semester) have been underlined. It has been deduced from this review that these tools and mechanisms generate main elements of neoliberal governmentality in the EU, to sustain the policy cycle. Specifically, the instruments such as *European Semester*, *Scoreboards*, *Alert Mechanism Reports*, *In-Depth Reviews*, *Excessive Imbalance Procedures*, and *Country-Specific Recommendations* have been displayed as the examples for dispositif of security in the EU for surveillance, prevention and correction. Thus, they will be gone through in more detail in the next section under the "economic governance mechanism". And the roles and impacts of the instruments in this mechanism will be analyzed for the AFSJ.

Next, in chapter 3, the emergence of justice as a policy field will be elaborated by looking at the changing approaches from intergovernmental cooperation to supranationalism. It is considered that this transition has influenced the approach towards the justice policy field as well. The period of transferring the elements of the third pillar regulations to the first pillar and the estbalishment of the AFSJ has been indicated as the shift from intergovernmental to supranational rationality. The respective treaties, regulations and programs have been scrutinized in this section. It has been found that the rise of neoliberalism and the global security threats have been the major dynamics to shape the justice agenda. Such that, the contents, focuses, priorities and even the names of the justice programs have been affected by the respective discourse of the period. From time to time, especially after global terrorist attacks, security discourse has dominated the AFSJ and from time to time, global crisis and economic priorities shaped the agenda. This finding will be used as a peculiar feature of being "mediator between security and freedom" of EU's securitizing justice in the next chapter. In this context, the policy documents of the EU that have been indicated in this section, particularly, the headings of the following chapter have been inspired by the emphasis of "trust, mobility and growth" that are referred in Communication document called "the EU Justice Agenda for 2020-Strengthening Trust, Mobility and Growth within the Union" (European Commission, 2014a).

Finally, this chapter has also mapped the institutions of the EU in the AFSJ. After having drawn the picture that polishes the EU as a neoliberal actor with a supranational approach, it was equally important to define the institutions of the AFSJ and their relations with each. It has been confirmed that all the institutions define their sub-priority areas and function accordingly after having received the priorities from European Council and European Commission annually. In addition, the agencies in the AFSJ put forth an intervowen structure in terms of priorities. It is considered that securitizing justice which has been defined as

multi-purposive, multi-functional, interwoven in nature, fits this picture. One of the derivations of this mapping, in terms of this structure, can be about the priority area of "the justice and fundamental rights". This priority of the Commission targets the cooperation on security and justice in the EU and preserving the rule of law. And they include the policy areas of "security union", "judicial cooperation", "fundamental rights", "data protection" and "consumer protection". It has been seen from the mapping that under this priority and policy areas, there are two policy departments : DG Justice and Consumers and DG HOME. Thus, it has been expected that these two DGs should in principle operate to attain their umbrella priority target of "justice and fundamental rights". Or having acknowledged that they have separate tasks, at least they are expected to carry out activities that do not contradict with this umbrella target. That is, DG HOME, which mainly develops and carries out the Commission's policies on "migration and asylum" and "borders and security", would not be expected to engage in the activities against the objective of cooperation on security and justice in the EU. Therefore, this interconnectivity in terms of policies and agencies will be used as one of the contexts to associate the security and migration policies with justice in the next chapter.

Based on these findings and derivations of this chapter and the conceptualization of Chapter 2 as well, in the next chapter, "securitizing justice" will be looked for in the case of the EU policy network.

CHAPTER 4

MEDIATION BETWEEN FREEDOM AND SECURITY: SECURITIZING JUSTICE IN THE EU

As narrated in the previous sections, what Foucault describes as the "crises of governmentality" corresponds to the confrontation between freedom and security. These two are both among the main values for society and the sources of the procedures of control and forms of state intervention at the same time. Thus, this tension; crises of governmentality both limit and let off the room for operations of the neoliberal governmentality and in the end establishes a regime of truth. That's why Foucault defines liberalism as the new art of government which appears as the "management of freedom" and underscores security as the principle of "calculation of manufacturing the cost of freedom" (Foucault, 2008, p.63-65).

This chapter mainly aims to analyze the "securitizing justice" in the case of the EU which is propelled by the tension between freedom and security. The analysis will be based on the above narrated literature regarding the Foucauldian neoliberal governmentality and the post-structural perspectives of securitization. To this end, first, the scope of analysis will be sketched by defining the objects of analysis in the EU and then the main hallmarks of the securitizing justice will be framed and elaborated in the successive sections. These sections will be based on the characteristics of securitizing justice to *develop*, *deepen* and *secure* the advanced liberal society.

4.1 The Scope of Analysis

Securitizing justice in the EU constitutes a policy area with multi-dimensional objectives. On the one hand, it is to enforce the integration and the common values of the EU on the other it is to strengthen economic growth and security. In parallel to these, securitizing justice is also expected to contribute to the legitimacy and effectiveness of other policy areas other than justice. In other words, it is the legal ground and a set of procedural rules required to establish and secure the relevant policy area. Therefore it is often referred to as "justice for …" for the policy area to be strengthened. Thus, it is argued in this study that the main agencies, instruments, and policies regarding the EU justice policy do not serve only to the field of justice but also to other EU policies with the neoliberal governmentality network. As has been mentioned earlier, "de-governmentalization of the state" or "de-statization of government"(Rose, 1996, p.56), has led to a detachment from the center through a network of enterprises, organizations, communities, professionals, individuals. Indeed, neoliberal governmentality requires both the harmony of the internal functioning of an agency to implement various interconnected policies and the harmony of the policies which are implemented under different agencies. In this sense, justice or namely “securitizing justice” is a very striking case to reveal this neoliberal governmentality network and its intertwined functioning. And again because of this intertwined and complicated structure, the well-organization of the scope of the analysis carries a special significance. In this sense, it would be useful to examine certain elements of securitizing justice under specific policy objectives of the EU, rather than just describing the main agencies and their policies underneath. Therefore, securitizing justice will be analyzed in terms of its role in constructing, deepening and securing advanced liberal societies. Indeed, its articulation to the economic governance system in the EU, its individualizing and

totalizing power in the process of establishing a digital single market and its managing vision between freedom and security will be elaborated. This chapter analyzes the securitizing justice as the intrinsic securitizing practices in several interconnected EU policies. The contradictions on access to justice, freedom and fundamental rights arising from this kind of justice will be particlularly touched upon.

In this framework, the policy documents of the EU that have been indicated in the previous section will be addressed. Especially the headings of this chapter have been inspired by the emphasis of "trust, mobility and growth" that are referred in Communication document called "the EU Justice Agenda for 2020-Strengthening Trust, Mobility and Growth within the Union" (European Commission, 2014a). As has been narrated before, this is a leading document for the AFSJ and has important objectives that shape the agenda. So, the important objectives in this document such as "The Justice for Growth", "Enhancing Mutual Trust", "Justice for Citizens: Making Justice Simple for Citizens" will shape this study as well. However, since these objectives can all be intertwined with each other, they will be re-organized under different titles in this study. In addition, it is worth mentioning that the analysis under these titles will not be restricted with only these points referred in this Communication document. Since the hallmarks of the "securitizing justice" will be associated with the discourses and policies of the several EU agencies in the AFSJ, the titles of each section in this chapter will be referring to a specific element of securitizing justice.

In the subsection 4.2, "Justice for Growth", which reveals the idea that the EU Justice policy has to provide "support for economic recovery, growth, and structural reforms" (European Commission, 2014a), will be analyzed to expose the "advanced liberal" characteristics of the securitizing justice. This section will basically aim to put forth the policies related to the establishment of an advanced

liberal society. As has been noted, in this study the neoliberal governmentality is associated with the advanced liberal societies as the analytics of neoliberal governmentality in Foucauldian theory takes its cue from German and American neoliberal approaches. Namely, the Ordo-liberal emphasis on competition, the sustainability of the market, enterprise society and the economic-juridical order; and the Chicago School's highlight on the unlimited generalization of economic order to the social system and the ideal of homoeconomicus are the basis of the advanced liberal societies. Within this regime of truth, the state is de-governmentalized and the different networks of accountability have been established through privatization; the new subject of the government appears as the "consumer", and a new relation between expertise and politics has been constructed based on calculation of risk and financial management and accounting surrounding the social policy as well (Rose, 1996, p.54). In this framework, "the securitizing justice" appears as the means to secure this type of society. This securing function and the ultimate objective of the advanced liberal society, which is economic growth, are combined or even merged in the definition of justice as a policy field in the EU. Moreover, building trust for "businesses and consumers to enjoy a single market that truly works as a domestic market" (European Commission, 2014a, p.3) is mainly targeted. To this end, red tape and costs, together with the intermediary procedures in both the civil and commercial proceedings are all seen as the burdens to be removed with the help of the tool of the justice policy. While sometimes being a part of the "rescue and recovery" culture, it is used to help companies and individuals in financial difficulties and insolvency; sometimes it aims at solutions towards consumer protection and unemployment (European Commission, 2014a, p.3-5). In fact, businesses and consumers need to be confident that they will be able to effectively enforce contracts and handle litigation in court, or where possible out of court, throughout the EU, within a reasonable time ((European Commission, 2014a, p.5). Since a

well-functioning set of rules to establish and secure the investment-friendly environment, it is accepted as the pre-condition of the well-functioning market structure and growth. Thereupon the securitizing justice manifests itself as the minimum procedures to meet the needs of the internal market.

Because of the above-mentioned connection, the mutual interaction between justice and growth is closely related to the economic strategy documents as well. For instance, the Annual Growth Survey (AGS), which is the Commission's main tool for setting out the general economic and social priorities for the EU and its Member States for the year ahead, recognizes the link between a business-friendly environment on the one hand and the rule of law and improvement in the independence, quality and efficiency of justice systems on the other (European Commission, 2017b). As such, this installs the securitizing justice within the economic governance structure of the EU as an indispensable prerequisite. It is indicated that structural reforms need to be pursued so as to ensure that justice systems are capable of delivering swift, reliable and trustworthy justice, which would notably reduce the length of judicial proceedings thereby supporting the effectiveness of other policies (European Commission, 2014a, p.5) In addition, it is also underlined that improving the independence, quality, and efficiency of national justice systems is part of the economic adjustment programs and of the European Semester (European Commission, 2014a, p.3). Within this line of thought, the justice policy is successfully installed in the EU's economic governance framework which has the competencies to monitor, prevent and correct problematic economic trends that might threaten the national economies of the member states. In this framework, the EU Justice Scoreboard has been used to monitor the effectiveness and giving country recommendations of the national justice systems. The Justice Scoreboard mainly focuses on civil, commercial and administrative cases to pave the way for a more investment, business, and citizen-friendly environment (Ec.europa.eu, 2018c).

Therefore, the securitizing justice's first hallmark of establishing an advanced liberal society will be elaborated under subsection 4.2 called "Justice for Growth". And the elements of the dispositif of security such as calculating the costs and drawing optimal borders, management of risk, monitoring and the tools of sovereign and disciplinary powers such as juridical code, surveillance, and correction are all going to be examined in this economic governance structure. The object of analysis will be the Annual Growth Surveys (2011-2019), Commission Work Programs (1999-2018), DG Justice and Consumers's Annual Activity Reports (2013-2017), DG Justice and Consumers Strategic Plan for 2016-2020, related EU Communications, Justice Scoreboards (2013-2020) and country-specific recommendations and respective communication documents of the Commission. The analysis will be made by scrutinizing the relevant sources and interviewing the EU representatives.

After this, subsection 4.3 is designed as the continuation of the first section named "Justice for Citizens, Businesses, and Consumers". This part aims to expose how the "securitizing justice" deepens the advanced liberal society. In the advanced liberal societies, the subjects' involvement in the market and the processes related to market this is encouraged since their participation contributes to this system. Moreover, established structure and the new set of relations based on neoliberal governmentality leads to "a plethora of indirect mechanisms that can translate the goals of political, social and economic authorities into the choices and commitments of individuals, locating them into actual or virtual networks of identification through which they may be governed" (Rose, 1996, p.58). These networks of relations and the structure will be tested in the EU case in line with the individualizing and totalizing power of neoliberal governmentality throughout the respective policies.

The main intention of the EU can be summarized as creating a favorable environment to mobilize the citizens within the EU and make the businesses invest safely and consumers buy goods and services freely. The facilitating role of justice such as making the EU citizens and consumers "feel at ease" and enable them for the full use of the right to move, buy goods and services and live in another member state constitute the rationale of this section (European Commission, 2014a, p.3-4). On this ground, the individualizing power of the neoliberal governmentality in the EU will be searched in the digital internal market that is tried to be established and in the relation between the electronic services to citizens, businesses, and consumers. Thus, the policies to enhance EU citizenship, digital applications for access to justice and improve the "digital single market" will be analyzed. The object of analysis will be the Commission Work Programs (1999-2018), DG Justice and Consumers' annual reports (2013-2017) and Strategic Plan for 2016-2020, Consumer Conditions Scoreboards (2013-2019) and e-justice portal, e-Justice Action Plan for 2019-2023 and interviewing the EU representatives.

The subsection 4.4 will be named as "Justice for a Europe that protects: Access to Justice for All in the Enclosure of Securitization. Under the mission of such protection, "securitizing justice" will be examined in terms of its attribute of securitization and the ability of management of security and freedom. In this part, the promise of "justice for all" and the securitizing justice which has the intrinsic tendency to produce contradictions in terms of fundamental rights, freedom, and access to justice will be analyzed. As has been narrated in the previous sections, with its role in the management of transforming the "bad freedoms" into "good freedoms" in line with the neoliberal order, "securitizing justice" does not need to have a promise on the universal values. The population which is circulated through the political economy has to be secured from the external threats and the possible risks that might influence the functioning of the system. Thus, the

dispositif of security starts to function beyond the speech act through discourse and practices and comprehensively with its extended definition. The system to be described is a complete whole with professionals, policies, tools, and institutions bounded by legal contracts and continuously renovated discourse. And the well-functioning of the order is guaranteed through the cooperation of these actors and elements, and everything is tried to be defined and given a role on a legal basis. Thus, security institutions and professionals are continuously being re-produced and the competencies are extended upon "need". The role of securitizing justice within this "management of unease" appears as constructing new governance mechanisms and institutions; merging the domestic and international policies in terms of security and justice, and discourses and policies regarding the exclusion and inclusion and re-producing broader meanings of security. Consequently, justice is not perceived as the "realization of good" but "access" to a certain legal framework for the sake of the "security" of the neoliberal order. And the legal practices and institutionalization oriented towards security gain importance. At this point, the circulation of the population and the freedom defined for consumers, businesses, and EU citizens are deemed prior. Thus, while the securitizing justice remains as a securitizing practice for the neoliberal order, security practices may have to make concessions about the promises given about justice for all. And since the priority is given to the single market and consumers, businesses and EU citizens, the ignored or silenced rights (even if not the violated) would be the non-EU citizens and/or non-consumer/businesses. Therefore, in this part, it is also going to be tested for the EU case whether the promise of the EU of "justice for all" is really silenced by security within the Home Affairs mechanisms. Moreover, the concessions or intrinsic silences that may appear as a result of this all-encompassing claim of "justice for all" will be tried to be found.

As the main strategy documents and the programs of the EU indicate, the justice policy has a cross-cutting protective contribution to several areas. As such, justice is both to promote the rule of law and human rights, good governance, fight against corruption and to promote security and create a safe and solid environment for business, trade, and investment as well (Council of the European Union 2009, p. 2). The conflict, which arose from the tension between providing security and the freedom in the EU case, will be demonstrated. First, the internal discourse and the judicial well-functioning of this relation will be revealed. Besides, the tensions unresolved in it will be also be touched upon. So, this part will analyze the justice's role of "ensuring mutual trust" by managing security and freedom. In this sense, the securitizing practices of the justice policy in the EU will be examined inspired by the post-structural securitization analysis. As is stated in the Article 3.2 of the Treaty of the EU "The Union shall offer its citizens an area of freedom, security, and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration, and the prevention and combating of crime" (European Union, 2012). The above-mentioned aspects of securitizing justice will be examined in the EU case on the basis of this main reference to the Treaty. The related institutions and policies, the types of judicial cooperation that have been conducted, discourses, new tools, and strengthened agencies with respect to the extended securitization will be analyzed. Thus, among this very wide agenda, the subsection 4.4 namely "Justice for a Europe that Protects: Access to Justice for All in the Enclosure of Securitization", will have the object of analysis of the Commission Work Programs (1999-2018), DG Justice and Consumers's and DG HOME's annual reports (2013-2017) and Strategic Plan for 2016-2020, FRA Reports and Opinions (2011-2018), European Data Protection Supervisor (EDPS) opinions, Human Rights Watch reports

(2011-2019), FRONTEX and eu-Lisa websites and reports, related EU Communications, Regulations, Directives and respective interviews.

4.2 Justice for Growth: *Establishing the Advanced Liberal Society*

The principle of "Justice for Growth" in the EU justice policy area is the predominant tendency. This can be observed especially after the adoption of the Europe 2020 Strategy. The emphasis on sustainable economic growth, stronger economic governance and economic security, digitalization, etc. are some of the points that influenced the overall policy agenda of the EU including the AFSJ. At least as important as this tendency is the understanding of effective national systems in the EU. It is considered that national justice systems play a key role in upholding the rule of law and so restoring confidence and contributes to economic growth. The European Commission uses several tools to improve the effectiveness of the national justice systems. These are European Semester, structural funds supporting justice reforms, technical assistance on justice reforms, cooperation and verification mechanism and European e-Justice portal.[55] Indeed, these processes are closely related to the reform process on the economic governance of the EU. Therefore, to be able to understand the functioning and the objectives lying under this specific principle of "Justice for Growth", first it is necessary to look briefly at the functioning of this new economic governance system. Then, how the economic governance system is reflected in the field of justice policy will thus be better understood and the neoliberal governmentality inside the AFSJ will be better demonstrated. As one of the main policy tools revealing this mentality; *the justice scoreboards* will be analyzed within this section as well.

[55] See https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/improving-effectiveness-national-justice-systems_en#cooperation-and-verification-mechanism

4.2.1 The Impact of New Economic Governance System

The EU economic governance is defined as the system in which the Commission sets the yearly priorities for EU growth (Ec.europa.eu, 2011a). As part of the economic integration process, the history of the timeline of the economic governance, in fact, can be dated back to the Maastricht Treaty. However, its surveillance and coordination aspects were strengthened day by day through the entry into force and the amendment of the Stability and Growth Pact in 1997 and 2005 respectively. In addition to the economic crisis and the discourses of a need for stronger economic governance and preventing the discrepancies by enhancing policy coordination at the beginning of the 2010s, the Commission proposed to create a tool called European Semester to coordinate ex ante budgetary and economic policies in line with both the Stability and Growth Pact and the Europe 2020 strategy (Ec.europa.eu, 2011b). Principally, the European Semester aims to contribute to ensuring convergence and stability in the EU, ensuring sound public finances, fostering economic growth, preventing excessive macroeconomic imbalances in the EU and implement the Europe 2020 strategy (Consilium.europa.eu, 2019b). And it covers three main blocks of economic policy coordination; one is structural reforms: focusing on promoting growth and employment in line with the Europe 2020 strategy; next is fiscal policies: in order to ensure the sustainability of public finances in line with the Stability and Growth Pact and finally the prevention of excessive macroeconomic imbalances (Consilium.europa.eu, 2019b). As is argued, the European Semester is a new form of governance in the EU, which allows for coordinated surveillance of national economic policies (Manko, 2013, p.2). The system works like a chain or a cycle throughout the year starting with the Annual Growth Survey (AGS), in which the Commission provides “a solid analysis on the basis of the progress on Europe 2020 targets, a macro-economic report and the joint employment report, and sets

out an integrated approach to recovery and growth, concentrating on key measures" (Ec.europa.eu, 2011b). Therefore, agreed priorities and policies related to them apply to all the members and also can be translated into country-specific recommendations in the end. The cycle which is re-initiated at the end of each year is sketched below:

Figure 7 European Semester cycle[56]

As can be seen from Figure VII, the AGSs belong to the preparatory phase of the European Semester. In fact, the AGS is based on the progress on Europe 2020 targets in the areas of employment, education, social inclusion, innovation, and energy use; the macroeconomic report which gives an overview of the economic situation in the EU; the joint employment report, which analyses the employment and social situation in the EU and the annual report on the state of the single market integration (Consilium.europa.eu, 2019b). Therefore, it appears as the tool

[56] See https://www.consilium.europa.eu/en/policies/european-semester/

to feed the overall EU priorities that affect the national economic and budgetary decisions of the members and then their national reform programs (NRPs) with the Stability and/or Convergence Programs. Indeed, since the European Semester involves assessment of the members' implementation and the recommendations to them on these policies, there is an extensive logic of surveillance and correction within this mechanism.

The AGSs which have been issued since 2011 have been analyzed as presenting the Commission's view of the priorities that member states should take into account when designing their economic policies for the coming year. The first AGS issued in 2011, was motivated to overcome the crisis that the EU faced, so it was called "Advancing the EU's comprehensive response to the crisis". There were three main priority areas to tackle the financial crisis and the increasing unemployment: fiscal consolidation and enhancing macroeconomic stability, labor market reforms for higher employment and growth-enhancing measures (European Comission, 2010c). Indeed, there is no reference to justice or the judiciary within this document. In the AGS of 2012, the main concerns have been continued with the addition of the main points of the "Euro Plus Pact", which was an agreement of the member countries of the Euro area and six non-Euro Area Member States and requires these countries to make voluntary commitments in the areas of competitiveness, employment, sustainable public finances, and financial stability, going beyond what has been agreed at EU level (European Comission, 2010c, p.2). Although not addressing specifically, the need to enhance the performance of the civil justice systems was mentioned within the section of "modernizing public administration" in this AGS. Settling the claims in a reasonable time frame to take advantage of the new business opportunities was underlined as the main reason for this need (European Comission, 2010c, p.13). This emphasis has been reiterated in the AGS of 2013 and 2014 as well. It was again underlined that improving the quality, independence, and efficiency of

judicial systems as well as ensuring that claims can be settled in a reasonable time frame should reduce costs for businesses and increase the attractiveness of the country to foreign investors (European Commission, 2012, p.13). What was lacking in the AGSs of 2011 and 2012 was the role of AGS of setting "social priority". Although in those two AGSs, there were the attributions of social protection and cohesion with regard to the economic crisis, in 2013 it was explicitly indicated that the purpose of the AGS "is to set out the economic and *social* priorities for the EU" (European Commission, 2012, p.13). In 2015 AGS, besides these concerns, the emphasis on ICT has been added. It was stated that to pave the way for a more business and citizen-friendly environment and to foster investment, enhancing the efficiency and independence of the judicial systems is vital. And therefore, it was remarked as a real requirement to tackle issues such as the length of proceedings, the number of pending cases, the insufficient use of ICT, and the promotion of alternative dispute resolution mechanisms and the independence of judicial systems (European Commission, 2014b, p.14). When the AGS of 2016 titled "Strengthening the recovery and fostering convergence" was scanned, it can be seen that the issue of justice was touched upon under the part of "Further improve product and services markets and the business environment." Confirming the previous AGSs, it was underlined that "enhancing the quality, independence, and efficiency of Member States' justice systems is a prerequisite for an investment and business-friendly environment." (European Commission, 2015, p. 13) In addition, better use of ICT in courts has also been emphasized to improve the quality standards of the judiciary. Similarly, in the AGS of 2017, the importance of the effective justice systems to support economic growth and deliver high-quality services for firms and citizens under the "Tackling Barriers to Investment" title (European Commisson, 2016f, p. 8). In the same manner, the AGS of 2018 also mentioned this issue and indicated that the rule of law and improvement in the independence, quality, and efficiency of justice systems are

crucial for a business-friendly environment under the title of "Boosting Investment to Support the Recovery and to Increase Long-Term Growth" (European Commisson, 2016f, p. 3). Finally, the AGS of 2019 besides the annual and usual evaluation also makes an overall analysis of the term of the Commission which is coming to its end this year. To reach a stronger Europe ideal in the face of "global uncertainty", a couple of policies have been listed together with "the achievements". In this sense, to be able to sustain the economic growth, the basic principles which have been underlined in each and every AGS have been reiterated. It was again emphasized that the rule of law, effective justice systems, and robust anti-corruption frameworks are crucial to attracting business and enabling economic growth (European Commission, 2018, p.12) This time, "anti-corruption" was also highlighted and the independence and efficiency of court systems and a comprehensive approach to fighting corruption have been referred (European Commission, 2018, p.12).

The impact of these references within the main documents of the European Semester can be followed throughout the policy documents of justice as well. As was mentioned, the Communication of 2014, called "Strengthening Trust, Mobility, and Growth within the Union" explicitly indicated that the justice as a policy area was considered to have "a major role to play in enforcing the common values upon which the Union is founded, in strengthening economic growth and in contributing to the effectiveness of other EU policies" (European Commission, 2014a, p. 10). To be able to evaluate the policies in line with these developments, it will be useful to look at the related documents.

4.2.2 Main Discourses and Policies towards Justice for Growth

The mapping of the main discourses and the policies towards "justice for growth" can be followed from the work programs of the Commission, the annual activity

reports of the respective DGs and respective strategic plans. To be able to follow the attributions to the European Semester and steps are taken to achieve justice for growth, first, these documents will be analyzed in this section.

The work programs (WP) are the documents that show how the Commission plans to give practical effect to the political priorities set out by the President and provide a multiannual overview to help stakeholders and other EU institutions plan their work with the Commission (European Commission, 2020). To begin with, the WP of 1999 is significant to see the beginning of the developments just after the Amsterdam Treaty and the establishment of the AFSJ. And the practices will be analyzed from 2007 since they have begun to mature after the Lisbon Treaty onwards. Although not presenting in detail in 1999 WP, referring to the Tampere Council, it was mentioned that the Commission will take forward the action plan requested by the European Council on how best to implement the provisions of the Amsterdam Treaty for the establishment of an area of freedom, security, and justice. And indeed, this was evaluated as forwarding proposals of the Commission on immigration, asylum, the crossing of external borders and judicial cooperation (Ec.europa.eu, 2020c). In the WP of 2000, this ambition has been continued and several concrete steps have been proposed. One of the main steps, which is worth mentioning, was to establish a "scoreboard" as a mechanism to monitor progress in the measures taken in the creation of the AFSJ. As it was mentioned in the third chapter in this study, this idea of building scoreboards has been improved throughout time. Justice Scoreboards after 2013 stays too detailed and advanced when compared to the first versions. While in 2001 WP, the main concerns stayed the same, in 2002, the actions for the AFSJ were dominated by the security issues resulting from the 11th September attack. It included the initiatives to fight terrorism and crime, prevent terrorist funding, money laundering, organized crime, effective external border controls and the extension of the mandate of Europol (European Commission, 2001, p.10). In WP 2003,

justice was mentioned under the measures needed to be taken for the challenges of the enlargement. Accordingly, these measures were to focus on the management of the EU's external borders and streamlining of economic policy coordination. The security mission and the reference to the 11th September continued in the WP of 2004 and the policies regarding the AFSJ included managing the common borders effectively, balancing tough action against illegal immigration with measures on the fair treatment and integration of legal immigrants, and further measures in the fight against crime and terrorism (European Commission, 2003, p.8). The WP of 2005 was dominated by the impact of the Hague Programme in 2004 in terms of justice policy. It was also in the WP that the concern for the slowdown of the economic growth was also indicated. The security of the European citizens was underlined and ensuring the free movement through the approaches to border management, asylum and immigration were brought into agenda. In that sense, to reduce the costs of border control member states were invited to produce burden-sharing solutions (European Commission, 2004, p.7). And it was for the first time the term "access to justice" was used with the need to be reinforced by referring to the issues of civil justice and individual rights (European Commission, 2004, p.8). In 2007, the "risks" were listed for the citizens of Europe as the environmental and health risks, communicable diseases and natural disasters and threats from terrorist attacks (European Commission, 2006, p.4). Towards these risks, ensuring a high level of security and justice through law enforcement, a criminal investigation, border control and the extension of the Schengen Area were pointed in the document (European Commission, 2006, p.4) When the WP of 2008 was published, the new multi-annual strategy (the Stockholm Programme) to establish AFSJ was notified with the impetus of the Lisbon Treaty. Among the priority initiatives, defining a global strategy on the issue of e-justice, which relates to a large scale to existing and envisaged Community instruments such as criminal

records and an EU electronic payment order, is worth mentioning (European Commission, 2007, p.27). Setting the priorities for 2009 WP coincides with the "testing times" (European Commission, 2008, p.5) of the crisis of the financial market. Therefore, while it was indicated that the economic downturn must be taken into account, the knowledge-based, competitive EU target and the European values of social justice and sustainability should be in core in WP 2009 (European Commission, 2008, p.2). And the Communication of the Stockholm Programme was listed among the initiatives to determine the means and the plan to achieve the policy of justice (European Commission, 2008, p.10). Although not elucidated in detail, it is also noteworthy that, in WP 2009, justice was expressed as "social" justice for the first and the only time. As can be seen up till 2009, the justice policy portfolio was established gradually and implemented with the impetus of the multi-annual programs.

In 2010, the crisis finally struck Europe and so the WP was named as "Time to Act" (European Commission, 2010d, p.1) and it was declared that the "new era" (European Commission, 2010d, p.1) started for the EU. As was mentioned above, this was also the beginning of the new economic governance of the EU as well. The Lisbon Treaty, the newly elected Parliament and the Commission were shown as the necessary tools to act to build solidarity and boost economic growth (European Commission, 2010d, p.3). In this respect, "Europe 2020 – a strategy for smart, sustainable and inclusive growth" was pointed out as the main strategy document to be followed. Indeed, it was for the first time that the WP mentioned the term "*raison d'être*" for the EU's main aim to improve the well-being of its citizens and to further their interests (European Commission, 2010d, p.7). And the key element of this policy agenda of "putting people at the heart of the European Action" was notified as to the Stockholm Programme for "an open and secure Europe serving and protecting the citizen" (European Commission, 2010d, p.7). Following this start to take action, the 2011 WP was for the series of hard policies

for the recovery of “the worst crisis of the last decades”. Just like the previous WP, in 2011, the Europe 2020 strategy was indicated as “the backbone of efforts at EU and national level to deliver smart, sustainable and inclusive growth” and the first European Semester was initiated (European Commission, 2010e, p.3). In this framework, building an area of freedom, justice and security was among the five priorities of the Commission. In fact, this area was defined as the area of “citizens” and EU citizenship was declared as a tangible reality. Moreover, again just like 2010’s WP, 2011 also referred to the Action Plan of the Commission regarding the implementation of the Stockholm Programme. But, as can be remembered from the previous chapter this was an inter-institutional struggle between the Commission and the Council. Indeed, the preparation of the Commission for such an aggressive action plan was perceived somehow as “an act of provocation and even as a shameful practice” since it was seen to go far beyond the policy priorities envisaged by the Council’s Stockholm Programme (Council of the European Union, 2009). Thus, the European Council reminded the Commission to use the Stockholm Programme as “the only guide frame of reference” for the political and operational legislative agenda of the EU’s AFSJ (Council of the European Union, 2009).

The WP of 2012 was named as “Delivering European Renewal” and the discourses of the crisis and the need for solidarity, and sustainable economic growth were still continuing. For the AFSJ, the emphasis of the “EU citizenship” was also preceded by explaining that the security and the justice in a Europe without internal frontiers is one of the biggest priorities for the EU (European Commission, 2011b, p.8). The term *“raison d'être”* was used once again to extend the rationality of the EU in this WP. In fact, it was argued this time that “the freedom to explore opportunities across borders is a central part of the EU's *raison d'être”* (European Commission, 2011b, p.8). Curiously, this logic was not fully clarified and it was only stated that the EU needs to cement mutual trust, to

press ahead with the delivery of the Stockholm Programme finding resolution on key issues like asylum and address new challenges such as cybersecurity (European Commission, 2011b, p.8). In addition, the single market was started to be pronounced regarding the AFSJ in this WP. The unnecessary bureaucratic obstacles to free circulation, simplifying legalization requirements and facilitating the cross-border recognition of civil status documents, etc were indicated in line with the functioning of the single market (European Commission, 2011b, p.8).

To tackle the economic crisis and put the EU back on the road to sustainable growth remained the absolute imperative in the WP of 2013 as well. To this end, the innovation and renovation in the business environment, exploitation of the IT revolution, effective labor markets, deepening economic and monetary union with a fully-functioning banking and fiscal union, etc were mentioned for a Europe to compete in the global economy (European Commission, 2012b, p.2-3). The justice policy was mentioned under the title of "Secure and Safe Europe" and with the objective of removing obstacles to the circulation of citizens of Europe. Accordingly, this "doubled" objective of being secure and safe included on the one hand, fighting crime and corruption, controlling common external borders and ensuring the respect of the rule of law and of fundamental rights, with the right balance between security and mobility. On the other hand, it also needed a functioning and efficient justice system to support growth, entrepreneurship and attract investors (European Commission, 2012b, p.9). Hereby, the efficient functioning of the justice system and the well-circulation of the EU citizens and the attraction of the investment were harmonized from this WP on. And again from this WP onwards, "the businesses" were named as the new addressees of the justice policy and the EU regime of rights. It was argued that the mutual trust in the areas of safety, security, and justice needs to be earned, the fundamental rights of the citizens should be protected and the people and the businesses should take full advantage of their rights by easy access to justice (European Commission,

2012b, p.9). The remarkable initiatives of this year's WP were towards establishing a consumer protection network, to establish a judicial scoreboard to encourage best practices and consolidating mutual confidence in common control of borders through Schengen arrangements (European Commission, 2012b, p.9).

It can be observed that from 2013 onwards following the strengthening of the governance structure, the procedures of management and monitoring were got tight and the cycle of the reports was increased. Within this trend, the term needs to be analyzed after 2013 by a special focus on the DG Justice's Annual Activity Reports (AAR) and the Justice Scoreboards besides the WP of the respective years.

In the AAR of 2013, the DG Justice's mission was defined as to build a European Area of Justice for the benefit of everyone in the European Union. And indeed this "everyone" was explained as the citizens and the shareholders of growth (entrepreneurs, consumers or workers) by stating that the DG Justice delivers Justice for Citizens and Justice for Growth (DG Justice and Consumers, 2013, p.4). It was also underlined that DG Justice was also active in monitoring and, where appropriate, ensuring the effective implementation of EU law (DG Justice and Consumers, 2013, p.11). There are especially two parts to mention in this report; which are the "policy highlights of the year" and the "key performance indicators". Some of the developments are listed below as the policy highlights of the year that have a close connection with the target of justice for citizens and *justice for growth* of the DG (DG Justice and Consumers, 2013, p. 9-10):

- The conference (Assises La Justice) was held to initiate a broad debate on the next steps building the European Area of Justice.
- The first EU Justice Scoreboard was launched to promote the improvement of the quality, independence, and efficiency of the national justice systems.

- The initiative was launched to establish a European Public Prosecutor's Office (EPPO) to create a Union-wide system to protect the EU budget against fraud.

- The proposal was made for the inclusion of the Roma since this integration will bring social and economic benefits,

- A series of regulations were made to simplify the cross-border acceptance of public documents between the EU Member States, which would exempt a wide range of public documents (birth, death, marriage certificates, etc) from legalization or similar formalities,

- Revisions were made of the small claims regulation, which offers a way to resolve cross-border disputes for smaller amounts without complicated legal procedures; and of the 1990 directive on package travel, to update the rules that apply when consumers book holiday 'packages'.

Five key performance indicators of the respective year were determined as follows ((DG Justice and Consumers, 2013, p.8-9):

- Cumulative number of legal professionals in the EU that have received training on EU law or law of another Member

- Use of the e- Justice portal (Milestone and target numbers based on the average increase in the use of 50% per year to 2016, and of 20% per year from 2016 to 2020)

- Progress towards equal participation in the labor market:

    - Female employment rate, 20-64 age group

    - The employment rate of people with disabilities

    - The unadjusted gender pay gap

    - Share of nonexecutive board members who are women

- Percentage of Europeans who consider themselves as "well" or "very well" informed of the rights they enjoy as citizens of the Union

- The residual error rate for all DG Justice Activity- Based Budgeting activities

According to the indicators, the judicial training, the use of ICT in justice systems, right-awareness as an EU citizen and equal participation in the labor market were the basic headlines to measure the performance of the year. And it seems quite harmonious with the economic growth target of the Union.

In the next year, although it was accepted that the signs of recovery were observed; promoting growth and jobs and to deliver the Europe 2020 strategy through the European Semester remained at the heart of the WP for 2014 (European Commission, 2013, p.2-3) "Justice and Security" was deemed under the key priorities of the year. It was also the year that the Stockholm Programme comes to end. By underlining the same concerns for the corruption, terror and the fundamental rights of the EU citizens; the importance of the effective justice systems was also emphasized in terms of the "people and businesses" to take full advantage of their rights and easy access to justice. In this sense, the importance of the EPPO was remarked for the sake of the EU's financial interests (European Commission, 2013, p.7-8). When the AAR of the DG Justice was looked at, some functional changes were realized. In this respect, while the responsibility of the drug policy was transferred to DG HOME, the responsibility of the disability policy was transferred to DG Employment. And the social responsibilities of DG Internal Market and the Consumer Affairs of the DG Health and Consumers transferred to DG Justice (DG Justice and Consumers, 2014, p.4). As is seen, the DG Justice and Consumers (DG Justice and Consumers) was officially established. The key performance indicators of the DG remained the same. And also, from 2014 onwards it was decided to go on with the normal process of policy formulation used in other established EU policy areas rather than the multi-annual policy programs. Some of the main policy highlights of the year

concerning the “justice for growth” were as follows: (DG Justice and Consumers, 2014, p.8-12)

- The cases which were brought to the European Court of Justice with respect to infringement of the rules of the EU regarding data protection rules, racism and compensation of crime victims were mentioned. (Hungary, Finland, Italy, and Spain)
- The studies towards the EU data protection reform for the completion of the Digital Single Market were conducted.
- Together with the Committee of the Regions, the Conference of Mayors was organized to discuss challenges and opportunities arising out of the free movement of citizens in the European Union.
- The EU Consumers Rights Directive entered into force, strengthening consumers’ and businesses' rights.
- In line with Europe 2020 strategy, the EU Justice policy was accepted as a support for economic recovery, growth and structural reforms. And the vision was set in a policy Communication the Commission as: enhancing mutual trust; facilitating mobility; and contributing to economic growth. To address these challenges, the Commission proposed to base the future EU Justice policy on a combination of consolidating what has been achieved; codifying EU law and practice where necessary; and complementing the existing framework with new initiatives.
- The Market Abuse Regulation and the Market Abuse Directive were decided to enter into application in July 2016. And the regulation towards establishing the European Account Preservation Order to help businesses recover millions in cross-border debts, allowing creditors to preserve the amount owed in a debtor’s bank account, was accepted.
- Based on the EU Justice Scoreboard and on in-depth country assessment, 12 Member States received in 2014 Country Specific Recommendations concerning their justice system.

In 2015, new expectations from the newly elected Parliament and the new term of mission for the Commission arose. So, the WP, named as “A New Start”, defined 10 priorities[57] of the Commission. Accordingly, the priority of “An Area of Justice and Fundamental Rights Based on Mutual Trust” included justice, protection, fairness, and rule of law for the EU citizens. The same concerns of a fight against cross-border crime, terrorism, and fraud were emphasized. And equality in the labor market was also underlined (European Commisson, 2014d, p.9). However, as can be seen in the activities of the DG Justice and Consumers, these priorities were not perceived as mutually exclusive and all inter-connected. The AAR of DG Justice and Consumers of 2015 officially declared its re-organization as for both justice and consumers and inclusion of the new directorates of "Consumers" and a new unit “Company law” to the DG Justice and Consumers' portfolio (European Commisson, 2014d, p.4). And also the consumer conditions index was added to the Key Performance Indicators of the DG. With this new structure the policy highlights of the year to be indicated for the “justice for growth” are as follows (DG Justice and Consumers, 2015, p. 5-7):

- DG Justice and Consumers contributed to a number of Commission-wide horizontal processes, in particular, the European Semester as well as a number of Commission priorities, in particular, the Digital Single Market Strategy, the Internal Market Strategy, the Capital Union Action Plan, the Security Agenda, Migration Agenda, and Energy Union.

- 15 Member States were subject to monitoring of justice reforms, and DG Justice and Consumers followed possible emerging systemic threats to the rule of law in Hungary and Poland.

- In line with the Digital Single Market general objective, the Commission adopted two legislative proposals devising simple and effective contract law rules for consumers and businesses on the supply of digital content and on the online and other distance sales of goods.

[57] See Figure 3: Ten Commission Priorities for 2015-19

- In the context of the review of the EU-US Safe Harbors arrangement, the Commission adopted a communication on the Transfer of Personal Data from the EU to the United States of America under Directive 95/46/EC. This followed the Judgment by the Court of Justice in Case C-362/14 and provided the much needed provisional guidance for business on the possibilities of transatlantic data transfers following the ruling.

- Efforts against money laundering and terrorism financing increased for the integrity of the EU financial markets and confidence in the financial sector.

- "The Strategic Engagement for Gender Equality 2016-2019" was published in December 2015. The objectives within this document were about the labor market participation, role in decision making and against violence.

In WP of 2016, namely "No Time for Business As Usual", summarized the important events that shaped the challenges to overcome as the economic growth which was slower than expected, need to restore the stability of the Greek economy, the migratory pressure on the external borders, the insecurity in the neighborhood, the terrorist attacks such as Charlie Hebdo attack as such (European Commisson, 2015, p.2). It is also noteworthy that monitoring and where necessary enforcing the application of European legislation was mentioned as one of the Commission's most important responsibilities in this document (European Commisson, 2015, p.4). Justice policy was located again under the priority of "An Area of Justice and Fundamental Rights Based on Mutual Trust" of the Commission. The ongoing studies towards the legislative regulations against terrorism, fraud, and corruption were mentioned. And also, the importance of the agreement on the data protection reform (Regulation and Directive) and the proposal on EU Passenger Name Records was underlined (European Commisson, 2015, p.4).

For the year 2016, it is also useful to elaborate the "Strategic Plan for 2016-2020" which was published by DG Justice and Consumers This document was important by defining the operating context of the DG and wide range of tools that have been used, main stakeholder groups and agencies, strategies and main objectives. First, it was indicated that the operating context of the DG Justice and Consumers was based on the Treaty on European Union, the Treaty on the Functioning of the European Union (TFEU), and the Charter of Fundamental Rights of the European Union, which has the same legal value as the Treaties, set out the scope of European Union action in the areas of Justice, Equality and Consumer policies (DG Justice and Consumers, 2016b, p.3). In this framework, it was argued that the DG Justice and Consumers had interconnected duties resulted from the various provisions of the TFEU. (Title IV ("Free Movement of Persons, Services, and Capital", Title V "Area of Freedom, Security and Justice", Title VII "Common Rules on Competition, Taxation and Approximation of Laws", Title X "Social Policy" and Title XV "Consumer protection") (DG Justice and Consumers, 2016b, p.3). In the document, the tools that were used to achieve the policy goals within these were also listed. To begin with, since the entry into force of the Lisbon Treaty, the pillar structure was ended and the EU law has expanded in the justice policies; the first objective of the DG Justice and Consumers appeared as "to enforce the EU law to ensure that citizens and businesses enjoy the rights and opportunities provided by EU law including in a cross border context" (DG Justice and Consumers, 2016b, p.3). Besides, communication activities to reflect political priorities and accompanying the strategic policy initiatives; the Justice Scoreboard, the Consumer Scoreboards as well as Annual Reports on equality between women and men and on Roma integration prepared by DG Justice and Consumers were listed as the tools for achieving policy objectives (DG Justice and Consumers, 2016b, p.3). It was also worth mentioning that DG Justice and Consumers also expressed in this

document that there was also a significant international dimension to their policies to protect the rights and interests of EU citizens and businesses also outside the EU, including by mainstreaming the priorities of DG Justice and Consumers into EU external policies (DG Justice and Consumers, 2016b, p.4). This clear explanation of the area of responsibility and the tools is important to be able to understand the intertwined duties of DG Justice and Consumers (both with respect to their connectedness with other priorities of the Commission and also the merge of internal/external policies of the EU). Therefore, the "Strategic Plan for 2016-2020" explicitly put forth that DG Justice and Consumers contributes in particular to four priorities defined by President Juncker (DG Justice and Consumers, 2016b, p.7); and the general objectives are "A Connected Digital Single Market"; "A Deeper and Fairer Internal Market with a Strengthened Industrial Base"; "A Union of Democratic Change". And specifically, DG also committed to contributing to the several Commission priorities (DG Justice and Consumers, 2016b, p.8-9). First, it contributes to the priority "A new boost for Jobs, Growth and Investment" via policies on effective national justice systems, promoting equality between women and men as well as increasing women's participation in the labor market. In addition, it contributes to the priorities of achieving "A Reasonable and Balanced Free Trade Agreement with the U.S." and "A stronger global actor" through the policies of the data protection rights and mainstreaming judicial reforms into the EU's external policies and funding programs respectively. Moreover, in this detailed strategic plan, it was clearly emphasized that DG was going to work specifically to create a regulatory framework to improve the business environment for investors, stakeholders and companies, while at the same time preventing money laundering and financial malpractice; strengthening the single market, including the Digital Single Market, by modernizing and harmonizing consumer, contract, company as well as non-discrimination and gender equality laws, by ensuring their proper

implementation and enforcement including in a cross border context (DG Justice and Consumers, 2016b, p.8-9).

Thus, the AAR of the DG Justice and Consumers in 2016 was based on the task to effectively meet the challenges that common European values encountered in 2016 (DG Justice and Consumers, 2016a, p.2). As was mentioned above, DG declared explicitly that they do not only work for the priority of justice but also work for interconnected priorities of the Commission such as the priorities "a Connected Digital Single Market", "a Deeper and Fairer Internal Market", "An Area of Justice and Fundamental Rights" and "a Union of Democratic Change". Within this report, the DG clearly classifies the specific activities according to their priority areas of the Commission. Thus, the key achievements that can be indicated were as follows (DG Justice and Consumers, 2016a, p.6-10):

- The proposal to revise the Consumer Protection Cooperation (CPC) Regulation was adopted as part of the Commission's E-commerce package for European consumer laws up to speed with the online world by providing consumer authorities with new powers to act faster against bad online practices.
- A proposal was put forward to provide businesses an effective restructuring framework and give bankrupt.
- The Commission launched the EU-wide Online Dispute Resolution platform (ODR platform) helping consumers solve issues stemming from online shopping.
- In the area of consumer and marketing law, the main activity was the REFIT Fitness Check of consumer and marketing law launched.
- In the 2016 European Semester, 6 member states (BG, HR, IT, CY, PT, SK) received a country-specific recommendation on the need to improve the effectiveness of the justice systems. 7 member states' monitoring was continued. (BE, ES, MT, PL, RO, SI) In addition, DG also participated in the monitoring of ongoing justice reforms in Greece which was subject to

an economic adjustment program and, therefore, did not participate in the European Semester.

- As regards the rule of law, the Commission has been engaged in an intensive dialogue with the Polish government to address concerns regarding the rule of law in Poland, in particular, the situation of the Constitutional Tribunal.

- General Data Protection Regulation together with the Data Protection Directive for Police and Criminal Justice Authorities entered into force in May 2016 for European citizens and businesses to fully benefit from the digital economy.

- Regarding the external dimension of EU data protection, the Commission in 2016 concluded two major arrangements for transatlantic data transfers, both for commercial purposes and in the area of law enforcement cooperation.

- The Commission adopted a proposal on money laundering in response to the recent terrorist attacks, and to the revelations stemming from the Panama Papers.

- DG Justice and Consumers worked on the Report on progress towards effective EU citizenship 2013-2016 (regarding the achievements of Union citizenship, non-discrimination, free movement and residence in the territory of the Member States, the right to vote and stand as a candidate at municipal and European Parliament elections in the Member State of residence, the right to consular protection, the right to petition the European Parliament and the right to take complaints to the Ombudsman.)

The WP of 2017 that claimed "Delivering a Europe that protects, empowers and defends" was very decisive to implement the key priorities of the Commission since the challenges regarding the economy, environment/energy, security, migration, etc increased with the Brexit. Although not staying in its borders and interrelated with the other priorities of the Commission, "An Area of Justice and Fundamental Rights Based on Mutual Trust" included the follow up to the EU Security Agenda, management of the borders, new European Travel Information

and Authorisation System (ETIAS) to check of visa-exempt third-country nationals intending to travel to the Schengen area, tackling with terrorism financing (European Commission, 2016g, p.11-12). In addition, the promotion of the rule of law was underlined since "independent, effective justice systems support economic growth and upholding fundamental rights" (European Commission, 2016g, p.12). The activities that were reflected in the justice portfolio of the DG can be followed in the AAR of 2017. In the respective AAR, it was clearly underlined that DG portfolio was visible in all policy priorities (from the work on platforms, online sales and data protection under the Digital Single Market to proposals on insolvency, company law and work-life balance under the Internal Market, as well as contributions to the European Semester and work on corporate governance) spelled out by President Juncker (European Commission, 2016g, p.2). In this framework, the key activities to be remarked concerning these intertwined priorities can be listed as follows: (European Commission, 2016g, p.7-8)

- The General Data Protection Regulation entered into force in 2016 and The Consumer Protection Cooperation Regulation was updated.
- The 2017 Consumer Conditions Scoreboard evidenced significant developments, notably a broad improvement of consumer conditions across the EU, and a surge in consumer confidence in online shopping.
- DG Justice and Consumers contributed to proposing a new prudential regime for investment firm supervision, including the rules on remuneration, corporate governance, and transparency.
- In the 2017 European Semester, 5 Member States received a country-specific recommendation on the need to improve the effectiveness of their justice systems. DG also monitored 9 Member States, in which justice reforms have been ongoing, and participated in the monitoring of justice reforms in Greece as part of the economic adjustment program.

- 2017 EU Justice Scoreboard was prepared to assist the Member States to achieve more effective justice by providing objective, reliable and comparable data on the quality, independence and efficiency of justice systems in the EU.
- The Commission pursued its efforts to uphold the respect of the rule of law in the European Union and continued its dialogue with the Polish authorities under the Rule of Law Framework.
- The Council Regulation on the establishment of the European Public Prosecutor's Office (EPPO) was adopted by the co-legislator.
- Commission's Communication on Exchanging and Protecting Personal Data in a Globalised World, adopted in January 2017.
- The Commission launched in April 2017 "An initiative for work-life balance for working parents and careers" aimed at tackling women's underrepresentation in the labor market and the unequal share of care responsibilities between women and men.

In 2018, the Commission turned its face towards democracy and titled the WP as "An agenda for a more united, stronger and more democratic Europe." Having complied with the economic growth targets, they declared that "with growth now above 2% for the EU as a whole – and 2.2% for the euro area – Europe's economy has grown faster than that of the United States over the last two years" (European Commission, 2017c, p.2). It was stated that the Commission will be completing its tasks to accomplish their priorities. The rule of law was pointed out as one of the common values of the EU respects besides fundamental rights and democracy. Indeed, the rule of law, meaning an independent judiciary has deemed a prerequisite for a society in which peace, freedom, tolerance, solidarity, and justice prevail and indispensable for sustainable and fair growth, as well as for trust in Europe (European Commission, 2017c, p.11-12). For the priority of "Delivering Better On the Ground – Better Regulation, Implementation, and Enforcement", the Commission promised to continue to help Member States

improve the effectiveness of their national justice systems and to fight corruption through the European Semester, and to support justice reforms and judicial training with EU funds, including with the EU Justice Scoreboard (European Commission, 2017c, p.13). Besides, for the priority of "An area of Justice and Fundamental Rights based on Mutual Trust", it was highlighted that "the success of the internal market ultimately depends on trust and this trust can easily be lost if consumers feel that remedies are not available in cases of harm" (European Commission, 2017c, p.8). So, the Commission presented a "New Deal for Consumers", including a couple of regulations to enhance judicial enforcement of consumer rights and facilitate coordination by national consumer authorities(European Commission, 2017c, p.8). The policies towards data protections were also mentioned. In this sense, the adoption of a decision between the EU and Japan to ensure the free flow of personal data as an integral part of the strengthened economic partnership was remarkable. Finally, one of the most important claims of the WP was to strengthen the Schengen system by expressing the intention to get "back to Schengen" as soon as possible while taking proportionate security requests of Member States fully into account (European Commission, 2017c, p.8). This intention will be analyzed in more detail in the third section of this chapter.

4.2.2.1 Justice Scoreboards

The Justice Scoreboards, being among the tools of governance in the EU, are prepared by DG Justice and Consumers for achieving policy objectives. As narrated in the previous sections, the idea of a tool as "scoreboard" can be traced back to the idea of the creation of an area of freedom, security and justice and the adoption of several measures following the Vienna and Tampere European Council. In this sense, "scoreboard" was defined as the tool to help to keep

citizens informed of the measures being taken in the field of justice and home affairs. Moreover, it is to keep up the momentum generated by the Tampere European Council and highlight any delays in implementing the measures decided.[58] This scoreboard with its original version is not being used anymore and remains very simple when compared to the new "Justice Scoreboard" of DG Justice and Consumers but the idea of the monitoring and assessment is still there. "Effective national justice systems" are deemed crucial for upholding the values upon which the EU is founded, and considered to play a key role in creating an investment-friendly environment, restoring confidence, providing greater regulatory predictability and sustainable growth (Ec.europa.eu (2018b). In this context, Justice Scoreboards are used as an information tool that helps the EU achieve more effective justice by providing comparable data on the independence, quality, and efficiency of national justice systems (Ec.europa.eu, 2018c). In fact, scoreboard mainly focuses on civil, commercial and administrative cases to pave the way for a more investment, business, and citizen-friendly environment (Ec.europa.eu, 2018c), that's why in this study it is taken as an object of analysis. That is to say, it would not be incorrect to claim that the monitoring of the scoreboards not only provides the information on national justice systems but also works a "feasibility report" for investors. It is also worth mentioning that the Justice Scoreboards which provide information and monitoring of the judicial systems have a considerable impact on setting standards for the national justice systems of the member states. However, in terms of this study, rather than making a value-laden or a cost-benefit analysis of this tool, the scoreboards have been analyzed as part of a "regime of truth" and to show their role on securitizing justice.

[58] See "Scoreboard", Commission communication of 24 March 2000: Scoreboard to review progress on the creation of an area of "Freedom, Security and Justice",https://eur-lex.europa.eu/legal-content/ENG/TXT/?uri=LEGISSUM:l33121

In the introduction of the first Justice Scoreboard in 2013, the scoreboard is described as the tool "to promote effective justice and growth" (EU Justice Scoreboard 2013, p.1). It is argued in the document that the economic crisis is the catalyst for profound changes in the EU and within this reform process, national economies should be restructured for growth and competitiveness. In fact, the national justice systems are pointed out as playing a key role to restore confidence and return to growth (EU Justice Scoreboard 2013, p.1). Furthermore, it was clearly stated that:

> an efficient and independent justice system contributes to trust and stability. Predictable, timely and enforceable justice decisions are important structural components of an attractive business environment. They maintain the confidence for starting a business, enforcing a contract, settling private debt or protecting property and other rights (EU Justice Scoreboard 2013, p.1).

In addition to this logic, the experiences in the member states which are subject to the economic adjustment programs also show that the shortcomings in the functioning of a justice system increase the negative growth and so undermine the confidence of the citizens and enterprises (EU Justice Scoreboard 2013, p.1). To give an example, it is argued that, if a Greek judge or Italian judge does not implement the EU law correctly or on time, this creates a problem on the EU level (Interview I, p.2019). In other words, shortcomings in national justice systems are obstacles for the functioning of the single market, for the well-functioning of the EU area of justice and the effective implementation of the EU acquis in the EU as a whole (EU Justice Scoreboard 2013, p.1). For this reason, national judicial reforms became an integral part of the structural components in the economic adjustment programs and also the improvement of the quality, independence and efficiency of judicial systems became a priority in the European Semester (EU Justice Scoreboard 2013, p.1). Actually, the judicial reforms were accepted as part of the economic recovery and it was perceived that there is a mutual relation

between them. The European Commission financially supports certain justice reforms through the European Structural and Investment Funds (ESI Funds). In this sense, since 2007, 16 Member States used both the European Social Fund (ESF) and the European Regional Development Fund (ERDF) to improve the effectiveness of their justice systems; and between 2007 and 2020, more than 900 million Euros will have been committed (EU Justice Scoreboard 2019, p.7). Funded activities include "developing and upgrading business processes in courts and introducing case management systems or developing or upgrading human resources management processes; digitalization of court services and purchase of information and communication technology (ICT) systems; providing training to judges, prosecutors, court staff, bailiffs, public notaries, lawyers and raising citizens' awareness of their rights" (EU Justice Scoreboard 2019, p.7). It was considered that the structural reforms to ensure the effectiveness of judicial systems can pave the way for a more business-and citizen-friendly environment (EU Justice Scoreboard 2015, p.1). The improvement regarding the justice reforms was monitored since the Scoreboard of 2015. The indicators for this monitoring are:

> Procedural law reforms, Promotion of ADR methods, Legal aid, ICT development, Optimizing the judicial map, Court fees, Administration of Courts, Judges Council for the Judiciary, Court specialization, Legal professionals, Other activities (EU Justice Scoreboard 2015-2019).

In this way, besides the state of play of specific years' development, the efforts and the "intention" of the members to improve the effectiveness of the justice systems can be observed.

The access to an effective justice system is also determined as the essential right in the EU democracy and very interlinked to the effectiveness of all EU law and specifically to the EU economic laws that contribute to the growth. These include the EU competition laws, legislation for the single market such as in the area of

electronic communications, intellectual property, public procurement, and environment or consumer protection (EU Justice Scoreboard 2013, p.2). One last remark about the use of scoreboards is the need for a systematic overview. As explained before, in AGS of 2013 the European Commission highlighted the importance of improving the quality, independence and efficiency of national judicial systems (EU Justice Scoreboard 2013, p.2) and the Justice Scoreboard designed as a tool to this end. Thus, to use the tool of Justice Scoreboard was accepted as "a political decision" (EU Justice Scoreboard 2013, p.2) to overcome these challenges.

The main characteristics of the Scoreboard are listed as *being comparative* (but not idealizing any type of justice system), *presenting the trends in the national justice systems* and *being non-binding* as well as *evolving mechanisms*. Since it is designed to improve the business and investment environment, the Scoreboard examines efficiency indicators for *non-criminal* cases, and particularly for litigious civil and commercial cases, which are relevant for resolving commercial disputes, and for administrative cases (EU Justice Scoreboard 2013, p.3). The data used in the Scoreboards are collected and analyzed by the Council of Europe Commission for the Evaluation of the Efficiency of Justice (CEPEJ) from the respective countries and also sources such as from the World Bank, World Economic Forum and World Justice Project (EU Justice Scoreboard 2013, p.3). At the end of the analysis, the poor performance of the countries is evaluated specifically and the Commission proposes "country-specific recommendations" on the need to improve justice systems. This assessment and the recommendation are also belonging to the European Semester cycle (EU Justice Scoreboard 2013, p.3). Therefore, although it is claimed that the scoreboard monitoring is not binding, belonging to the European Semester gives this tool the power to give political messages (EU Justice Scoreboard 2013, p.3) for the correction. In addition, the findings of the Scoreboard help to establish priorities for EU

structural funds. At this point, Estonia's use of structural funds to develop e-justice tools and now its position as being the most advanced countries in the use of ICT in the management of justice was shown as a striking example (EU Justice Scoreboard 2013, p.3). As a matter of fact, the scoreboard mechanism appears as a tool that can easily be installed in the neoliberal governmentality.

Although the Justice Scoreboard has not appeared much within the academic discussions, there are several claims concerning this tool that can be listed. The inconsistency of the data collected from the member states because of the difficulty of gathering reliable and comparable data, not being binding, its "overemphasis of the economic value of the justice" (Dori, 2015, p.24), and its role in the integration of EU with its spillover effect as "the expansion of EU tasks across new policy domains" (Strelkov, 2018, p.10) are some of the points that can be highlighted. Furthermore, the Institute of International and European Affairs drew attention to the business-oriented character of the Scoreboard, considering that it measures the business-friendliness of justice systems (Manko, 2013, p.2). Within this study, scoreboards will be mostly approached at exactly this point and it is being a tool of securitizing justice. On the basis of this brief information, the Justice Scoreboards of 2013-2019 will be analyzed with their common characteristics attributed throughout seven years. To begin with, the indicators of the Scoreboards "evolving" during years can be grouped under three primary concerns: *efficiency of the justice systems, the quality of justice systems and independence of the judiciary*. In this framework, the indicators which were compared among the member states that provided data are listed below: [59]

[59] European Commission EU Justice Scoreboard 2013-2019

Table 1 Indicators of Justice Scoreboards[60]

Number of incoming civil, commercial, administrative and other cases (1st instance/per 100 inhabitants)
Time needed to resolve litigious civil and commercial cases (1st instance/per 100 inhabitants)
Time needed to resolve administrative cases (1st instance/per 100 inhabitants)
Time needed to resolve civil, commercial, administrative and other cases (1st instance/in days)
Time needed to resolve litigious civil and commercial cases (1st instance/in days)
Rate of resolving civil, commercial, administrative and other cases
Rate of resolving litigious civil and commercial cases (1st instance/in %)
Rate of resolving administrative cases (1st instance/in %)
Number of litigious civil and commercial pending cases (per 100 inhabitants)
Number of administrative pending cases (per 100 inhabitants)
Average length of judicial review (1st instance/in days)
Availability of monitoring of courts' activities
Availability of evaluation of courts' activities
Surveys conducted among court users or legal professionals
Availability of online information about the judicial system for the general public
Electronic communication between courts and parties

[60] The indicators are compiled from the 7 Scoreboards between 2013-2019.

Table 1 (continued)

Electronic processing of small claims
Electronic processing of undisputed debt recovery
Electronic submission of claims
Income threshold for legal aid in a specific consumer case
Court fee to start a judicial proceeding in a specific consumer case
Standards on information about case progress
Availability of alternative dispute resolution methods
Compulsory training for judges
Judges participating in continuous training activities in EU Law or in the law of another Member State (as a % of total number or judges)
Budget for courts (in EUR per inhabitant)
General government expenditure on "law courts" (in EUR per inhabitant)
Number of judges (per 100.000 inhabitants)
Number of lawyers (per 100.000 inhabitants)
Judicial independence (perception – higher value means better perception)
Independence of civil justice (perception – higher value means better perception)
Time needed to resolve non-criminal cases
Detailed spending of financial resources in each justice system
Standards applied to improve the quality of judgments in highest courts

Under the "efficiency" target, the key message of the scoreboards is "justice delayed is justice denied"; but with an advanced liberal perspective, explaining that "timely decisions are essential for businesses and investors: in their

investment decisions, companies take into account the risk of being involved in commercial disputes, labor or taxation disputes or insolvencies" (EU Justice Scoreboard 2014, p.6). It was exemplified that the legal enforcement of a supply or services contract becomes very costly or even meaningless if the judicial dispute takes longer, and the probability of retrieving money from payments and penalties diminishes (EU Justice Scoreboard 2014, p.6). In the Scoreboard of 2019, it was argued that (EU Justice Scoreboard 2019, p.4) according to a study "reducing the length of court proceedings by 1% (measured in disposition time[61]) may increase growth of firms (Bove, Elia, p. 2017) and that a higher percentage of companies perceiving the justice system as independent by 1% tend to be associated with higher turnover and productivity growth (Bove, Elia, p. 2017). Similarly, it was claimed that another study has indicated "a positive correlation between perceived judicial independence and Foreign Direct Investment flows in Central and Eastern Europe."[62] This statistical verification goes on with the surveys that exemplifying the effectiveness of national justice systems for companies. It was underlined within the same Scoreboard that:

> in one survey, 93% of large enterprises replied that they systematically review the rule of law conditions (including court independence) on a continuing basis in the countries they invest in[63] and, in another, more than half of small and medium-sized enterprises replied that cost and

[61] 'Disposition Time' indicator is the number of unresolved cases divided by the number of resolved cases at the end of a year multiplied by 365 (days). It is a standard indicator defined by Council of Europe's CEPEJ: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp

[62] Effect of judicial independence to FDI into Eastern Europe and South Asia; Bülent Dogru; 2012, MPRA Munich Personal RePEc Archive: https://mpra.ub.uni-muenchen.de/40471/1/MPRA_paper_40322.pdf . EU MS included in the study were: BG, HR, CZ, EE, HU, LV, LT, RO, SK and SI.

[63] The Economist Intelligence Unit: "Risk and Return – Foreign Direct Investment and the Rule of Law", 2015 http://www.biicl.org/documents/625_d4_fdi_main_report.pdf, p.22

> excessive length of judicial proceedings, respectively, were among the main reasons for not starting court proceedings over infringement of intellectual property rights (IPR)[64]

Therefore, the length of the proceedings is exposed as one of the major problems to be solved. But at the same time, it is admitted that the length of the proceedings may be affected by the incoming cases resulted from inadvertent reasons. Accordingly, it was concluded in the Scoreboard of 2014 that countries which are affected by the sovereign debt, financial and economic crisis may have the increasing incoming cases (EU Justice Scoreboard, 2014, p.15). This would cause a loop for the expected target. However, it is not likely to say that the justice system will develop when the economic crisis is overcome or when prosperity is reached.

Another point to be achieved in terms of the investment-friendly environment; or for the sake of the well-functioning justice systems is the "quality". It is argued that "a lack of quality of justice decisions may increase business risks for large companies and SMEs and affect consumer choices" (EU Justice Scoreboard 2014, p.16). It was declared that the findings of the Scoreboard confirm that training and ICT should be key components of the future EU Justice policy (EU Justice Scoreboard, 2014, p.24). As one might appreciate and the EU also accepts that there is no single quality standard for the justice systems or the scoreboard analysis does not intend to make everything identical but it provides a general framework for the integration of the EU (Interview II, 2019). Within this general framework, there are quality standards for an investment-friendly environment and there should be a quality of the standards to manage this environment. Therefore, in line with this thought, the measurement of the quality of the national justice systems is being done according to four categories; "*accessibility of justice*

[64] EU Intellectual Property Office (EUIPO), Intellectual Property (IP) SME Scoreboard 2016: https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/sme_scoreboard_study_2016/Executive-summary_en.pdf

for citizens and businesses; adequate material and human resources; putting in place assessment tools, and using quality standards" (EU Justice Scoreboard, 2019, p.23). It can be asserted that except for the training and the independence of the decisions; the quality of the justice system requires also internal governance in itself including managing the caseloads, organizing the timing, use of ICT and increasing the availability, setting and monitoring of standards on backlogs, etc. In summary, establishing a manageable, timely, transparent and accessible system (both at the stages of the operating and monitoring), within which the decisions are taken in a short period, appears as the main target.

The independence of the judiciary is the last point to be sustained for the proper functioning of the justice system. Judicial independence is a requirement stemming from the principle of effective judicial protection referred to in Article 19 TEU, and from the right to an effective remedy before a court or tribunal enshrined in Article 47 of the Charter of Fundamental Rights of the EU (EU Justice Scoreboard, 2019, p.44). The Scoreboard reflects the input from the European Network of Councils for the Judiciary (ENCJ), the Network of the Presidents of the Supreme Judicial Courts of the EU (NPSJC) and the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU (ACA-Europe) since 2019. In this regard, the appointment and dismissal of judges, court presidents and judges-members of the Councils for the Judiciary, as well as on the organization of the prosecution services, and powers and the judicial activity of the highest national courts in situations relating to judges, etc are being evaluated (EU Justice Scoreboard, 2019, p.44). Having the basis from these documents, in the Scoreboard, independence of the judiciary is also remarked with its importance for an attractive business-friendly environment as well. It is argued that judicial independence assures the predictability, certainty, fairness, and stability of the legal system in which businesses operate and that's why improving the independence of national judicial systems, together with their

quality and efficiency, is an important element in the European Semester (EU Justice Scoreboard, 2014, p.25). One of the most common examples of the problem of independence among the member states is the case of Poland[65]. This case is striking to see the effect of this Scoreboards and their role on the economic governance system. As was stated before, at the end of the Scoreboard analysis, the Commission can give country-specific recommendations if there is a poor performance on the justice systems. As can be seen in the European Semester cycle in figure VII, if the EU Council endorses and the Council of the EU adopts then this recommendation can have political consequences. In this sense, although the scoreboards, in the beginning, were deemed non-binding, these kinds of cases have such impacts. Therefore, as can be sketched, at the end of the day, all required parts of a functioning justice system are articulated in the cycle of European economic governance.

4.3 Justice for Citizens, Businesses and Consumers: *Deepening the Advanced Liberal Society*

This section is allocated to expose the processes, policies, and tools which are "conducted" to improve the freedom of the subjects who can "conduct" their own rational preferences. This includes the strategies, monitoring/correction tools,

[65] In September 2018, the Commission decided to refer Poland to the Court of Justice of the European Union for violation of judicial irremovability and independence by the Law on the Supreme Court. The Commission's concerns relate to the abrupt lowering of the retirement age of Supreme Court judges and the discretionary power given to the President of the Republic to prolong the active service of these judges without any clear criteria and no judicial review of the final decision taken in this respect, which the Commission considers a violation of Article 19(1) TEU read in connection with Article 47 of the Charter. On 17 December 2018, the Court of Justice of the European Union issued interim measures, as requested by the Commission, ordering Poland to restore the Supreme Court to its situation before 3 April 2018, when the contested law entered into force, until the final judgment is rendered in the case. On 1 January 2019, a law adopted by the Polish Parliament to implement the Court's order entered into force. On 11 April 2019, the Advocate General at the Court of Justice considered that the Court should rule that the provisions of Polish legislation relating to the lowering of the retirement age for Supreme Court judges are contrary to EU law as they violate the principles of irremovability of judges and of judicial independence.

individualizing/totalizing electronic access tools and necessary legislation which in the end deepens the advanced liberal society. To recall, the advanced liberal society is constructed on "the rationality within which the government must address the market, the family, the community, the individual and new ways of allocating the tasks of government between the political apparatus, intermediate associations, professionals, economic actors, communities and private citizens" (Rose 2004, p.140). It is the process that the neoliberal governmentality has appeared as a new form of power, penetrated throughout all aspects of everyday life. It reveals the process that the individuals are conceived as rational bodies that can calculate the costs and benefits for themselves, and so the citizens are perceived as rational consumers of the goods and services. This "homoeconomicus" rationality of the neoliberal governmentality will be approached as one of the hallmarks of the securitizing justice in the EU.

As narrated, the justice policy has become increasingly central to EU integration and has had a major role to play in enforcing common values of the EU, strengthening economic growth and contributing to the effectiveness of other EU policies (European Commission, 2014a, p.10). This multilateral impact of the justice policy gives the scope of maneuver for this study to sketch the intertwining relations of the neoliberal governmentality to the extent that the citizens are described as the "end-users" (European Commission, 2014a, p.10) of the justice systems and justice is perceived as the system composed of goods and services to be supplied to the consumers in the market and act as a "facilitator" for the businesses and citizens. With this idea, in this part, the individualizing and totalizing effect of the securitizing justice will be revealed through analyzing the relevant justice policy tools and the processes.

4.3.1 Towards Digital Single Market

As one can appreciate in this era, increased internet usage, social media, globalization of data transfers and other technological advances have made life easier for millions, but also increased the collection, use, and processing of personal data globally.[66] It is expressed that in the EU, the roaming charges have ended; citizens can now access film, sport, music, video game and e-book subscriptions wherever they are in the EU, and at the end of 2019 they will be able to shop online without unjustified discrimination just because of where they happen to live (European Commission, 2018b, p.3). These developments have some political, economic and legal consequences, which have been brought together by the securitizing justice at the "Digital Single Market (DSM)". In fact, it exactly points out the process that the more the area of individual freedoms is extended, the more the individual is committed to the system that gives these freedoms. That is, the surrounding power of neoliberal governmentality reveals its individualizing and totalizing power.

DSM strategy in the EU was adopted in 2015, to ensure access to online activities for individuals and businesses under conditions of fair competition, consumer and data protection, removing geo-blocking and copyright issues (Ec.europa.eu, 2018d). It was built on three pillars as "access" for consumers and businesses to digital goods and services across Europe; "environment" for creating the right conditions and a level playing field for digital networks and innovative services to flourish and "economy and society" for maximizing the growth potential of the digital economy (Ec.europa.eu, 2018d). It also identified e-Government as one of the key elements to maximize the growth potential of the digital economy and to achieve an inclusive digital Europe (Ec.europa.eu, 2019c). So, following the

[66] Programme of the Irish Presidency of the Council of the European Union, 2013: 21, http://eu2013.ie/media/eupresidency/content/documents/EU-Pres_Prog_A4.pdf

Strategy of the DSM, in 2016 a new e-Government Action Plan for 2016-2020 was published by the Commission aiming to remove existing digital barriers to the Digital Single Market and to prevent further fragmentation arising in the context of the modernization of public administrations (European Commission, 2016a). According to the Action Plan; it was foreseen that by 2020, public administrations and public institutions in the European Union should be open, efficient and inclusive, providing borderless, personalized, user-friendly, end-to-end digital public services to all citizens and businesses in the EU (European Commission, 2016a). In this framework, the public administration will be modernized through ICT and digital enablers; cross-border mobility will be enabled with digital public services and the digital interaction will be facilitated between administrations and citizens/businesses (Ec.europa.eu, 2019c).

As Věra JOUROVÁ, the Commissioner for Justice, Consumers and Gender Equality argues the developments within the area of DSM are important for the respect of data protection as a fundamental right of citizens in a fast-moving technological context (Jourová, 2014, p.8). At the same time it means an introduction of a single data protection law for Europe, creating new, stronger rights for individuals, simplifying the life of a business, and ensuring strong and coordinated enforcement by supervisory authorities (Jourová, 2014, p.8). Therefore, to ensure that citizens have more control over their personal data, to strengthen confidence in the digital economy and support the growth of the digital single market can be listed as the main points of the justice policy of the EU in this area.[67]

As was indicated, DSM was one of the ten priorities of the Commission for 2015-2019. And DG Justice and Consumers contribute to the priority of *"a connected digital single market*" besides the priorities of *"jobs, growth and investment",*

[67] Programme of the Irish Presidency of the Council of the European Union, 2013: 21

"justice and fundamental rights", "democratic change" (Ec.europa.eu, 2017c). Under this priority, DG Justice and Consumers aims to increase the share of businesses and consumers engaging in online cross-border trade of goods and digital content, enhanced consumer and business confidence in buying and selling online, as well as in accessing and making use of digital content (DG Justice and Consumers, 2016b, p.9). DG Justice and Consumers are also involved in *the European Cloud* and *European Free Flow of Data* Initiatives which is directly linked to the DSM Strategy *"Maximizing the Growth Potential of the Digital Economy"* and related with the general objective of ensuring *"A new boost for Jobs, Growth and Investment"* (DG Justice and Consumers, 2016b, p.10). The goal of the European Cloud initiative is to develop a strong European industrial capability in cloud computing to support the EU's competitiveness and growth. And also, the European Free Flow of Data Initiative seeks to boost innovation and support economic growth by ensuring a smooth flow of data in the data value chain (DG Justice and Consumers, 2016b, p.10). Besides, as part of the e-government action plan, the e-Justice Portal appears as one of the prominent targets of DG's tools. In addition to the establishment of an "e-Justice Portal", "a one-stop-shop for information on European justice and access to judicial procedures in the member states", "the go-live of tools for direct communications between citizens and courts in other Member States (e-CODEX), as well as the introduction of the European Case Law Identifier (ECLI) search engine" were pointed out in the e-Government Action Plan 2016-2020 (European Commission, 2016a).

Besides the scope of DSM, the use of ICT in the policy area of justice can be traced back to the multi-annual European e-Justice Action Plans beginning with 2007. The first one was for 2009-2013, by the declaration of the JHA Council that work should be carried out with a view to developing at European level the use of ICT in the field of justice, particularly by creating a European portal. It was

argued that the use of an electronic system in this area would reduce procedural deadlines and operating costs, to the benefit of citizens, undertakings, legal practitioners and the administration of justice (EUR-lex, 2014b). The main logic of this initiative was to facilitate access to justice so, the Commission published a communication to the Council, the European Parliament, and the European Economic and Social Committee entitled "Towards a European e-Justice Strategy" (EUR-lex, 2014b). In this document, e-justice was described as the result of threefold; *to improve access to justice*, *cooperation between legal authorities* and *the effectiveness of the justice system itself (*European Commission, 2008a). The similar vision as the first multi-annual e-justice action plan was continued under the second action plan of 2014-2018. It was agreed that further development of e-Justice as one of the cornerstones of the efficient functioning of justice in the member states and at the European level (EUR-lex, 2014a). In the most recent document regarding the strategy of e-justice (EUR-lex, 2019b), 2019-2023 Strategy on e-Justice, the commitment and the willingness to sustain the strategy on e-justice in line with the agreed principles of e-government, previous action plans and strategies based on priorities established according to the identified importance for citizens, businesses and the judiciary, the sustainability outlook and technological developments were once again demonstrated (EUR-lex, 2019b). The e-justice portal, which has been targeted in each and every action plan, will be looked in more detail.

4.3.2 Complementary Policy Tools of DG Justice and Consumers

4.3.2.1 e-Justice Portal

e-Justice Portal, which is managed by the DG Justice and Consumers according to the applicable law [68], is targeted at citizens, businesses, legal practitioners and the judiciary. The objective is stated as the removal of the barriers to enable the citizens with an equal capacity to access to justice in the other member states as in their own countries (e-justice.europa.eu, 2018a). Since its opening on 16th July 2010 (Interview III, 2019), both its design and the European e-Justice Portal have been enriched with information pages, search tools, and dynamic forms to facilitate the user experience (EUR-lex, 2019b). While the website is run by the European Commission, responsibility of its content is shared between the Commission and the individual Member States (e-justice.europa.eu, 2018a). It is designed as a meeting point for citizens, businesses and the members of the judiciary to access all the relevant information. Although, there has been not much promotion about it, by 2019 there were 3 million visits to the website (Interview III, 2019). And despite it is not a centralized database, the "mandatory interconnections" (Interview III, 2019). through legal ties bring all the related people to meet at this point and have easy access to justice. The slogan of the e-justice portal is "making your life easier".

[68] All processing operations on personal data linked to the organisation and management of the European e-Justice Portal within the responsibility of the European Commission are governed by Regulation 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC and by Commission Decision 2014/333/EU on the protection of personal data in the European e-Justice Portal.See https://e-justice.europa.eu/content_legal_notice-365--maximize-en.do

Figure 8 European e-Justice Portal[69]

One and the only introductory YouTube video[70] on the portal summarizes the objectives of the portal. If a Swedish man wants to buy a flat in Spain, he needs a notary. But he doesn't know where to find. The justice e- portal provides him the

[69] https://e-justice.europa.eu

[70] See https://www.youtube.com/watch?v=SeZyPi758CQ

list of notaries or lawyers throughout the EU. Or; when a Polish man, who runs a kitchenware company wants to cooperate with a German company, he can check this company from the portal and find out if the companies are economically solvent. Similarly, it is told in the same video that a lawyer can claim her/his clients' money-back using the electronic payment order. That is how the citizens and businesses life is made easier. The outlook of the e-justice portal is shown in Figure 8. One of the remarkable outcomes of this portal is said to be a communication tool for businesses. Actually, it was created for "setting up interconnection of member states' business registers" in order to allow access via the European e-Justice portal to certain information on companies. In accordance with Directive 2012/17/EU, e-Justice Portal covers the business registers of all EU countries plus Iceland, Lichtenstein, and Norway.[71] Accordingly, cross-border access to business information on companies and their branches opened in other member states can only be improved if all member states engage in enabling electronic communication to take place between registers and transmitting information to individual users in a standardized way, by means of identical content and interoperable technologies. In addition, it was also expressed in the Directive that this interoperability of registers should be ensured by the registers of member states providing services, which should constitute interfaces with the European central platform. So the platform is defined as being capable of distributing information from each of the member states' registers to the competent registers of other Member States in a standard message format.[72] In other words, through this tool in the e-Justice portal, namely "Business Registers Interconnection System (BRIS)", the companies are ensured to get registered,

[71] https://e-justice.europa.eu/content_find_a_company-489-en.do

[72] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, http://data.europa.eu/eli/dir/2017/1132/oj

search for other companies, and communicate with each other electronically in a safe and secure way. It is asserted that this will enhance confidence in the single market through transparency and up-to-date information on companies and reduce burdens on companies (European Commission, 2016a). In fact, the aim is to increase legal certainty and thus contribute to an exit from the global economic and financial crisis, which is one of the priorities of the agenda Europe 2020 and also improving cross-border communication between registers by using innovations in information and communication technology.[73] This system mainly consists of a core services platform called the European Central Platform (ECP), the member states business registers and an electronic access point to information on companies.[74] Again to be available on the European e-Justice Portal, an electronic interconnection of insolvency registers to enhance transparency and legal certainty in the internal market is mentioned to be developed by the Commission for the near future.[75] In this tool, when the necessary blanks are filled for search, the results provide a list of companies with the country name, address of the registered office, registration system, company type, business register ID and EU ID. The Director of the e-Justice Portal has indicated in the interview in 2019 that, BRIS allows users of the e-Justice portal to obtain information on over 20 million companies.[76] Here is an example of how the search screen and the results may look in Figure 9 and 10:

[73] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (Text with EEA relevance.), http://data.europa.eu/eli/dir/2017/1132/oj

[74] https://ec.europa.eu/cefdigital/wiki/pages/viewpage.action?pageId=46992657

[75] European Commission EU eGovernment Action Plan 2016-2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016DC0179, Brussels, 19.4.2016 COM(2016) 179 final

[76] Interview III:2019

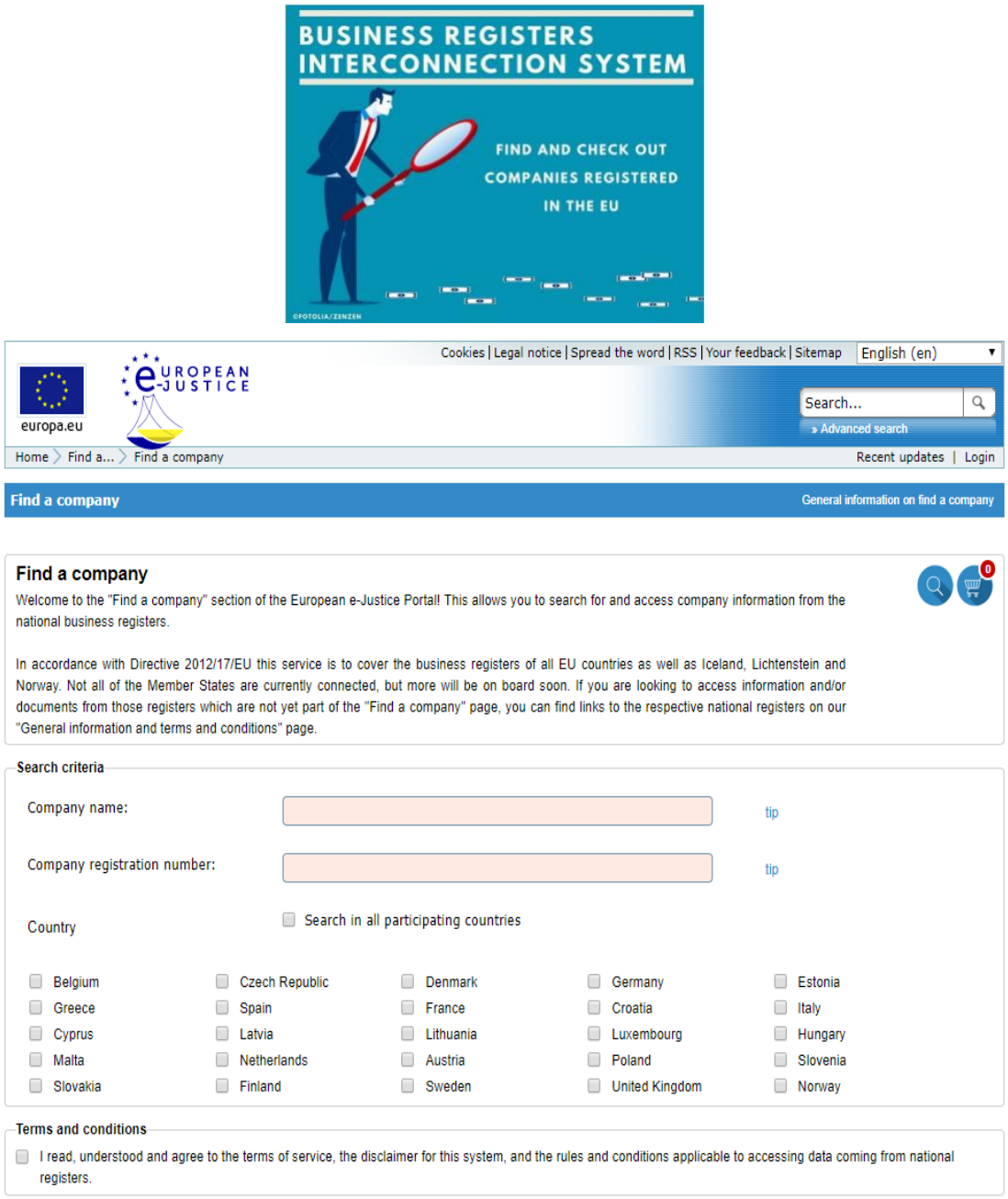

Figure 9 “Find a Company Section” in E-Justice Portal

Search results

Below are all matching entries based on your search criteria.

List of companies

Company name	Country	Registered office	Registration number	Company type	Business Register ID	EUID
2ICT B.V.	Netherlands	Westeinde 23, 3...	63406039	Besloten Vennoo...	NHR	NLNHR.63406039
ICT	Belgium	Kortenbosstraat ...	0471.893.320	Besloten vennoo...	KBOBCE	BEKBOBCE.047...
ICT	Belgium	Arthur Goemaer...	0872.608.040	Besloten vennoo...	KBOBCE	BEKBOBCE.087...
HICT	Belgium	Ottergemsestee...	0866.039.556	Naamloze venno...	KBOBCE	BEKBOBCE.086...
ICT	France	163 Boulevard S...	821798592	Société par Actio...	9201	FR9201.821798...
ICT	France	41 avenue Paul ...	819959776	Société par Actio...	7501	FR7501.819959...
ICT	France	1 Avenue d'Aigui...	523816254	Société par Actio...	4302	FR4302.523816...
BICT	Belgium	Katteveldstraat 3...	0872.579.633	Besloten vennoo...	KBOBCE	BEKBOBCE.087...
AICT LTD	United King...	Flat 7 Shipstall, ...	11564035	Private Limited	EW	UKEW.11564035
EnergyICT (EICT)	Belgium	Spinnerijstraat(K...	0443.515.573	Naamloze venno...	KBOBCE	BEKBOBCE.044...
Hebbizz ICT Sol...	Netherlands	Kruiswijk 19 r, 17...	34206708	Besloten Vennoo...	NHR	NLNHR.34206708
ICT SRL	Italy	PIAZZA WALTH...	03456780364	Società a respon...	RI	ITRI.03456780364
ICT S.R.L.	Italy	PIAZZA CARLO ...	07713660012	Società a respon...	RI	ITRI.07713660012
ICT S.R.L.	Italy	VIALE CHERUB...	02840750596	Società a respon...	RI	ITRI.02840750596
ICT S.R.L.	Italy	CORSO GIOVA...	11793230019	Società a respon...	RI	ITRI.11793230019
ICT - S.R.L.	Italy	VIA CASALE LU...	11528711002	Società a respon...	RI	ITRI.11528711002
ICT S.R.L.	Italy	LARGO OLGIAT...	09760201005	Società a respon...	RI	ITRI.09760201005
ICT SRL	Italy	VIA RENATO LU...	02405420221	Società a respon...	RI	ITRI.02405420221
ICT-Partners	Netherlands	Prins Willem-Ale...	08096763	Besloten Vennoo...	NHR	NLNHR.08096763
GICT B.V.	Netherlands	Acaciastraat 41, ...	65915291	Besloten Vennoo...	NHR	NLNHR.65915291
ICT LTD	Malta	1,, BREWERY S...	C46930	kumpanija privat...	ROC	MTROC.C46930
ICT S.A.	Luxembourg	102, Route de R...	B141442	société anonyme	RCSL	LURCSL.B141442
ICT Architect	Luxembourg	89B, rue Pafebru...	B176367	société à respon...	RCSL	LURCSL.B176367
ICT, s.r.o.	Slovakia	Bebravská 9, Br...	35961279	spoločnosť s ruč...	ORSR	SKORSR.35961...
ICT ApS	Denmark	Stensmosevej 2...	17151932	Anpartsselskab	CVR	DKCVR.17151932

Figure 10 An example of a search result in “Find a Company Section” in E-Justice Portal

It is explained in the portal that the core services provided by all registers are to register, examine and store company information, such as information on a company's legal form, its seat, capital, and legal representatives, and to make this information available to the public (e-justice.europa.eu, 2018c). Therefore, a higher degree of legal certainty as to the information in the European business registers and the cooperation between business registers in Europe is targeted. In

this way, the procedures concerning cross-border mergers, and the exchange of relevant information regarding companies and their branches will be provided.[77] It has been confirmed by the interview held with e-Justice Portal representatives that BRIS contributes to fostering the competitiveness of European business by reducing administrative burdens and increasing legal certainty.

In line with the e-Justice Action Plan 2019-2023, the Portal's development is expected to continue towards being a more interactive one-stop-shop for justice, offering access to e-services or e-solutions (EUR-lex, 2019b). In addition to the finalization of the user-friendly interface and outreach dissemination programs, the initiatives will take places such as the digital access and exchange of legal documents between countries and a system of electronic proof of checking whether someone is a lawyer or not (Interview III, 2019).

FRA acknowledges that the use of information and communication technologies enhances access, timeliness, transparency, and accountability, helping judiciaries to provide more efficient services (FRA, 2010, p.21). On the other hand, it is also underlined that the e-justice exclusively is not the solution since the Court of Justice of the EU (CJEU) argued that the electronic means may not be offered exclusively due to the danger that the exercise of rights might be rendered in practice impossible for certain individuals (FRA, 2010, p.21). Therefore, through this portal, while the access to certain EU legislation and any kind of applicable tool has been facilitated on one side; the subjects are being registered and monitored on the other side. In this sense, the transparency, trust, and effectiveness in terms of both access to justice and the single market can all be attained with this portal. And indeed, these constitute the conception of justice on which the "e-justice portal" depends (Interview III, 2019). The securitizing justice is basically legal-procedural, practical/pragmatical, multi-purpose and access

[77] https://ec.europa.eu/cefdigital/wiki/pages/viewpage.action?pageId=46992657

oriented rather than being just for all. Moreover, addressees of the securitizing justice are the enterprises and the individuals that have homoeconomicus rationality. In parallel with this conception, e-justice portal's users are defined as such. That is to say, mainly the actors in the market are addressed by the access to justice policy. Although it highlights an overarching discourse of justice with the slogan of "making your life easier", it does not seem to embrace all. In the end of the day, it contributes to well-functioning of the business interactions, cross-border trade and "digital single market".

4.3.2.2 Consumer Scoreboards

The new policy tools of DG Justice and Consumers, "the Consumer Scoreboards", are the overview reports to monitor "how the EU's single market works for the consumers" (Ec.europa.eu, 2018e). They are the results of the initiatives beginning from the adoption of the Communication in 2008 called "Monitoring consumer outcomes in the single market: The Consumer Markets Scoreboard" (European Commission, 2009a). These initiatives were towards creating policies to take better account of citizens' concerns; for policymaking to be more evidence-based and driven by a better understanding of real outcomes for consumers. Thus, on 18 November 2008, the European Parliament adopted a report endorsing the methodology and indicators and calling for additional evidence on consumer empowerment, such as literacy and skills by underlining the importance of close cooperation with member states and communication of the results to a wider public (Consumer Markets Scoreboard 2009, p.6). From that date onwards, these scoreboards have been started to be implemented. Although it was originally under the responsibility of Directorate General for Health and Consumer Protection and DG Competition, after the merger of DG Justice with Consumer in 2014, scoreboards were started to be coordinated by DG Justice and

Consumers. This was a striking example of demonstrating the extending content of the justice policy in the EU towards attaining the goal of the well-functioning single market.

There are two main interconnected reasons for this policy tool to be included in this study. First of all, just like the Justice Scoreboards, the Consumer Scoreboards are also among the EU's monitoring and correction tools of governance that aim to measure and improve the conditions of the single market. But it gives the opportunity to make the analysis from the perspective of the consumer that is the "homoeconomicus", who has the capacity to assess the costs and benefits towards her/his interest. The ability to "conduct of conduct" of the consumers lies under managing the interests of the consumers. To the extent that the consumers act freely within the single market, the advanced liberal system is circulated. Therefore, this relevance of Consumer Scoreboards to the neoliberal governmentality can be revealed in this part. In addition, by aiming a well-functioning, competitive, transparent and trusty single market, the Consumer Scoreboards have a strong adherence to the Europe 2020 Strategy objectives and are expected to contribute to the European Semester as well. It is argued that improvements in consumer conditions can make a significant contribution to boosting economic growth in line with the objectives of the Europe 2020 Strategy. In fact, scoreboards are considered as a "diagnostic tool for implementing the Europe 2020 Strategy" (Consumer Markets Scoreboard, 2010, p.5) such that if consumers are able to fully play their role in the market, making informed choices and rewarding efficient and innovative businesses, they contribute to stimulating competition and economic growth (Consumer Markets Scoreboard, 2010, p.3). Although Consumer Scoreboards do not seem to be directly related to justice policy at first glance, it is also important to expose the understanding of securitizing justice in the EU within which justice and consumers are mentioned side by side. Moreover, it is worth underlining the

Scoreboard in terms of its functioning to secure the legal procedural framework to increase the freedom within the borders of the market.

To begin with, these scoreboards show how the single market is performing for EU consumers and warn of potential problems and also they are a tool for evidence-based consumer policy and help European and national policymakers and stakeholders to assess the impact of their policies on consumer welfare (DG Justice and Consumers, 2016b, p.4) Hence, they are among the governance tools that are both for monitoring, recommendation, and correction. They have been published since 2008 in two types: *the markets scoreboard* and *conditions scoreboard* in alternate years based on EU-wide representative surveys including Iceland and Norway.[78] In fact, scoreboard findings are deemed of interest to consumers, business stakeholders, policy-makers and enforcers at both the EU and national level (Consumer Markets Scoreboard, 2018, p.8). This wide range of interests for the scoreboards also can give an idea of the potential impact of them.

The first type, "The Consumer **Markets** Scoreboard" is prepared to monitor how consumers in the EU plus Iceland and Norway assess the performance of key goods and services markets. Furthermore, they also help to identify markets that are not creating the expected benefits for the consumers. In this sense, they are prepared through making consumer surveys called "the Market Monitoring Survey", based on experiences and perceptions (Consumer Markets Scoreboard, 2018, p.8). In fact, these surveys are carried out among the consumers who recently purchased goods or services in the assessed markets. In addition, the indicators which assess the market performance are called "the Market Performance Indicators (MPI)." These MPIs are; *Comparabilit*y (How easy/difficult is it to compare offers?), *Trus*t (Do consumers trust that retailers/suppliers comply with consumer laws?), *Problems & detriment*

[78] See https://ec.europa.eu/info/policies/consumers/consumer-protection/evidence-based-consumer-policy/consumer-scoreboards_en

(Proportion of consumers who encountered problems and extent of harm-including but not limited to financial loss), *Expectations* (Does a given market live up to consumers' expectations?), *Choice* (Are consumers satisfied with the number of retailers/suppliers on the market?) (Consumer Markets Scoreboard, 2018, p.12). The MPIs' objectives, which are stated clearly in the scoreboards, such as efficiency, effectiveness, trust, and competitiveness, etc are the objectives of the EU single market as well. Actually, these scoreboards while measuring the "consumer happiness", also give a considerable feasibility report to the investors by outlining the structure and the functioning with their deficits and investment-friendly aspects of the various markets in the EU.

Among the MPIs, it is argued that *comparability* provides the consumers to understand and compare different offers and choose the best ideal; lack of these criteria can lead to the endanger and reduce competition and thus harm overall economic efficiency according to these scoreboard analyses (Consumer Markets Scoreboard, 2018, p.49). Similarly, *trust* is deemed necessary for consumers to feel confident and actively engage in the market. Moreover, *expectations* are very important since they indicate the consumers' intention to purchase again (Consumer Markets Scoreboard, 2018, p.51-53). Likewise, the choice component matters since it is supposed to be able to measure the extent to which consumers are satisfied with the number of suppliers present in the markets assessed (Consumer Markets Scoreboard, 2018, p.55).Within this analysis, the *problems and detriment* are also identified as challenges to overcome and to improve. The additional indicators such as *complaints* are also identified and measured to improve the performance of the businesses and lead national authorities to public intervention on the problematic areas through legislative action as well (Consumer Markets Scoreboard, 2018, p.64-79). Ensuring *price comparisons, switching* option and *safety* are also other additional indicators which both aim to protect consumers and help the functioning of the market at the same time

(Consumer Markets Scoreboard, 2018, p.64-79). All these analyses are conducted to find out the performance of the various markets (almost 40 markets by 2017) of goods and services from airline services, alcoholic drinks, and banking services to the personal care services, ICT products, and water supply.

In the last part of the Consumer Market Scoreboards, there are national rankings that list the best and worst markets for goods and services of the countries. For instance, Greece, being at almost at the bottom of the whole list, has three leading markets in terms of MPI score (Electronic products, Dairy products, and Spectacles and lenses) and three markets at the end of the spectrum (Fuel for vehicles, Clothing and footwear and New Cars) (Consumer Markets Scoreboard, 2018, p.113). And likewise, it was pointed that Germany ranks among the top three EU-28 countries for two goods markets: Meat and meat products and Furniture and furnishings, and three services markets, Mobile telephone services, Offline gambling and lottery services, and TV-subscriptions (Consumer Markets Scoreboard, 2018, p.101). As a result, one can see overview of all the national markets' performance for all EU members and Iceland and Norway. While the deficits are demonstrated for the further improvement of the respective markets for the sake of the consumers' happiness, the overall improvement is considered to provide economic growth.

The second type, "The Consumer **Conditions** Scoreboard", is published every two years alternately to Market Scoreboard, to monitor the consumer environment across Europe by looking at *knowledge and trust*; *compliance and enforcement*; *complaints and dispute resolution* (Consumer Conditions Scoreboard, 2017, p.5). The primary motivations of this Scoreboard are to give an overview to reach the targeted level of indicators; to contribute to the creation of favorable legal conditions for DSM and the legal infrastructure to secure fair environment in case of disputes of consumers/retailers in the market. In this framework, the Consumer

Conditions Scoreboard is seemingly much more associated with the objectives of the justice policy of the EU.

Just like the Market scoreboard, Consumer conditions scoreboard is also based mainly on surveys. But this time, the retailers' attitudes towards cross-border trade and consumer protection are also included in the surveys.[79] To be able to find out the content of this scoreboard, it is useful again to briefly list the indicators. First indicator: *knowledge and trust* component assesses the extent to which consumers and retailers are aware of consumer rights, and their perceptions on safety and on environmental claims of products offered on the market (Consumer Conditions Scoreboard, 2017, p.17). In fact, this is a very detailed analysis to make sure a trusty market for consumers including each and every stage from trust in organizations, redress mechanisms, product safety, and environmental claims. Second one: *compliance and enforcement* assess the extent of compliance with consumer regulations and their enforcement (through consumers' and/or retailers' experiences with illicit commercial practices) perceived ease and cost of compliance with consumer regulations and the role of different organizations in monitoring compliance (Consumer Conditions Scoreboard, 2017, p.40). Finally, the indicator of *complaints and dispute resolution* examines consumers' propensity to complain about problems and their satisfaction with complaint handling, their awareness; and also the use of Alternative Dispute Resolution (ADR) schemes in each country and the length of judicial proceedings as well (Consumer Conditions Scoreboard, 2017, p.54). A selection of these indicators feeds into the Consumer Conditions Index (CCI) (Consumer Conditions Scoreboard, 2017, p.14). This scoreboard also examines progress in the integration of the EU retail market based on the level of business-to-consumer cross-border transactions and the development of e-commerce through dedicated

[79] See https://ec.europa.eu/info/policies/consumers/consumer-protection/evidence-based-consumer-policy/consumer-scoreboards_en

representative surveys of consumers and retailers in all EU countries, Iceland and Norway (Consumer Conditions Scoreboard, 2017, p.5).

The Consumer Conditions Scoreboard has a special focus on the DSM beginning with 2015. In the following edition in 2017 it is also dedicated to the DSM strategy by its special focus to e-commerce (Consumer Conditions Scoreboard, 2017, p.5). In fact, the DSM strategy is considered to have two-sided obstacles: from both supply and demand sides. And it is argued that the demand-sided obstacles resulted from the consumers' lack of trust. The related assessments and overcoming measures to improve the conditions are listed. Indeed, in the Scoreboard of 2017 the statistics show that the consumers seem "considerably more DSM-ready than businesses in terms of trust in e-commerce" (Consumer Conditions Scoreboard, 2017, p.88). Likewise, for all the indicators, the improvement for the consumer conditions are pointed out in each and every scoreboard. For example, while knowledge of consumer rights was a matter of concern in 2013 scoreboard and it was stated that "seven out of ten consumers do not know what do to when they receive products that they did not order"; (Consumer Conditions Scoreboard, 2013, p.42). In 2017 it was expressed proudly that "consumers do not only know their rights better, they are also more confident that their rights are respected by companies and protected by the actions of public authorities and non-governmental consumer associations" (Consumer Conditions Scoreboard, 2017, p.17-18). The improvement of the conditions of the consumers can be analyzed as the success of the "conduct of conduct" in terms of a neoliberal governmentality perspective. When consumers know their rights better and are confident that their rights will be respected, they will be able to conduct their preferences freely within the market. This will provide a mutual trust between the consumers and the market. In other words, the neoliberal order will function by making the individuals free.

At the end of the Scoreboard, again there are country statistics and comparisons in terms of the above-mentioned indicators. For instance, Greece's performance according to the situation of the consumers and retailers is as follows: the consumers in Greece have the EU's lowest score on the knowledge and trust composite indicator and they have the lowest trust in organizations particularly in NGOs; moreover, they have the lowest knowledge of consumer rights in the EU. On the other hand, the retailers in Greece have the highest confidence in online selling in the EU for 2017 (Consumer Conditions Scoreboard, 2017, p.125). In addition, detailed data from these scoreboards are also disseminated through a user-friendly database as well.[80] As a matter of fact, these comparisons are made to see whether the legal regulations of these countries operate effectively. However, they also act as feasibility reports for investors, just like justice scoreboards, guiding the consumer preferences and the policy-makers. The countries' market structure with its deficiencies and the strong aspects are listed explicitly. It "monitors" and gives the possibility to the country to "correct" itself in the way that it can improve the conditions of the consumers and retailers and thus aims at improving the functioning of the EU single market. This bilateral impact, in fact, demonstrates the rationality of the neoliberal governmentality. Therefore, the consumer scoreboards are intended to liberate the individuals (citizens, consumers, and businesses) in such a way that they get hold tightly in the system and deepen the advanced liberal structure.

[80] For Market Scoreboard see http://81.247.254.96/QvAJAXZfc/opendoc.htm?document=ConsumerScoreboard.qvw&host=QVS%40vsrv1463&anonymous=true and for Conditions Scoreboard see http://81.247.254.96/QvAJAXZfc/opendoc.htm?document=CSD_Consumers_Retailers_2015.qvw&host=QVS%40vsrv1463&anonymous=true

4.4 Justice for "a Europe that Protects"[81]: Access to Justice for All in the Enclosure of Securitization

Having put forth the ***justice for growth***, which is both a means and the consequence of the advanced liberal society and the ***justice for citizens, businesses and consumers*** which deepens the functioning of this kind of society; the final pillar of the securitizing justice to be portrayed in the EU refers to the promise of "access to justice for all" [82]. Besides the intrinsic securitizing practices that can be followed in the first two pillars, more apparent securitizing practices will be mentioned in this part. Therefore, the attempt in this part to reveal the deficiencies in terms of fundamental rights and access to justice for non-EU nationals (non-consumer/business) while providing security for the Union. The discourses and instruments of the respective agencies will be evaluated in terms of rights to privacy, the data protection, effective remedy, and non-discrimination; and the discrepant attitudes towards non-EU nationals will be analyzed to expose the deficiencies and/or intrinsic silences. In this context, the intended vision and the position of justice policy in return while maintaining the security of this well-established advanced liberal order will be approached. In line with the post-structural securitization analysis, the discourses and the practices of security within the justice-oriented policies and/or organizations will be shed light. It should be noted that the analysis of this section will focus on the ability of securitizing justice to mediate freedom and security in favor of security. It was tried to be exposed in the sections of 4.2 and 4.3 that the mutual recognition of the

[81] European Commission - Press release, "A Europe that Protects: 15 out of 22 Security Union legislative initiatives agreed so far",Brussels, 20 March 2019 http://europa.eu/rapid/press-release_IP-19-1713_en.htm

[82] European Commission (2005) Hague Programme: Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice, COM (2005) 0184 final, 10 May 2005, section 2.3

securitizing justice by both the citizens, businesses/consumers and the EU itself was meant to provide more freedom within the single market. Keeping the same tendency in itself, in this section, the policies, and agencies which facilitate the EU's cross-border securitarian law enforcement and the protective tendency of the EU will be demonstrated. The main contradiction, here, arises from the claim of "access to justice for all" and the policies towards the third country nationals.

As has been argued so far, it is evident that security is defined as the inseparable part of the EU justice policy. To recall, The Commission's prioiritization of justice and fundamental rights aims to step up cooperation on security and justice in the EU and preserve rule of law.[83] As narrated in the mapping section also, there are two DGs working under the priority area of "justice and fundamental rights" of the Commission: one is "DG Justice and Consumers" and the other is "DG HOME". So, it is considered that the cooperation on security and justice should be analyzed to overview the justice policy as a whole. That's why DG HOME's activities and its cooperation with the related agencies are also included in this study. However, for the sake of the outlook of this study, not all the activities of Home Affairs will be deeply gone through. The relevant ones that can be associated with securitizing justice will be picked up. DG HOME contributes to four general objectives of the Commission; "Towards a New Policy on Migration", "An Area of Justice and Fundamental Rights Based on Mutual Trust", "A Union of Democratic Change" and "A Deeper and Fairer Internal Market with a Strengthened Industrial Base". The intertwining contribution of the DG HOME to these objectives will be the key to underline the inner connection between securitization and justice. In other words, the question of "how can the securitizing justice be the common denominator of the policies of migration, fundamental rights, democracy and fair market" will be the main focus in this

[83] See Figure 3.

analysis. To which objectives does justice as such serve to will be the related problematic in this framework.

Migration is the first issue, picked up for elaborating the justice policy as setting the procedural framework and having contradictions in terms of justice and fundamental rights at the same time. Actually, *migration* which is remarked as both "opportunity and a challenge" by the Commission is the first policy area of DG HOME since it is deemed that credible migration policy has to follow both a humanitarian and an economic imperative (DG Migration and Home Affairs, 2016b, p.10). Since the migration is a very comprehensive issue including the fundamental rights, security, international politics, and law; not all the policies in this issue will be addressed in this section. But a common ground of policies which merges the opportunity and challenge will be traced in an understanding of "management…which cannot be dealt with by the member states acting alone"(DG Migration and Home Affairs, 2016, p.10). As such, it is clearly indicated that it is "an area where there is, therefore, an obvious added value in taking measures at EU level and at mobilizing the EU budget" (DG Migration and Home Affairs, 2016b, p.10). Therefore, the management of migration in favor of the security of the EU and the legal processes and the contradictions in terms of justice policy will be considered under this section.

In July 2014, President of the European Commission presented the political guidelines that stress the need to better manage to protect those in need while calling for a new European policy on legal migration to address shortages of specific skills and attract talent (DG Migration and Home Affairs, 2014, p.5). It was before the refugee crisis in 2015, but the tragedy in Lampedusa (DG Migration and Home Affairs, 2013, p.5) had happened where hundreds of migrants died trying to reach European shores and the EU had started to look for alternative ways to improve the migration policy. Thus, in line with these efforts,

the EU first concluded Mobility Partnerships with Morocco and Azerbaijan, completed the negotiations of a new Mobility Partnership with Tunisia, and signed a readmission agreement with Turkey (DG Migration and Home Affairs, 2013, p.5). After the migration and refugee crisis in 2015, these efforts have gained intensity and DG HOME started to follow "the European Agenda on Migration" which was developed by President Juncker's Political Guidelines (DG Migration and Home Affairs, 2016b, p.10). DG HOME mainly implements policies to realize four specific objectives under this agenda. These objectives are towards reducing incentives for irregular migration; conducting effective border management; enhancing protection and solidarity; and addressing skill shortages on legal migration (DG Migration and Home Affairs, 2016b, p.11-12). The main policy tools to attain these objectives are the conclusion and implementation of readmission agreements, collaborating with the EU agencies on several actions and policies, proposing necessary legislation and implementing the respective decisions. All these policies are to ensure the economic, cultural and social growth of the EU and to build a safer Europe.[84] This is exactly the point that freedom and security are turned into a matter of management and circulation of a population towards these objectives. So, firstly, the fine-tuning of the freedom and security and the resulting shape of the policies of justice and fundamental rights will be overviewed.

The second part of the analysis will be in line with the "Back to Schengen" roadmap of the Commission. Following the refugee crisis and the migratory flows in the EU, this roadmap published in 2016, both outlines the costs of "non-Schengen" and proposes remedies to overcome the challenges. Accordingly, Schengen "is one of the major achievements of European integration…and the key means through which European citizens can exercise their freedoms, and the internal market can prosper and develop." (European Commission, 2016b, p.2).

[84] See https://ec.europa.eu/home-affairs/who-we-are/about-us_en

This was a breaking point for the extended securitization practices in the EU for strengthening networks of policies, legal enforcements, and agencies for the migration and external border management. Then, on the basis of the priority objectives of the Commission and the DG HOME and the related agencies (FRONTEX and eu-Lisa), the next point to be analyzed will be the extended notion of security with its continuously renovated discourse, increasing networks of agencies and respective legal enforcement and the position of the justice policy in return.

4.4.1 Migration and Integration: *Circulation of the Population*

Migration policy as a whole is not considered to be as one of the main issues to be elaborated on its own in the area of the justice policy. However, there are junctions that associate migration to justice. First, one might assert based on the respective policy documents, that migration is conceived as a matter of security, especially following the 2015 migration crisis. And again the reviewed policy documents in this study show that an issue that is associated with security is ultimately referred to as the EU justice policy agenda under the priority area of "the justice and fundamental rights" of the Commission that targets the cooperation on security and justice in the EU. Additionally, the migration policy in the AFSJ has considerable references to the Europe 2020 Strategy and it functions in the framework of intense legal regulations and institutionalization with the securitarian and neoliberal concerns. In this frame, it is considered that migration policy can also be scrutinized within the area of securitizing justice, which has the common denominator of securitarian and neoliberal concerns. In particular, the management of migration as the calculation of security risks appears as a form of neoliberal governmentality which calculates the costs and benefits, defines the risks and approaches the problem in a manageable size and

circulates the population. Within this scenario, both the EU member states and the migrants are deemed as the calculative agents of having the free capacity to act. That is, both agents are considered to be *homoeconomicus.*

Therefore, firstly, the policies, which aim to maximize the benefits of migration for the European economy and the migrants, will be indicated. The policies to attract skilled migration can be mentioned at this point. It is argued that the "safer Europe" requires developing a balanced and comprehensive EU migration policy based on solidarity and responsibility and in line with Europe 2020 strategy which makes an important contribution to the Union's economic development and performance in the longer term.[85] In this framework, the interconnection between migration and integration is underlined. This requires both the set of rules for "legal migration" and tackling the "irregular migration" and trafficking/smuggling in human beings, setting up a common European Asylum System and respect for fundamental rights all at the same time.[86] On the other hand, legal migration is not only expected for respect for human rights but also for the demographic challenges that the EU is facing. As is expressed in the "A European Agenda on Migration", the EU's population is aging while its economy is increasingly dependent on highly-skilled jobs and without migration, the EU's working-age population will decline by 17,5 million in the next decade (European Commission, 2015c, p.14). So, migration is approached as an important way to enhance the sustainability of the growth of the EU economy within this document. In this sense, it is underlined that the EU should ensure consistency between migration and employment, education, development, and trade policies and provide for the short-term movement of highly-skilled professionals supplying services (European Commission, 2014c, p.4). Therefore, it is also

[85] See https://ec.europa.eu/home-affairs/who-we-are/about-us_en

[86] See ss

indicated that attracting and retaining international students, as well as promoting education among legally-resident migrants will help secure supply of the skills needed for the EU labor market in the future (European Commission, 2014c, p.4). In the same manner, in 2015, the European Commission decided to launch "the European Dialogue on Skills and Migration" to create a platform fostering a long-standing dialogue with different private and public stakeholders on the issues of labor migration and labor market integration of third-country nationals.[87] There were two meetings to promote this idea in 2016 and 2017 related to this. The EU labor market focus and the integration of the Union constitute the main idea for the respective policies.

H2020 and Erasmus+ are among the programs that are oriented towards attracting talented individuals to the EU (European Commission, 2015c, p.14). Similarly, "the Directive on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing" in 2016 is also carrying this objective as well. It is indicated in this Directive that immigration from outside the EU is one source of highly skilled people, students, and researchers and actually they play an important role in forming the Union's key asset of human capital and in ensuring smart, sustainable and inclusive growth, and therefore contribute to the achievement of the objectives of the Europe 2020 Strategy.[88] Therefore this Directive was prepared to facilitate the necessary regulations for the admission, entry and the residence of third-country nationals applying for the purpose of carrying out a research activity, education or training. In line with this

[87]See https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/european-dialogue-skills-and-migration_en

[88] See Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing *OJ L 132, 21.5.2016, p. 21–57,* http://data.europa.eu/eli/dir/2016/801/oj

Directive, the necessary regulations were accepted for the accompanying families of the applicants to attend the labor market during their stay. In the same manner, facilitating web portals such as EURAXESS, European and EU Immigration Portal are also used. EURAXESS is a platform for researchers, entrepreneurs, universities, and businesses to interact with each other and a joint initiative of the European Commission with the 40 countries participating in the European Union's Horizon 2020 Programme for Research.[89] The EU Immigration Portal[90] is also for helping migrants to give an idea about the necessary proceedings based on the migration profile. As is seen in Figure 11, according to the given profile, the portal is directing the person to the best possible option.

Figure 11 Immigration Portal: Which country do you want to go?[91]

[89] https://www.euraxess.org.tr/

[90] https://ec.europa.eu/immigration/

[91] See ss

What is much more considerable in terms of attracting the skilled migration was initiated respectively in 2009 and 2011. In May 2009, the European Commission adopted the "Blue Card Directive"[92], and in December 2011 the "Single Permit Directive"[93] to establish the Blue Card Scheme: A demand-driven, residence and work permit. The first one was for the admission of skilled and educated migrants to the EU and the second one was to simplify the procedures by funneling applicants into a single application procedure.[94] Moreover, in 2014, two additional Directives were adopted, on the conditions of entry and residence for seasonal workers[95] and intra-corporate transferees[96] to simplify and harmonize migration procedures and give migrants clear employment-related rights.[97]

Through this scheme, an attractive Europe was aimed at the destination of skilled professionals. The merit-based system of the Blue Card Program promises:

[92] See Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, *OJ L 155, 18.6.2009, p. 17–29 , http://data.europa.eu/eli/dir/2009/50/oj*

[93] See Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, *OJ L 343, 23.12.2011, p. 1–9,* http://data.europa.eu/eli/dir/2011/98/oj

[94] See Blue Card, Retrieved from https://www.apply.eu/BlueCard/

[95] See Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, *OJ L 94, 28.3.2014, p. 375–390, http://data.europa.eu/eli/dir/2014/36/oj*

[96] See Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, *OJ L 157, 27.5.2014, p. 1–2, http://data.europa.eu/eli/dir/2014/66/oj*

[97] https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration

> working and salary conditions equal to nationals, free movement within the Schengen area, entitlement to a series of socio-economic rights, favorable conditions for family reunification, permanent residence perspective and freedom of association. [98]

Indeed, these requested merits are very "high-qualifications" such as having higher professional qualifications such as a university degree, working as a paid employee, having a high (at least one and a half times the average of national salary) annual gross salary, presenting a work contract or binding job offer in an EU country for at least one year, etc.[99] As long as these qualifications are met, the migrant is very welcomed by the EU members. In fact, the Blue Card is perceived as a very successful tool at this point. As a result of this careful scrutiny of the highly qualified applicants, 35.000 Blue Cards were issued over in Germany alone before 2015. It is argued that this is the total amount of the US Green Card since 1920.[100] In the following years 2016 and 2017, Germany issued above 80% of the total Blue Cards.[101]

As can be seen, while the skilled migration appeared as an opportunity to boost economic growth, the irregular migration is deemed as "security risk" to be managed collectively by the member states. The way of managing/curbing/circulating this risk will be demonstrated in the following section.

[98] https://www.apply.eu/BlueCard/

[99] https://ec.europa.eu/immigration/blue-card/essential-information_en

[100] https://www.apply.eu/Questions/

[101] https://ec.europa.eu/eurostat/statistics-explained/pdfscache/70280.pdf

4.4.2 Extension of the Security Professionals, Agencies and Legal Enforcement: *Management of Security and Freedom*

4.4.2.1 The European Border and Coast Guard Agency (Frontex)

Another hallmark of securitizing justice is the system of the network that it refers to. The system within which the neoliberal governmentality is dominant is a complete whole with professionals, policies, tools, institutions bounded by legal contracts and continuously renovated discourse. This is the system that refers to the extension of the security professionals, related agencies and legal enforcement.

EU deals with curbing irregular migration through effective return policy and in line with the Charter of Fundamental Rights. Indeed, there are policies both coordinated between the EU member states and non-EU countries in terms of irregular migration. It is highlighted that every year, between 400.000 and 500.000 foreign nationals are ordered to leave the EU because they have entered or they are staying irregularly.[102] In this framework, the EU pays considerable importance to the operational cooperation between EU members by stating that the return policy would not be effective without operational cooperation.[103] This kind of cooperation leads to new approaches that bring new agencies, legal enforcement, and professionals together.

The relevant period of the EU to analyze this issue coincides with the adoption of the "Back to Schengen" roadmap. It is a significant document for the EU to

[102] https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission_en

[103] https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission_en

revitalize its aims of existence and strengthen its identity. As Walters and Haahr argue "if European cooperation was legitimated by the project of ceaseless economic competition and betterment, in *Schengenland* it is sanctioned in the name of societal defense" (Walters & Haahr, 2005, p.139). That is, they express that "*Schengenland* casts the EU in the form of a safe inside which is troubled by a world of chaos beyond it and constitutes a new kind of security/territory nexus" (Walters & Haahr, 2005, p.139) Agreeing with these statements, it is considered that this process of strengthening Schengen needs to be examined as it contains elements of neoliberal governmentality. Because it is also agreed that there has been a securitization of the single market with the main assumption that "after the abolition of internal border controls, transnational flows of goods, capital, services, and people will challenge public order and the rule of law" (Walters & Haahr, 2005, p.139). So, firstly it will be useful to briefly elaborate the discourses in this roadmap.

In the roadmap, the major outcome of "unprecedented migratory and refugee crisis", which deemed as the largest one since the Second World War, was underlined as the reason for questioning of the proper functioning of the Schengen area of free movement and its benefits to European citizens and the European economy (European Commission, 2016b, p.2). Particularly, the reintroduction of the internal borders in eight countries (Belgium, Denmark, Germany, Hungary, Austria, Slovenia, Sweden, and Norway) since September 2015, was perceived as a big threat for Schengen-one of the "major achievements of European integration" (European Commission, 2016b, p.9). So, to be able to resolve the skepticism on the Schengen, the document provides an overview of the costs of the "non-Schengen". It is argued that it will damage the whole EU economy and particularly would generate direct costs for the EU economy in a range between 5 and 18 billion Euros annually (European Commission, 2016b, p.3). In fact, these costs and impacts were listed by sector. For instance, if the

Schengen is suspended, the haulage sector would bear an additional 1,7 to 7,5 billion Euros (European Commission, 2016b, p.4). Similarly, in the labor market, the suspension would first cost commuters and travelers nearly 5,2 billion Euros in terms of time lost; in addition, this would discourage workers' work cross border, finally would reduce the potential workers in the pool (European Commission, 2016b, p.4). In the same manner, this would affect tourism avenues as well. Such that, it is estimated that at least 13 million tourist nights could be lost in the EU due to the reduction of intra-Schengen tourist trips caused by cumbersome border controls, with a total cost of 1,2 billion Euros for the tourism sector (European Commission, 2016b, p.4). And finally, it is underlined that between nearly 5,8 billion Euros of administrative costs would have to be paid by governments due to the need for increased staff for border controls (European Commission, 2016b, p.4). In such an accounting scheme of the costs and benefits, restoring the Schengen area without controls at internal borders is deemed vital for the EU as a whole.

Having listed these heavy costs, the necessary steps are outlined in the roadmap. These steps are towards a coordinated approach based on acting collectively and in cooperation with EU Agencies. This appears as a typical case for neoliberal governmentality which includes the cost-benefit calculation for circulating the population and a case of securitization at the same time which follows this calculation as spreading through security professionals, agencies and legal enforcements. In this framework, in the roadmap, which defines the risks of security, the security precautions are also listed as policy areas. The first one is related to the strengthening of the external border management especially focused on the deficiencies in Greece with its strategic location. The next one is on inviting all the members to fully apply the Schengen Borders Code. Another one is on the successful implementation of Joint Action Plans for the reduction of irregular migration (e.g. EU-Turkey Joint Action Plan) and to set up the European

Border and Coast Guard by extending the competencies of Frontex (European Commission, 2016b, p.4).

It is so salient to indicate in terms of a securitization analysis that the Frontex- the European Border and Coast Guard- is continuously renovated by a security discourse attached to it after its establishment. At first, Frontex was created in 2004 by European Council Regulation[104] as a coordinating agency for the operational cooperation of EU Member States at the external borders with a limited mandate. Following its establishment, its legal basis has been amended three times. In 2007 it was amended for establishing a mechanism for the creation of Rapid Border Intervention Team[105] and for explaining in detail the competencies of the related network in 2011.[106]

After the migration/refugee crisis in 2015, the Commission proposed to amend the Frontex legal basis to strengthen its role in return (European Commission, 2015c, p.10). The "need" to strengthen the existing agencies was pronounced through several channels such as the EU factsheets[107] and communications[108] as

[104] See Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union Retrieved from, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004R2007

[105] Regulation (EC) No 863/2007, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007R0863

[106] Regulation (EU) No 1168/2011, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2011.304.01.0001.01.ENG&toc=OJ:L:2011:304:FULL

[107] See some of the factsheets: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/securing-eu-borders/fact-sheets/docs/systematic_checks_at_external_borders_en.pdf and https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/securing-eu-borders/fact-sheets/docs/a_european_border_and_coast_guard_en.pdf

[108] See Brussels, 4.3.2016 COM(2016) 120 final - Back to Schengen A Roadmap

well. The new agency to be established is also proposed by sketching the costs and benefits for the EU's internal security and external border management. It was expressed that the deficiencies of the former Frontex (such as being unable to purchase its own resources, lack of having own operational staff, relying on member state contributions, not carrying out the border management operations without the prior request of a member state and lack of having an explicit mandate to conduct search and rescue operations)[109] has hindered its ability to effectively address and remedy the situation created by the refugee crisis.

And "The European Border and Coast Guard Agency (Frontex)" was established by Regulation (EU) 2016/1624 of 14 September 2016.[110] Then, the "European Border and Coast Guard Agency" replaced the "European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union", however, it has been given the same legal personality and the same short name: Frontex.[111]

On the other hand, the Agency's competences and tasks have been expanded and the budget started to increase. So, the Frontex started to support border control at land, air and sea borders by reinforcing, assessing and coordinating actions of member states at the external borders of the EU.[112] Through these processes, it is believed that the new Agency "will have real powers to support member

[109] https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/securing-eu-borders/fact-sheets/docs/a_european_border_and_coast_guard_en.pdf

[110] See Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016,, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.251.01.0001.01.ENG&toc=OJ:L:2016:251:FULL

[111] https://frontex.europa.eu/about-frontex/legal-basis/

[112] https://frontex.europa.eu/media-centre/focus/the-european-border-and-coast-guard-VgCU9N

states."[113] In the same manner Commissioner for Home Affairs, Migration and Citizenship Dimitris Avramopoulos highlighted that: *"...the European Border* and Coast Guard will have the full operational capacity and powers needed to effectively and fully support member states on the ground, at all times." He added that "…better controlling our external borders, fighting irregular migration, carrying out returns and cooperating with third countries …also help preserve the long-term viability of the Schengen area of free movement."*[114]*

Figure 12 The European Border and Coast Guard video screenshot[115]

When the proposal on a reinforced agency called European Border and Coast Guard was endorsed by the Council in 2016, the European Commission President Jean-Claude Juncker said that:

> The agreement on the creation of a European Border and Coast Guard shows that Europe is able to act swiftly and resolutely to deal with common challenges…As of now, Europe treats the protection of its borders as a common mission of solidarity.[116]

[113] Social Media Clip, 01/04/2019, https://audiovisual.ec.europa.eu/en/video/I-170554

[114] http://europa.eu/rapid/press-release_IP-19-1929_en.htm

[115] Social Media Clip, 01/04/2019, https://audiovisual.ec.europa.eu/en/video/I-170554

[116]" European Border and Coast Guard agreed" Wednesday, 22 June, 2016, https://ec.europa.eu/home-affairs/what-is-new/news/news/2016/20160622_1_en

This was a remarkable example demonstrating a case of securitization. Especially with an outlook of the sociological approach, one can both discern the security discourse of the EU officials and the instruments/agencies which are extended/strengthened for security at the same time.

Following these, towards attributing the "real power" to the Frontex, by April 2019, it has been agreed to set up a standing corps of 10.000 border guards until 2027 to ensure that the Agency can support member states whenever and wherever needed.[117] The new structure is designed to have the standing corps which will bring together Agency staff as well as border guards and return experts seconded or deployed by member states, who will support over 100.000 national border guards in their tasks.[118] In addition, it is agreed that the Agency should have a budget and own equipment such as vessels, planes, and vehicles.[119] This was the big step that multiplies the security professionals all around the EU in terms of the security of the external borders and so the internal market. As of 2019, Frontex is accepted to be a cornerstone of the EU's efforts to safeguard the area AFSJ, helping to guarantee an area of free movement without internal borders checks.[120] The Agency currently has 1500 officers deployed at the EU's sea, land and air borders, assisting the EU Member States in tasks such as surveillance, fingerprinting and security checks. Moreover, it has the capacity to have a further 1500 officers at its disposal at short notice as well as additional

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[117] See https://frontex.europa.eu/media-centre/focus/the-european-border-and-coast-guard-VgCU9N

[118] See http://europa.eu/rapid/press-release_IP-19-1929_en.htm

[119] See ss

[120] See https://frontex.europa.eu/about-frontex/foreword/

equipment in the case of an emergency at the external border.[121] While it had 6.280.202 Euro budget most of which was mostly provided by the EC annual subsidy[122], by 2019 this increased to 333.331.000 Euros[123].

Finally, the current tasks of the Frontex also reinforce the network of this security structure and the professionals. In fact, it has various tasks including the analysis of risk and vulnerability, training on border management, deploying border and coast guard officers along with vessels, aircraft and helicopters, etc, data exchange between the border authorities of the EU members and combating cross border crime. It is argued that this extension of competencies of Frontex reveals the perception of the EU that migration is not just a security concern, but a terrorism risk.[124] In fact, the agency makes continuous monitoring through risk analysis, information exchange, the European Border Surveillance System (EUROSUR) and experts from its own staff in the member states in the liaison offices (Frontex, 2017, p.15). Indeed, according to the result of the vulnerability assessments, the capacity and the readiness of the member states to face challenges at the external borders in terms of equipment, infrastructure, staff, and financial resources are calculated. Then the measures to be taken are recommended (Frontex, 2017, p.15-16). Besides, Frontex also assists the EC and the member states in identifying key border security technologies and implements the EU framework programs for research and innovation in border security

[121] See ss

[122] https://frontex.europa.eu/assets/Key_Documents/Budget/Budget_2005.pdf

[123] See ss

[124] See "European Border and Coast Guard: The EU force of securitisation in migration governance" https://rli.blogs.sas.ac.uk/2019/04/24/european-border-and-coast-guard-the-eu-force-of-securitisation-in-migration-governance/

(Frontex, 2017, p.18). All these tasks make the Frontex as a whole system that feeds itself and reinforce its capacity.

In this framework, the most significant criticisms regarding the Frontex actually expose the neoliberal governmentality and discourses of securitization networks that have been established. Indeed, these have resulted from the continuous reinforcement of the Agency. At this point, the Fundamental Rights Agency (FRA) highlights these in its Opinion Report and supports Frontex to overcome these issues. FRA argues that there is a considerable expanded mandate and scope of activities without adjusting the fundamental rights protection framework; larger use of migration management support teams, whose deployment is not anymore limited to situations of disproportionate migratory challenges; the enhanced operational cooperation with third countries and the increased possibility to process personal data, including the limitations to important data subject rights (FRA, 2018b, p.17). The management of this extended mandate shows both the "performance" of the neoliberal governmentality and "conduct" of the fundamental rights within this system.

4.4.2.2 Hotspots and Readmission

Another element that contributes to the expansion of the securitization network after the 2015 refugee crisis is the "hotspot approach". It was actually designed to manage the "exceptional"[125] migratory flows and it has been continued to be implemented by 2019 to meet the "frequent exceptional" flows. In May 2015, the Commission initiated the setting up of "hotspots", presented an EU Action Plan

[125] See "The Hotspot Approach to Managing Exceptional Migratory Flows", https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf

on return and adopted a proposal for a Council Decision establishing an emergency relocation mechanism for the benefit of Italy and Greece aiming to relocate 40.000 people within a two-year period (DG Migration and Home Affairs, 2015, p.6). It was designed as an approach within which the European Asylum Support Office (EASO), Frontex and Europol can work together on the ground with frontline member states to swiftly identify, register and fingerprint incoming migrant (European Commission, 2015c, p.6). Italy and Greece are the first two EU Member States where this hotspot approach is currently being implemented. [126] So, in Greece and Italy, the proceedings of the initial reception, identification, fingerprinting and registration of asylum seekers and the migrants coming to the EU by sea 24 hours a day and seven days a week and also channeling newly-arrived people into international protection, return or other procedures are being conducted (DG Migration and Home Affairs, 2015, p.14).

Figure 13 The Hotspots as of 2018 [127]

[126] See https://ec.europa.eu/home-affairs/content/hotspot-approach_en

[127] See FRA 2018.

This initial identification involves the distinction of whether the person arriving is a refugee or a migrant. As one of the representatives of the EU expresses this perception (Interview II, 2019), the refugee and the migrant who leaves her/his country for a better life and economic reasons are attempted to be distinguished starting from the borders. It is clearly indicated that for the refugees the related law and the legal regulations are being implemented.[128] However, it is argued that in the hotspots there were rather arbitrary implementations. As Arshid Rahimi, a 20-year-old Afghan from Ghazni, told Deutsche Welle- Germany's international broadcaster- "his mother forced him to leave after his father and sister were killed during a Taliban attack on a school near his house. His life was threatened by the Taliban, but here people say that he came for economic reasons" [129] At this point, the refugee and the "economic" migrant distinction seems to be blurred.

The current data and the functioning of the hotspots expose the capability of the EU to manage security and freedom. While they are functioning to protect the external borders of the EU and seen as a necessary prerequisite for the Schengen area of free movement, they are claimed to transgress the human rights and freedoms within the hotspot areas. According to the 2018 statistics, there are five hotspots in Greece (on the islands of Chios, Kos, Leros, Lesvos, and Samos with a total capacity of 6338 places) and five in Italy (in Lampedusa, Messina, Pozzallo, Taranto and Trapani with a total capacity of 1850 places)[130] However,

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[128] See the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 and Art. 1A of the Geneva Refugee Convention and Protocol.

[129] See https://www.dw.com/en/inside-moria-greeces-1st-hotspot-refugee-camp/g-18830657

[130]See "Hotspots at EU external borders State of play", http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623563/EPRS_BRI(2018)623563_EN.pdf,3

the population of the facilities is too much exceeding their actual capacities. For instance, according to the Greek police forces, until the beginning of June 2018, the total number of refugees and migrants present in the Greek hotspots amounted to over 16.500.[131] Similarly, as a UN report stated the camp's capacity is 410 people, but the director of Volunteer's Coordination Lesvos, reveals that the camp normally hosts 2.000-4.000 people.[132] The overcrowding hotspots, with lack of sufficient shelters, food, infrastructure, medical services, and waste management, are accused of constituting poor living conditions for the migrants and refugees.[133]

Figure 14 Moria hotspot on the island of Lesbos[134]

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[131] See ss

[132] https://www.dw.com/en/inside-moria-greeces-1st-hotspot-refugee-camp/g-18830657

[133] Hotspots at EU external borders State of play", http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623563/EPRS_BRI(2018)623563_EN.pdf,3

[134] Human Rights Watch, September 2017, https://www.hrw.org/news/2017/11/30/asylum-seekers-hell-greek-hotspot

Besides exceeding capacity, it is often argued that there is a problem of lack of transparency. Especially, it is indicated that in the initial screening and registration procedures which are conducted by Greek authorities and Frontex, lacks transparency. So, the vulnerable persons are neither identified nor supported properly and they remain deprived of procedural safeguards afforded to them by EU and domestic law (Kyprioti & Masouridou, 2018, p.30). Moreover, one of the most important aspects of EU justice policy area, "access to justice" is also problematic for the people in the hotspot areas. It is asserted that the Greek hotspots are located on small islands where no courts are operating, so practical aspects to safeguard even the physical access to justice were apparently not taken into consideration (Kyprioti & Masouridou, 2018, p.24). These deficiencies for the non-EU populations demonstrate the restriction of freedom for outsiders while aiming the opposite for the insiders.

The European Union Agency for Fundamental Rights (FRA), which is an EU agency with the specific task of providing independent, evidence-based advice on fundamental rights, addresses the gaps of fundamental rights in hotspots.[135] The training and capacity building activities in the Eastern Aegean islands and in Italy such as child protection, guardianship of unaccompanied children or forced return monitoring, etc have been implemented since 2016.[136] However, it has been noted again by FRA in 2019 that the fundamental rights situation in the Greek hotspots is, further deteriorating, calling for an enhanced presence of the FRA in the field (FRA 2019, p.100).

[135] https://fra.europa.eu/en/about-fra/who-we-are

[136] https://fra.europa.eu/en/theme/asylum-migration-borders/fra-work-hotspots

Another policy tool of the EU, which is very much linked with the implementation of the hotspots and coordinated with non-EU countries in terms of irregular migration, is the readmission agreements. In line with the respective Directive adopted in 2008, common standards have been defined in terms of cooperation with the EU states and agencies; and also need for Community and bilateral readmission agreements with the third countries to facilitate the return process has been underlined.[137] In this respect, the EU makes readmission agreements with countries to set out clear obligations and procedures for the authorities of the non-EU countries and of EU Member States as to when and how to take back people who are irregularly residing.[138] As of 2019, 17 readmission agreements were signed with Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, Macedonia, Bosnia and Herzegovina, Montenegro, Serbia, Moldova, Pakistan, Georgia, Armenia, Azerbaijan, Turkey and Cape Verde between 2004 and 2014.[139] Especially, the EU-Turkey Statement agreed in 2016 was seen as a compulsory and complementary stage for the border management of the EU. Its main aim was declared as to end irregular migration flows from Turkey to the EU, to ensure improved reception conditions for refugees in Turkey and open up organized, safe and legal channels to Europe for Syrian refugees.[140] So, after 20

[137] Dırectıve 2008/115/EC of the European Parlıament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF

[138] https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission

[139] See https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission

[140] See https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180314_eu-turkey-two-years-on_en.pdf

March 2016, people arriving on the Aegean islands were detained on hotspot premises, to facilitate their re-admittance to Turkey in cases where they did not apply for international protection or their applications were rejected.[141]

To be able to emphasize these processes in terms of neoliberal governmentality, it is useful to examine the parts considered "successful". As long as the aim is to maintain the Schengen borders and the functioning of the internal market, one should accept that the declining numbers of migration are deemed a success. This notification can be seen in several reports of the EU. For instance, in 2018 it was reported that daily crossings have gone down to an average of around 80 from 10.000 in a single day in October 2015 and the irregular arrivals remained 97% lower than the period before the EU-Turkey Statement became operational.[142] Even though it was a success for the EU in numbers, the situation was just the opposite in terms of human rights. It was argued for many that "the true magic of the deal is that it made the suffering and injustice at the European borders become invisible" (Bonamini, 2018).

Although it was promised that "EU should continue enforcing the return policy based on common standards that ensure a credible and humane return, respecting fundamental rights and the dignity of each individual" (European Commission, 2014c, p.5), the readmission agreements are usually criticized in several respects. Firstly, it is discussed that the readmission agreements are used as pragmatist tools to impose the third countries the EU governance system based on the conditionalities such as "suspending payment or aid when sufficient dialogue could not build" (Sönmez & Kırık, 2017, p.4) Furthermore, it is also argued that

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[141] See ss

[142] See ss

the EU does not care about the transgression of human rights in the transit countries and puts the readmission and reducing the number of flows as a first priority. It is asserted that the operational effectiveness of the policies in readmission policies from the perspective of increasing expulsion rates is inconsistent with international legal standards framing inter-state relations and the rights of individuals subject to expulsion practices (Carrera, 2016, p.4).

Human Rights Watch (HRW), which is an independent organization to investigate and reports on abuses happening in all corners of the world[143], indicates such inconsistencies in its reports. HRW argues that readmission agreements are facilitating the return of migrants and asylum seekers entering the EU to transit countries such as Ukraine that lack the will or capacity to guarantee them access to asylum and treat them humanely.[144] In the same manner, in 2018, HRW report of recommendations for reform, EU institutions and national governments are reported as "drawing the wrong lessons from the challenges of managing mixed migration flows since 2015"[145]. They argued that the focus of EU policy over the past three years has been on preventing arrivals, outsourcing responsibility to countries outside the EU, and downgrading refugee protection inside the EU.[146] In this framework, it was recommended to EU to:

> ensure that readmission agreements with third countries include strong human rights conditions, particularly with respect to the return of third-country nationals to countries they have transited, ... removals should ensure procedural fairness, including the right to contest a removal decision (HRW, 2018).

[143]See https://www.hrw.org/about-us

[144] See https://www.hrw.org/news/2011/06/20/eu-put-rights-heart-migration-policy

[145] See https://www.hrw.org/news/2018/06/18/towards-effective-and-principled-eu-migration-policy

[146] See ss

Consequently, in the 2019 World Report of the HRW, it is expressed that the aim of reducing the irregular migrants and asylum seekers away from the EU borders remained. In this report, especially "problematic proposals for offshore processing, migration cooperation with non-EU countries with fewer resources, uneven human rights records, and less capacity to process asylum claims" (HRW, 2019) are highlighted . It is argued that the focus of the EU remained on keeping migrants and asylum seekers away from the EU. (HRW, 2019)

In the same manner, FRA also reports these deficiencies in the annual reports. FRA explicitly argues that:

> managing migration outside the EU involves fostering the sustainable development of third countries, and not only strengthening border checks and readmission procedures; improve search and rescue operations in the Mediterranean Sea; guarantee all migrants arriving in the EU the opportunity to lodge an international protection application (to be assessed through a fair proceeding), be informed about their rights and be offered adequate reception conditions; pay specific attention to the needs of vulnerable categories of migrants; create safe and regular entry pathways; set up a transparent mechanism for managing resettlement and humanitarian visa policies; ensure that return procedure is based on full respect for human rights, and guarantee easy access to family reunification procedures (FRA, 2017a).

These criticisms also demonstrate the position of the EU that protects its borders while managing the unwanted migration in the way that it sustains the proper functioning of the EU single market.

4.4.2.3 EU Information Systems: EU-Lisa

The European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) is the final agency to be addressed in this study to put forth the tension between the extended securitization network and the restrictions of the fundamental rights of data

protection, privacy, and access to justice. eu-LISA, which has been established through the Regulation (EU) No 1077/2011 of the European Parliament and of the Council of 25 October 2011 (and started its activities on 1 December 2012)[147], is the agency responsible for the provision and coordination of large-scale IT systems in the field of asylum, border management, and law enforcement (Eu-Lisa, 2014a, p.7). And its main objective is accepted as to increase the added value of ICT to the citizens of the EU and so contribute to the success of the EU's policies in the area of justice and home affairs (Eu-Lisa, 2018, p.7). Basically, in the beginning, eu-Lisa has been mandated to provide effective operational management of three main centralized information systems called "the second generation Schengen Information System (SIS II)", "the Visa Information System (VIS)" and "European Asylum Dactyloscopy Database (Eurodac)". Indeed, all of these systems were designed to be complementary; but two of them: VIS and Eurodac primarily targeted at third-country nationals and support national authorities in fighting crime and terrorism (European Commission, 2016c, p.5). Soon after the first design of the eu-Lisa and its large IT information systems, it began to widen its ties rapidly and especially towards third-country nationals by emphasizing the need of strengthening the border management and improved information exchange in the fight against terrorism as mentioned in the Communications[148] published consecutively in 2016. Then these databases have been expected to act as the "digital borders"(Quintel, 2018, p.5) of the Union. Thus, the discourse of "need" and the extension of the security networks once again manifest itself through digital borders. In other words, the neoliberal

[147] See Regulation (EU) 2011/1077, OJ L 286, 1.11.2011, p.1, Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1569253676164&uri=CELEX:32011R1077

[148] See European Commission (2016d)

governmentality and the securitization line is well-established via these IT systems within the AFSJ.

In its core mandate, eu-Lisa is tasked with managing the three main IT systems dealing with visas, asylum requests and the exchange of information to guarantee the security of the Schengen area.[149] These tasks include the coordination of SIS II, VIS and Eurodac. To begin with, SIS II, which has been launched in 2013 following the Regulation (EU) No.1860/2018[150], Regulation (EU) No.1861/2018[151] and Regulation (EC) No.1862/2018[152], is Europe's largest information system for public security.[153] It contains several types of information such as the information on people who may have been involved in a serious crime or may not have the right to enter or stay in the EU; data on missing persons, in particular children; and information on property such as banknotes, firearms and identity documents that may have been lost or stolen[154]. Accordingly, this

[149] See eu-LISA in Action 2014

[150] See Regulation (EU) 2018/1860

[151] See Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006, PE/35/2018/REV/1, *OJ L 312, 7.12.2018, p. 14–55,* http://data.europa.eu/eli/reg/2018/1861/oj

[152] See Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU, PE/36/2018/REV/1, OJ L 312, 7.12.2018, Retrieved from http://data.europa.eu/eli/reg/2018/1862/oj

[153] See eu-LISA in Action 2014

[154] See ss

information is shared through the national border control authorities, police, customs, visa and judicial authorities in the Schengen area for the investigation of cross-border crimes. The second large-IT system is VIS, which has been established by Decision 2004/512/EC[155] and Regulation (EC) No. 767/2008[156] respectively. The aim of VIS is put as to ensure fair, efficient and secure processing of the visa application processes and border entry travel procedures of external visitors to the EU.[157] And to do this, VIS processes data and decisions relating to applications for short-stay visas to visit, or to transit through, the Schengen Area.[158] The next large IT database is Eurodac, which has been established by Regulation (EU) No 603/2013.[159] Basically, it aims to enable the efficient and transparent receipt of EU asylum applications from those who may need the protection afforded by European values and standards.[160] The information that it contains compares the fingerprints of asylum seekers and irregular border-crossers: this helps to prevent abuses such as *asylum shopping*, where applicants apply for asylum in more than one of the EU countries. [161] In

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[155] See Council Decision 2004/512/EC.

[156] See Regulation (EC) No. 767/2008.

[157] https://www.eulisa.europa.eu/About-Us/Who-We-Are

[158] https://www.eulisa.europa.eu/Activities/Large-Scale-It-Systems/Vis

[159] See Regulation (EU) No 603/2013.

[160] See https://www.eulisa.europa.eu/Publications/Information%20Material/EL0214892ENC.pdf

[161] See ss

this way, this system also makes it possible to determine the EU country responsible for examining an asylum application as well.

Besides these existing systems, three more databases and the "interoperability" of all these systems are also among the agenda items of the EU and therefore the AFSJ after 2016. The need to strengthen and improve IT systems and their interoperability, data architecture and information exchange in the area of border management, law enforcement, and counter-terrorism, was underlined in the Communication of the Commission of 6 April 2016 entitled "Stronger and Smarter Information Systems for Borders and Security".[162] Thus, first, the Commission proposed a new Entry-Exit System (EES) in April 2016[163] and it has been decided to be established by the Regulation (EU) No 2226/2017[164]. Different from the previous ones, EES is towards all third-country nationals for short stay visits only irrespective of visa requirements. It is constructed to prevent irregular immigration and facilitating the management of migration flows, also to contribute to the identification of any person who does not fulfill or no longer fulfills the conditions of authorized stay on the territory of Member States.[165] In addition, it is also designed to serve the prevention, detection, and investigation of terrorist offenses and of other serious criminal offenses.[166] In the same manner, the idea of establishing an EU Travel Information and Authorisation System

[162] See COM (2016) 194 final, 6 April 2016.

[163] See ss

[164] See Regulation (EU) No 2226/2017

[165] See https://www.eulisa.europa.eu/Activities/Large-Scale-It-Systems/EES

[166] See ss

(ETIAS) has been launched in the Communication on Stronger and Smarter Information Systems in April 2016.[167] And indeed, very recently, it has been created by Regulation (EU) 2018/1240[168] and Regulation (EU) 2018/1241[169]. It is also oriented towards the internal security of the EU. With this database, it is aimed to provide available information to law enforcement authorities and Europol in case of prevention, detection or investigation of a terrorist offense or other criminal offenses.[170] To this end, it verifies if a third-country national meets entry requirements before traveling to the Schengen area via online application ahead of their arrival at the borders.[171] And the last large IT-system in this respect is "the centralized system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN)". As is known, the European Criminal Records Information System (ECRIS), which was established by the Council Framework Decision 2009/315/JHA[172], is the database to support the exchange of criminal convictions information mainly in the context of judicial cooperation and indeed it may be

[167] COM(2016) 194 final:8

[168] See Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226, Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1240

[169] See Regulation (EU) 2018/1241

[170] https://www.eulisa.europa.eu/Activities/Large-Scale-It-Systems/Etias

[171] See ss

[172] See Council Framework Decision 2009/315/JHA , https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:093:0023:0032:EN:PDF

used also for other purposes than criminal proceedings in accordance with the national law of the requesting and the requested Member State (EDPS, 2017, p.3). In line with the effectiveness of this system and the extension of it towards third-country nationals (TCN), the EU Agenda on Security[173] also included an agenda for establishing "ECRIS-TCN". Thus, ECRIS-TCN, which has been proposed by Regulation (EU) 2019/816[174], is to allow the Member States to quickly find out in which other Member States information on previous convictions of a non-EU national is stored.[175] Therefore, it is designed to process fingerprint data or facial images and identify the Member States in possession of criminal records information on a third-country national. [176]

The proposals for the establishment of EES, ETIAS, and ECRIS-TCN have been assessed and criticized by FRA and EDPS in terms of their structure which exceeds their original intentions. For instance, EDPS argues that the data that ECRIS-TCN is very sensitive and can only be used for supporting judicial cooperation but not for the border management purposes. Accordingly, if it is done, this would mean "functions creep", meaning the use of the system is

[173] See COM(2015) 185 final: 7,, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/basic-documents/docs/eu_agenda_on_security_en.pdf

[174] See Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726, Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R0816

[175] See https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20171212_eu_information_systems_security_and_borders_en.pdf

[176] See Regulation (EU) 2019/816

gradually extended beyond its purpose and it constitutes a big concern for data protection and transparency.[177]

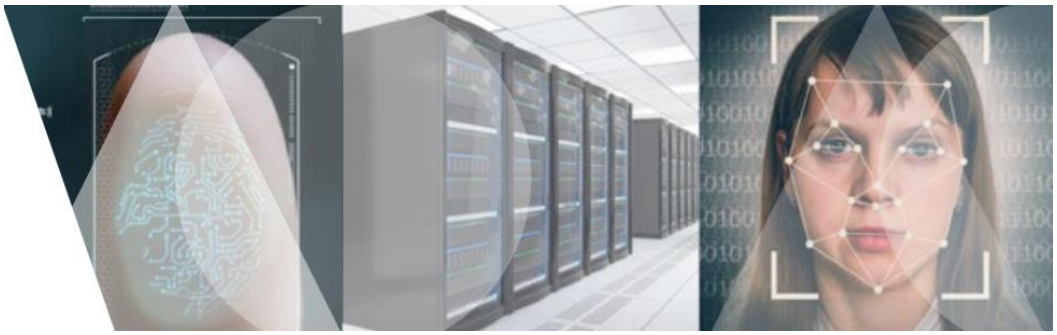

Figure 15 EU IT Systems[178]

In the same manner, FRA clearly puts forth its concern on avoiding the use of ECRIS-TCN for immigration law enforcement and argues that the EU legislator would need to clearly define the system's purpose (FRA, 2015b, p.3). And similarly, ETIAS is also a source of concern for the fundamental rights, in particular, the personal data protection as is underlined in FRA opinion (FRA, 2017b, p.4).

At this point, it is also worth mentioning the interview findings of FRA on the data and the way of collecting data being used in the EU's large-scale IT databases. It is indicated in that survey that the surveyors over 1200 passengers at border crossing points have also concerns on the implementation of these systems. Accordingly, half of the respondents believe that errors in their personal data could not be easily corrected; almost 40% of respondents are uncomfortable with providing their fingerprints when crossing borders and over 80% consider it

[177] See https://eucrim.eu/news/edps-criticises-commission-interoperability-plans-etias/

[178] See FRA 2018, "Under watchful eyes: biometrics, EU IT systems and fundamental rights", https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-biometrics-fundamental-rights-eu_en.pdf

important to be informed about why their personal data is being collected and processed (FRA, 2015a).

Table 2 Large IT-Systems in Brief

Large IT-System	Legal Basis	To whom it is applied	Categories of information covered	Main Purpose
Schengen Information System (SIS II)	Regulation (EU) No.1860/2018 Regulation (EU) No.1861/2018 Regulation (EC) No.1862/2018	EU and non-EU nationals	people who may have been involved in a serious crime or may not have the right to enter or stay in the EU, missing persons, property (banknotes, firearms, identity documents)	To enable national border control authorities, police, customs, visa and judicial authorities in the Schengen area to share information/investigation of cross-border crimes
Vısa Information System (VIS)	Decision 2004/512/EC Regulation (EC) No. 767/2008	Non-EU nationals requiring an EU visa	applications for short-stay visas to visit, or to transit through, the Schengen Area.	To ensure fair, efficient and secure processing of the visa application processes and border entry travel procedure
European Dactylography (Eurodac)	Regulation (EU) No 603/2013	All non-EU nationals (for short stay visits only)	fingerprints of asylum seekers and irregular border-crossers	To enable the efficient and transparent receipt of EU asylum applications from those who need international protection and control of irregular immigration

Table 2 (continued)

Entry-Exit System (EES)	Regulation (EU) No 2226/2017	All non-EU nationals (for short stay visits only)	time and place of entry and exit of third-country nationals	To prevent irregular immigration and facilitating the management of migration flows/identification of any person who does not fulfill or no longer fulfills the conditions of authorized stay on the territory of Member States/prevention, detection and investigation of terrorist offenses and of other serious criminal offenses.
European Travel Information and Authorization System (ETIAS)	Regulation (EU) 2018/1240 Regulation (EU) 2018/1241	EU visa-exempt non-EU nationals	entry requirements before traveling to the Schengen area of verifies if a third-country national meets	To reinforce EU internal security /identification of persons that might pose a security risk before they arrive at the Schengen external border/ make information available to national law enforcement authorities and Europol, where this is necessary in a specific case of prevention, detection or investigation of a terrorist offense, or other serious criminal offenses.

Table 2 (continued)

European Criminal Records Information System for Third Country Nationals (ECRIS-TCN)	Regulation (EU) 2019/816	All non-EU nationals and stateless persons convicted in the EU and whose convictions are stored in the national registers of criminal records.	fingerprints or facial images of the ones in possession of criminal records information on a third-country national.	To allow member states to quickly find out the previous convictions of a non-EU national.

The raising concerns are also continued to be expressed in the following reports of the FRA as well. In its report called "Under watchful eyes: biometrics, EU IT-systems, and fundamental rights", FRA also highlights the importance of respect for the right to information and the obligation to respect human dignity when collecting biometric data, the risks of sharing data with third countries for the persons in need of international protection and mentions how the right to asylum and the rights of the child are affected (FRA, 2018a, p.3).

Thus, by referring to the Charter, the report underlines the importance of the right to respect for private life and the right to protection of personal data (Articles 7 and 8 of the Charter), the right to human dignity (Article 1), the right to the integrity of the person (Article 3), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4), the right to liberty and security of a person (Article 6), the rights of the child (Article 24), the right to good

administration (Article 41) and the right to an effective remedy (Article 47) (FRA, 2018a, p.21).

While one may interpret these IT-databases as examples of strengthening security on border management, the European Commission found them insufficient and ineffective to manage migration challenges to security and decided to move forward to strengthen them further. This concern put forth the "interoperability" discussions on the agenda. Although it is argued that the first inception might be even traced back to the documents[179] following 11th September, the idea has started to be pronounced in the Communication of 2005[180] and the Paris attacks in 2015 have given an impetus to the studies (Vavoula 2019, p.2). With the debate that the Commission launched in 2016, the ways to develop stronger and smarter information systems were questioned (European Commission, 2016c) and shortcomings and the security gaps in the current system have been put forth. Following this, a high-level expert group has been established to give advice and assist the Commission in order to achieve interoperability and interconnection of information systems and data management for border management and security (EUR-lex, 2016). The new structure with the concrete steps has been planned and started to be implemented by indicating the deficits of the current structure. It was argued in one of the factsheets of the Commission that the current EU information systems for security, border and migration management do not work together; they are fragmented, complex and difficult to operate (European Commission, 2017a). In fact, this matter of fact is deemed to bring "risks" to terrorist and criminal detection and so to the EU's internal security. So, EC proposed the interoperability of the existing IT systems (SIS II, Eurodac and VIS) and the

[179] See Councıl of The European Union, Brussels, 24 October 2001 (06.11) (OR. fr) 13176/01, https://data.consilium.europa.eu/doc/document/ST-13176-2001-INIT/en/pdf

[180] See Brussels, 24.11.2005 COM(2005) 597 final, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0597:FIN:EN:PDF

newly established ones EES, ETIAS, and ECRIS-TCN. By interoperability, "the ability of information systems to exchange data and to enable the sharing of information" (European Commission, 2017a) has been pointed out. And four main elements to improve information sharing have been proposed. So that border guards, police officers, visa and immigration officials would have faster, more reliable and more complete information on people "posing a security threat" (European Commission, 2017a). Accordingly, four contentious tools have been proposed: "European search portal": a one-stop shop for a simultaneous search of multiple EU information systems, in line with the users' access rights; "shared biometric matching service": a tool cross-checking biometric data (fingerprints and facial images) and detecting links between information on the same person in different EU information systems; "common identity repository (CIR)": a shared container of biographical and biometric information on non-EU citizens and "multiple identity detector": automatic alert system detecting multiple or fraudulent identities (Ec.europa.eu, 2017h). It is asserted that this seemingly functional operating system to be suggested would strengthen the effectiveness and efficiency and would bring simplicity. In addition, it is underlined that considerable respect will be paid to the fundamental right to privacy in terms of data protection of the third-country nationals. Consequently, the interoperability has been accepted by the respective regulations in 2019.[181]

What concerns this study is both to show the extended ties of securitization mechanism and also the unequal applications of fundamental rights of data protection, privacy and access to justice for migrants and third-country nationals. Thus, after having indicated the extended IT databases towards interoperability, it is worth underlining the criticisms herewith. At this point, the issue of

[181] See Regulation (EU) 2019/817, http://www.europeanmigrationlaw.eu/documents/Regulation%202019_817-Interoperability-Borders&visas.pdf and Regulation (EU) 2019/818, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0818&from=EN

interoperability is important in terms of demonstrating the increasing weight of securitization in this area. And the criticisms directed towards interoperability and the accepted regulations in return also reveal the violations of the fundamental rights missed as a result of securitization. Therefore, both the interoperability and these criticisms will be mentioned in this part. Actually, these criticisms can be followed from the reports of the relevant authorities such as the European Data Protection Supervisor (EDPS) and EU Fundamental Rights Agency (FRA) to which the EU consulted during the respective legislation process. One of the main discussions of the interoperability is the use of data for new purposes within these proposed systems. EDPS acknowledges that CIR will contain an individual file for each person recorded in at least one of the following systems: EES, VIS, ETIAS, Eurodac and ECRIS-TCN and indeed, these data will consist of biographical data (names, surnames, place, and date of birth, sex, nationalities, travel documents) and biometric data (fingerprints and facial images) (EDPS, 2018, p.10). To stress the vulnerability of the CIR, EDPS underlines first the sensitivity of the biometric data and then the large scale of the databases. Accordingly, the biometric data are "neither given by a third party nor chosen by the individual and… they are immanent to the body itself and refer uniquely and permanently to a person" (EDPS, 2018, p.11). In addition, it is also argued that CIR will store data about all third-country nationals that crossed or considering crossing the EU borders and so will be huge and subject to multiple uses. Therefore EDPS emphasizes that the consequences of any data breach affecting the CIR could seriously harm a potentially large number of individuals and could become a dangerous tool against fundamental rights if it is not surrounded by strict and sufficient legal, technical and organizational safeguards (EDPS, 2018, p.11). Similarly, VIS and EES are being criticized since they are applied even to people for whom there is no association with serious crime and even to people who have no intention to overstay, let alone have links to terrorism or organized

crime (Rijpma, 2017, p. 223). Eurodac is also one of the databases that are criticized for this reason. FRA expresses that the data contained in Eurodac is collected without any evidence suggesting a link to terrorism or other serious crime, and pertains to a significant extent to persons in a vulnerable situation (FRA, 2016, p.43). Besides the concerns regarding vulnerability against fundamental rights, it is also argued that these kinds of centralized systems would strengthen the mass surveillance of the EU systems. While some liken this interconnected "general surveillance tools" (Rijpma, 2017, p. 235) to Big Brother (Bunyan, 2018), others associate with *panopticon* (Vavoula, 2019, p.3). EDPS also underlines that CIR seems to create conditions that may limit access to police authorities for only the purpose of identifying a person, and indeed this reveals the presumption that third-country nationals constitute by definition a security threat (EDPS, 2018, p.11). FRA also analyzes the interoperability; on the one hand, FRA affirms that it can enhance protection such as by supporting the detection of missing children; but on the other hand, the Agency argues that many problems can occur resulting from the weak position of the individuals whose data are stored in IT systems and who often lack knowledge of their rights and do not speak the language of the Member State (FRA, 2019, p.135). This point can also lead to false assumptions and affect the persons' right to an effective remedy, to being a disproportionate infringement to the rights to the respect of private life and protection of personal data (FRA, 2018a, p.42). In the same manner, by explaining that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal according to Article of the Charter, FRA also emphasizes the points to be strengthened by these IT systems. In this framework, the Agency declares that the EU legislator should include a provision establishing the individual's right to an effective remedy for the damages an individual might suffer during the processing of VIS against inaccurate or unlawfully stored data (FRA, 2018c, p.12), for administrative

decisions including travel authorization refusals under ETIAS (FRA, 2017b, p.41) and in other interoperable IT systems (FRA, 2018d, p.53). Finally, the EDPS also explicitly points the anti-discrimination on the fundamental rights. It is underlined that:

> the protection of the fundamental rights including the rights to privacy and data protection as enshrined in the EU Charter of fundamental rights is not limited to EU nationals. EU and member states are bound by it when applying EU law to the individual whether or not he/she is an EU citizen, a third-country national, a migrant (irregular or not), or an asylum seeker (EDPS, 2018, p.10).

This point is also elucidated by FRA. The Agency acknowledges the serious legal questions that might be arisen from recording and storing the data of migrants, asylum seekers and third-country nationals. And FRA adds that the reconciliation between the immigration law enforcement and security related issues with the data subjects' rights to the respect for private life, data protection and access to justice, should be provided for by law and be proportionate (FRA, 2016, p.35). In fact, this is the main tension that is to be revealed in this part of the study.

4.5 Chapter Conclusion

This chapter has analyzed the "securitizing justice" in the EU policy field, which has been conceptualized in the previous chapter. In this framework, the whole chapter has been divided into three pillars to systematize the functioning of the securitizing justice regarding its faculties to develop, deepen and secure "the advanced liberal" EU. In the first two parts, the intrinsic practices of this form of justice to securitize the European single market have been underlined. In the third part, it has been showed that there were cases where justice itself had to be securitized.

The indispensable starting point of the analysis was the economic governance mechanism of the EU. In fact, it has been concluded from the documentation analysis that the economic governance appears as the main system of the EU to establish and sustain its policy framework through setting priorities for economic growth. Hence, any assessment of the functioning of any policy area in the EU should take this economistic logic into account. Therefore, in the beginning of the first part, all the relevant elements of this mechanism have been focused on. More specifically, the European Semester, which was created in beginning of the 2010s to coordinate ex ante budgetary and economic policies in line with both the Stability and Growth Pact and the Europe 2020 strategy, has been elaborated. It has been conceived that this is an annual cycle, including the policy objectives/strategies, working programs, related activities, outputs and the country recommendations. There were two critical points that the details of the European Semester revealed for this study. First, although its initial objective was to coordinate the surveillance of the national economy policies, then after 2013 it started to embody the non-economic spheres by becoming more influential in politics. Second, thanks to this cycle, the priorities of the EU can easily be integrated to all the policy areas. Whether these priorities are included in national programs are monitored and corrected through the stages of this system. Thus, the functioning of the securitizing justice within this comprehensive, strong and effective annual cycle has been deemed very important for this analysis.

In the next part, the respective policy documents and the tools of securitizing justice policy field in the framework of this economic governance, have been elaborated. It was striking to see that while there was no references to justice at all in neither Stability and Growth Pact nor in Europe 2020 Strategy, all the subsequent programs or documents of justice have been referring to them. And since then, it has been explicitly pronounced that EU Justice policy has become

also a support for economic recovery, growth and structural reforms. By highlighting this, the restructuring of the AFSJ in the light of the economic priorities has been demonstrated in the analysis. First of all, it has been drawn attention that justice is identified with growth. It was seen from the documents that the EU was hardly interested in a definition of justice that did not aim to foster the economic growth. Such that, "social justice" was used only once in these documents during the analyzed period. In this sense, all the interviews held for the thesis confirm this finding. All the representatives who were interviewed accepted that the justice is important for the EU. When the reason of this was asked to them, not surprisingly all of them associated this concern with the economic growth (Interview I, II III, IV, 2019). It has been observed from these interviews that justice is attributed primary significance for what they do. In other words, in this design, they define themselves as the technical experts of what they do and position the justice as the operational, procedural, daily exercises. It was noteworthy to have the answer: "justice is a broad and huge area so let's talk about what we do here"(Interview I:2019) when meaning of justice for the EU was asked to DG Justice and Consumers. The sum of rules and regulations, instruments and discourses to establish the EU towards economic growth appears as the main logic of the justice. The documentation analysis has also showed that the addressees of the AFSJ have been defined as "consumers, citizens and businesses". Thus, it has been pointed out that the AFSJ has been designed legally for these subjects. The legal basis of the restructuring of the respective tools, institutions and the newly established agencies has also been highlighted. And finally, the Justice Scoreboard has been analyzed as the policy tool of the DG Justice and Consumers. It is considered that "scoreboard" mentality is crucial in terms of demonstrating the functioning of the economic governance in the AFSJ.

The following part of this chapter concentrates on the "deepening" aspect of the securitizing justice. In fact, here, the conclusions from the literature of the neoliberal governmentality based on the Ordo-liberal and American schools have been predicated. It was accepted that the more the people emancipate within the established borders: European single market; the more they hold on this system. In other words, while they are being individualizing in the EU, they are also being totalized under the rules of the Union. In this thesis, this individualizing/totalizing power of the neoliberal governmentality has been associated with the policies towards the subjects of justice: citizen, consumers and businesses. The policies which have been established to make them feel at ease confirms the main rationality. At this point, one of the main references has been the the Digital Single Market (DSM) strategy of the EU. DSM, which is a priority penetrated into many policy areas thanks to economic governance, appears as a central case to show the "deepening" of the "securitizing justice" in the EU. "Securitizing justice" not only constructs the legal background but also acts as an area of trial for the Digital Single Market strategy of the EU. At the same time, the objectives to attain "transparency, efficiency and access to justice"[182] have been carried out. In other words, the legitimacy and the applicability of the DSM strategy is ensured; and the justice is fulfilled. In fact, this "win-win" situation for both the market and the justice is one of the outcomes of the rationality of securitizing justice. E-justice Portal and the Consumer Scoreboards have been scrutinized in this part as the complementary policy tools of the DG Justice and Consumers. This win-win situation has also been demonstrated through these tools. Especially, the aspects of creating the investment-friendly environment within these tools have been revealed.

[182] See Interview III:2019: "The conception of justice that e-justice portal depends on what e-justice is about: transparency, efficiency, access to justice."

The last part of this chapter refers to a period of crisis of governmentality and the extension of securitiziation in the EU. Based on the sociological approach of the securitization, the analysis here has covered both the instruments/agencies/professionals and the discourses of the securitization. In this context, this part mainly points out to the times of migration crisis and the "Back to Schengen" agenda. Based on the derivation in the previous chapter, DG HOME has been perceived as an agency to operate under the priority of the cooperation on security and justice and preserving the rule of law. Indeed, the deficiencies in terms of fundamental rights and access to justice for non-EU nationals (non-consumer/business) while providing security for the Union have been revealed. The agencies, instruments and discourses particularly including the rights to privacy, the data protection, effective remedy, and non-discrimination have been analyzed in the light of the discourse on the "access to justice for all". First, it was significant to put forth the policies of justice to securitize the respective policies in the Home Affairs. Next, it was equally crucial to reveal the positioning of justice as a value in these policies. The cost/benefit analysis, the approach of targeting and selecting and the neglect of the fundamental rights and freedoms towards migrants and third country nationals have been the most prominent issues to be highlighted. These conclusions have been extracted from the subsequent parts of the chapter. First, it has been showed that there is a clear distinction between the skilled migration and the migration that is deemed as "security risk". The selective tools and mechanisms have been elaborated. It was striking to expose these tools such as blue card, immigration portal or Euraxess etc since they are presented as the services to provide options for the qualified migrants coming to the EU. They provide options and opportunities because these qualified migrants are considered to contribute to the economic growth of the Union. However, on the other side, it was also pointed out that the agencies and instruments such as Frontex, hotspots, readmission agreements and EU

Information systems, which are being used for the protection and management of borders, can turn into extended securitization mechanisms. They, with the increasing competences, can limit the fundamental rights and freedoms of the unwanted migrants. And in the end, they can ignore justice for these groups by implementing the rules to securitize the external borders.

Next chapter aims to integrate the main findings and derivations of the analysis conducted so far in relation to the available secondary sources and studies.

CHAPTER 5

NEOLIBERAL GOVERNMENTALITY AND SECURITIZING JUSTICE REVISITED-IN THE EU

In the previous chapter, the aim has been to expose the regime of truth established based on the logic of the neoliberal governmentality and the justice as a securitizing practice (and the justice which is implicitly being securitized at the same time) within the AFSJ of the EU. The justice, which has been manifested as the result of this combination is conceptualized as "securitizing justice". To reiterate, the emergent form of justice called "the securitizing justice" offers a twofold structure. First, it denotes an instrumental/procedural form composed of the legislation, rules and regulations to establish the economic governance structure and to facilitate the policies of securitization for the sake of the EU internal market. It has been showed that the related legislation under justice policies are used to overcome the threats against the neoliberal order. Such that, the main discourse of these policies are to provide an investment–friendly environment and economic growth. Justice, consumer and market scoreboards have been demonstrated as the tools of the DG Justice and Consumers to monitor and correct the conditions to reach a secure internal market for the investors and consumers. The mechanisms to filter the unwanted migration and welcome the qualified human resource such as blue card initiative, immigration portal and related tools have been pointed out. It has also declared that the related legislation and IT systems instruments are also implemented for border management to securitize migration against the concerns for "Back to Schengen". In summary, justice appears as a legal, procedural, facilitating, securitizing practice within this

picture. On the other side of the twofold structure of the justice, it has also be highlighted that justice is implicitly subordinated by these concerns of security and being securitized since it is no more possible to sustain the promise of "justice for all". The implications of the strengthened border management institutions and instruments on providing justice for all have been elaborated. It has been underlined that especially Frontex, hotspots, readmission agreements and IT systems have many practices that damages the idea of justice for all.

As is underlined, the functioning of justice as a securitizing practice and a policy area that is being securitized requires a deeper analysis including digging out what is "not shown" and "left silent". Indeed the discovery of the elements of the securitization necessitates moving beyond the official documents and seeking the "non-mentioned". Thus, besides the official discourses that have been elaborated in chapter 4, the problematic of justice in the EU in the secondary sources will also be put forward to be able to confirm the traces that we have found so far. In this regard, especially recent studies on the justice of home affairs, will be examined. The inconsistencies that these studies identified concerning to AFSJ will be emphasized. Then, the findings of this study will be associated with them. After underlining these commonalities, the nexus which has been tried to be constructed between justice and home affairs will be more highlighted. Then the main findings of the study will be gone through.

5.1 Justice as a Problematic in the EU in the Recent Studies

Although "securitizing justice" has not been conceptualized before as a particular form manifested in the EU justice policy area, certain inconsistencies and deficiencies concerning justice policy have been emphasized in recent studies. The increase in the number of recent studies on the issue also confirms the problematic of this thesis which is attempted to be established in the axis of the

conceptualization of securitizing justice. Thus, in this part of the analysis, these studies will be mentioned as the cross-checks to the main problematic of this study. Moreover, in this way, the nexus which has been tried to be constructed between the justice, security, fundamental human rights, management of border and migration will also be brought into the picture once again by associating the secondary resources with the analysis in this thesis.

First of all, it is widely accepted that justice is a contested concept and it is hard to find a single definition. Therefore, inconsistencies in the field of justice are only pointed by defining a constant on which justice is to be based. In this frame, justice is often approached on the basis of different priorities such as sticking to the *rule of law*, having *equal rights and freedoms*, *lack of domination*, *national sovereignty of the citizens*, *equal opportunity*, *non-discrimination*, *mutual recognition* or *human rights* as a whole. Much of the criticism upon the EU justice policy is related to these interpretations.

To begin with, approaching justice whether as a core value or a legal procedural framework is one of the most debated topics. Considering this issue as part of an old debate on the dilemma between the rule of law and justice, one may conclude that it is hard to separate one from the other. As Barnett very well expresses, "rule of law is neither form for form's sake, nor a second-best approximation of true justice" (Barnett, 1988, p.623). In fact, it is "what makes possible the knowledge and enforcement of justice in a social setting" (Barnett, 1988, p.623). In this sense, to address these concepts separately has been the subject of criticism. With an ethical perspective, Williams, in his analysis (Williams, 2010) criticizes the pragmatic approach or virtues of governance rather than concentrating on the defining values and a theory of justice as a foundational value in the EU (Williams 2010, p.18). He exposes how the practice of institutions, through law and policy, adjudication and regulation, rhetoric and action has led to the adoption

of law and values. He argues that there has been a failure to take justice seriously as a central defining theme in the EU. So, he concludes that "it should be strange to suggest that the EU, which possessed the power attributed to it, should not address some demands associated with notions of justice beyond the procedural" (Williams, 2010, p.298). On the other hand, a hollow understanding of justice that is deprived of a legal and institutional basis is criticized as well. In this manner, Roy indicates that "as far as the EU is concerned, justice appears to be an empty signifier tethered to the self-justifying referent of institutional stability" (Roy, 2015, p. 83). He argues that European integration has been pursued through institutional rules and their interpretation, but not necessarily through justice (Roy, 2015, p.79). Additionally, although not contending that justice should be dogmatically separated from the procedure, democracy or free movement; he argues that "to dogmatically force one of these politically defined components as the sole justifying basis for institutional action would render the reflexivity of justice meaningless" (Roy, 2015, p.96). Having put a remark on the necessity to integrate the rule of law with justice as a value, the way of attaining this objective seems to be still on the way to be found.

In fact, constructing a justice policy in the EU beyond procedural is often associated with attributing a value to it. And this common juncture is often referred to the fundamental freedoms and human rights. It is thought that only in this way, a common, universal understanding can be grounded. By sharing this stance, Kochenov and Williams assert that the gradual legal and political evolution of Europe has not been accompanied by the articulation of any substantive ideal of justice going beyond the founders' intent or the economic objectives of the market integration project (Kochenov & Williams, 2015, p.1). In a similar perspective, Williams also confirms that the EU lacks justice as a core value since it is composed of a set of institutional arrangements for imposing bureaucratic unity and market (Williams, 2010, p. 250) and he adds that the EU

should move away from the market as a coherent theme for human rights. Similarly, Douglas-Scott stands for this idea and argues that human rights remain a powerful symbolic and actual force for justice and a better focus for its achievement (Douglas-Scott, 2017, p. 59). Actually, the tendency to combine the European values with the universal human rights of the EU might be shown as the result of the understanding as such. Although not prioritizing as a policy area, human rights protection carries considerable importance for the EU by comprising the Charter of Fundamental Rights, the national constitutions and the European Convention on Human Rights (ECHR) and recognized as part of the EU law as fundamental rights (Leczykiewicz, 2016, p.2). At this point, the EU is expected to act as a human rights organization such that some of the human rights issues should be described as standards such as the right to be heard, the right to an effective remedy and the right to data protection (Leczykiewicz, 2016, p.52).

However, as our study aims to expose the problem arises from the attempt of the EU to establish the economic-juridical order by means of procedural justice while committing to universal human rights. As a matter of fact, the EU can provide this integrity of the rule of law and justice as human rights to the citizens, consumers, and businesses. However, the rule of law and human rights, hence justice, are not equally accessible for third-country nationals, immigrants and asylum-seekers, nor for member states that fail to meet their financial integration obligations. Indeed, the European values, security of the single market, and the EU integration seem to be prioritized implicitly to universal human rights. Kochenov also touches upon this point and argues that creating a market and questioning the state is not sufficient as a basis for a mature constitutional system since it potentially creates a justice void at the supranational level (Kochenov 2018, p.9). In his analysis, he concludes that the EU presents itself working within the paradigm of the internal market, which denies serious treatment of the majority of

the values[183] listed in Article 2 of the Treaty of the EU (Kochenov, 2018, p.10). And indeed, according to Kochenov, the foundational values of the EU are enforced through the pre-accession conditionality policies that have questionable results in terms of justice (Kochenov, 2018, p.11). He defines a type of citizenship for the EU called "market citizenship" and he argues that according to this perspective, those construed by law as economically active are viewed as inherently more valuable than the uninterested, less affluent or disabled (Kochenov, 2019, p.9). In fact, he underlines the danger of perceiving the internal market as self-sufficient rationality and conceives the market citizenship as a turn away from the fundamental principles of dignity, the rule of law and fundamental rights protection (Kochenov, 2019, p.1-11). With the same line of thought, Augenstein underlines the consequences of the austerity policies and financial predicaments of the countries like Portugal, Greece, Spain, Italy, etc. He points out to the reduction of fundamental rights to a function of economic integration and virtue of the expediences of financial reform in these countries. And he argues that "they will not muster the political strength to break the EU's vicious circle between output legitimacy and economic self-interest" (Augenstein, 2015, p.164). The inconsistency arising from the tension between the concern for the sustainability of the single market and related injustices are often mentioned in the studies of social justice. Besides, our study tries to expose that since the justice policy is deemed as the economic-juridical order that is being set; no inconsistency is being perceived and/or reflected for the EU justice policy area. It is assumed that problems in this area are resulting from the malfunctioning of the state/institution/individual concerned.

[183] The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Amartya Sen argues about the theory of justice that can serve as the basis of practical reason that it "must include ways of judging how to reduce injustice and advance justice, rather than aiming only at the characterization of perfectly just societies" (Sen, 2009, p.ix) Looking from this perspective, recent studies on justice in the EU are questioning the existence of the rule of law where injustice is reduced and/or justice is advanced rather than a perfectly fair society. Whether the injustice is being reduced and/or the justice is being advanced or disregarded at all in the EU is a contested issue. In this framework, the most questioned items are the comprehension of the rule of law and securitization actions in the EU. The perception of the rule of law as a pure procedural framework that justifies all legal proceedings, even for reducing justice, is usually criticized. Kaunert and Yakubov underline that, although the EU is neither a state nor an intergovernmental organization, it can securitize through establishing legislation and influences the security agenda of the member states (Kaunert & Yakubov, 2018, p. 37) In other words, the domino effect which is being done through the legislative power of the EU influences the policy agenda of the member states on especially towards migration. In this way, the policies regarding the migration are justified and thus, a perception pointing out that there is no question about justice is created.

Recent studies are found significant to show this nexus between migration and justice in the EU. One of the salient studies on this issue searches for migration and the embedded claims of justice in it through looking into the discourse in the national newspapers in Italy, Hungary, France, Norway and UK in 2014-2018. [184] All the cases in that specific research approach justice as "global justice", which is based on the definition of Eriksen[185]: justice as "Westphalian non-domination,

[184] See D'Amato & Lucarelli 2019.

[185] See Eriksen 2016.

cosmopolitan impartiality or mutual recognition"[186]. Accordingly, it was found that all cases display a prevalence of claims of justice as non-domination, especially in relation to the issue of border control with representatives of the state as the main claimants (D'Amato & Lucarelli 2019, p.12). This Westphalian narrative was mainly underlined in such a way that the European countries' most basic and important duty becomes guaranteeing and protecting its citizens' safety hence narratives tend to match with non-domination justice claims, as the main referent of justice is the domestic community (D'Amato & Lucarelli 2019, p.11). Indeed, it was also argued that various shades of Westphalian justice claims have "legitimized restrictive migration measures and even a disregard (when not open violation) of the rights of migrants" (D'Amato & Lucarelli 2019, p.13). Looking at the Italian newspaper discourses, it was concluded that although a humanitarian narrative was frequently found throughout the period, it was not based on issues of the migrants' rights but more on arguments of "benevolence" and "migrants' victimization"(D'Amato & Lucarelli 2019, p.11). So in that sense, it was also argued that the humanitarian narrative is also used in support of claims of migration control as well (D'Amato & Lucarelli 2019, p.11). Consequently, the European Parliament elections in May 2019, showing the rise of the sovereign, anti-immigrant parties such as Lega in Italy or Fidez in Hungary, have been highlighted as the proof of the discourse on the relationship between justice and immigration in European countries (D'Amato & Lucarelli 2019, p.13). In a similar vein, Kaunert and Yakubov demonstrate the results of the EU legislation and its effects on the security agendas of the member states on constructing a

[186]See the definition of "Global Justice" in Eriksen 2016. **Non-domination**: Absolute respect for UN supremacy, Prioritising state security and the security of own citizens, Freedom from…**Impartiality:** Multilateral institutions as key vehicles for protection of universal values, Hegemonic human rights discourse, Universality of values is absolute, Universal values are to be instantiated and actionable, Exercise of hard power and the responsibility to protect, Exercise of soft power/power of example, Freedom of… **Mutual recognition:** Shift towards non-hegemonic regimes and international institutions, Potential for paradigmatic value shifts, Evolving, flexible and contested values, Difference in international standing, Freedom to…

linkage between migration and counter-terrorism especially after the 2015 refugee crisis. They point out the anti-immigration campaigns of the right-wing parties in Austria, France, the Netherlands, and the UK and highlight the linkage of migration with the discourse of counter-terrorism (Kaunert & Yakubov 2018, p. 37). Although the embedded claims of justice in the policies of migration can be followed in media and relevant resources, it is relatively hard to expose this nexus directly in the EU's official documents, it requires deeper analysis.

The EU's policy of justice has been associated with its adherence to the security strategies in some studies. With reference to three main strategic security documents of the EU, Tonra and Tomic have elaborated on the EU's role in the pursuit of global justice in security.[187] They firstly underline the fact that the documents do not explicitly and solely focus on global justice, and the term 'justice' is used in a more narrow (legal) sense (Tomic & Tonra, 2018, p. 15). Although it is a minor conclusion for Tomic and Tonra's research, it is valuable to remark the general tendency to disregard the justice issues in the area of security. Based on the same conceptions of global justice of Eriksen, Tomic and Tonra also argue that the capacity and ambition of the EU to be 'just' has changed over time from 'justice as impartiality' towards combined elements of 'justice as non-domination' and 'justice as mutual recognition' (Tomic & Tonra, 2018, p. 20). Indeed, this has been explained as the EU's concern with good governance, a desire for strong states capable of governing and protecting its citizens (non-domination), resulting from the EU's more particular short-term interests and concerns and more universal and long-term normative aspirations (Tomic & Tonra, 2018, p. 15). As long as the migration is perceived as a security concern, the conception of justice as non-domination creates inconsistencies for the EU as

[187] These are "A Secure Europe in a Better World – European Security Strategy' (European Council 2003), 'Report on the Imple-mentation of the European Security Strategy – Providing Security in a Changing World' (European Council 2008) and 'Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign And Security Policy' (EEAS 2016).

the actor of upholding human rights, not for its citizens but all. As Ceccorulli and Lucarelli also emphasize figuring out which kind of external actor the EU is likely to be in the future requires a decision between securing its homeland and security of the migrants and their rights as equally as citizens (Ceccorulli & Lucarelli, 2017, p.2). Moreover, by assessing the securitization of the Schengen, Ceccorulli questions whether the EU can act as a normative power when its ontological security is under threat (Cecorulli, 2019, p. 318). And in fact, these debates on these inconsistencies may also reveal the justice claims of asylum seekers and migrants in the area of security.

On a similar basis, border management is perceived as one of the politicized mechanisms which have been criticized for causing inequality in freedom of movement and therefore subject to the debate on justice. Benedicto and Brunet elaborate the strengthened border management in the EU and argue that new hierarchies are being created in terms of freedom of movement by the surveillance of all the movements (Benedicto & Brunet, 2018, p. 37). They argue in their report that the EU "have constructed almost 1000 km of walls, the equivalent of more than six times the total length of the Berlin Walls, since the nineties to prevent displaced people migrating into Europe" (Benedicto & Brunet, 2018, p. 5). Besides, they also reveal that these physical walls are accompanied by even longer "maritime walls"- naval operations patrolling the Mediterranean, as well as "virtual walls"- border control systems that control the population entering or even traveling within Europe (Benedicto & Brunet, 2018, p. 5). In fact, apart from this report, building walls has been criticized a lot. United Nations High Commissioner for Refugees (UNHCR) also argues that in many places, fences and barriers may result in denying access to protection to people fleeing conflict or human rights violations. Accordingly, as a result of such restrictions, people seeking international protection increasingly rely on smugglers or use more dangerous routes thus putting their safety even more at

risk (UNHCR, 2017). Finotelli looks at the bilateral agreements promoted by the Southern European countries for the migration control and argues that it is a kind of "passing the buck" strategy of the EU in terms of guaranteeing the humanitarian standards (Finotelli, 2018, p. 248).

And on the other hand, whereas the border management agencies aim to reduce these risks, at some point they are exceeding their goals and becoming excessive securitizing agents. With reference to the new IT databases and agencies, Benedicto and Brunet highlight in their report that according to the eu-Lisa itself, the movement of people is now also a risk factor and a security threat that must be tracked and monitored such that not only migratory movements but also all people's movements are getting securitized (Benedicto & Brunet, 2018, p. 34). In the same manner, the report also asserts that through Frontex's agreements with third countries, asylum seekers end up in states that violate human rights (Benedicto & Brunet, 2018, p. 7). Moreover, Frontex is also criticized for being a militarized agency that increases the risk and the suffering of migrants (Benedicto & Brunet, 2018, p. 37). And what's more, the emphasis of the "effectiveness" on the policies of migration control also being criticized for ignoring the factors of liberal democratic regimes such as human dignity, long-term legitimacy outcomes, and trust (Benedicto & Brunet, 2018, p. 37). Carrera and Allsopp underscore the securitized and non-transparent role of the EU and its multiple agents working on irregular immigration. They argue that this role will deepen the mistrust on the policy of the irregular migration and so gradually will lead to undermining the legitimacy of the EU (Carrera & Allsopp, 2018, p. 70-71).

Therefore, although it is not explicitly mentioned in the EU official strategy documents and there is no such division of labor for the agents of justice in the Home Affairs; the policies of Home Affairs should have a particular concern to justice especially in terms of rights of the the migrants and third-country

nationals. And these studies also confirm that justice in the EU as a problematic may not be always approached exclusively but also interconnected with a set of power relations within which the cards of freedom, security, human rights, management of border and migration have been brought into play. In this sense, many argue that a coherent policy of justice cannot be conducted within these complex sets of cards that are played strategically. Therefore, the above-mentioned arguments also confirm the inconsistencies that justice as a policy area reveals. What is grave here is not only the inconsistencies in the field of justice but also how these inconsistencies are perceived in the EU. The inconsistencies are actually conceived of as matters of security and/or home affairs but not as a matter of injustice. And although it is not literally pronounced within the EU official documents that this is the new understanding of justice that the EU adopts, this perception implicitly exposes a new type of justice as "the securitizing justice". And although it is not literally pronounced within the EU official documents that this is the new understanding of justice that the EU adopts, this perception implicitly exposes a new type of justice as "the securitizing justice". Thus, the main findings will be put forth in the next section.

5.2 Main Findings on Securitizing Justice in the EU

In this part of the study, the main findings of the neoliberal governmentality and securitizing justice in the EU will be restated. First of all, this study was intended to present an analysis through extracting its own conceptualization based on the literature of Foucauldian neoliberal governmentality and post-structural conceptions of securitization. Following this track has led to the definition of the concept of "securitizing justice" and the determination of the general characteristics of this concept. Beforehand, neoliberal governmentality, having its roots especially in the Ordo-liberal understanding of the law which is used as an

instrument to create entrepreneurial forms within society, and the homoeconomicus rationality of the American neoliberalism have been particularly elaborated. With this design, first, “economic-juridical order”, which is defined by Ordo-liberals as positioning the juridical within the economic base instead of to the superstructure, has been searched and confirmed in the EU case. And secondly, the unlimited generalization of the market to the social system such as marriage, children, education, criminality, etc, which is the *homoeconomicus rationality* of the advanced liberal societies, has been remarked. In this frame, "de-governmentalization of the state" or "de-statization of government" (Rose, 1996, p.56), which led to a detachment from the center through a network of enterprises, organizations, communities, professionals, individuals has been analyzed. By this intention, firstly the development of the justice policy field within the neoliberal structure which is settled in parallel with European integration has been narrated in Chapter 3. It has been concluded from the documents that, whereas the policy areas have expanded beyond the economy; the policy of economy has been installed in each and every policy area through neoliberal governmentality in the EU. The dynamics of neoliberal governmentality especially; focus on *economic-juridical order, circulation, management,* and *regulation of population, extended definition of security, individualizing/totalizing power, multi-purposive pragmatism*, exclusion/inclusion, *competitiveness* and *market orientation, consumer-citizen, use of sovereign power and disciplinary power: legal code and surveillance/correction* have all been demonstrated through the official policy documents of the EU. Following this, securitizing justice has been defined as an element of neoliberal governmentality and the securitization. Accordingly, the general elements of the securitizing justice can be defined as follows: *adherence to the legal-procedural framework, multi-purposive pragmatism and use as a securitizing practice, the emphasis of access to the legal framework rather than a*

justice as a core value, management of unease, perception of rights as the rights of the consumer-citizen and securitization of justice for non-parties to the contract.

Upon this conceptualization, the analysis in Chapter 4 has been grounded on a three-pillar structure. These pillars are in fact the claims of the EU in terms of justice and they all reflect different aspects of the neoliberal governmentality and securitization. And they have been named as "Justice for Growth: Establishing the Advanced Liberal Society", "Justice for Citizens, Businesses and Consumers: Deepening the Advanced Liberal Society" and "Justice for a Europe that Protects: Access to Justice for All in the Enclosure of Securitization". In each and every section, the highlighted defining principle of securitizing justice has been used to point out to both one of the main concerns of the EU and requirements of the EU economic governance system. Hence, the regime of truth which manifests the "securitizing justice" in the AFSJ and its role in mediation between freedom and security has been elaborated. Particular emphasis has been given to the apparatus of security that suppresses the promises of "justice for all" as a fundamental value while deriving its power from procedural justice. This part required a deeper reading of justice especially for the migrants, asylum seekers and third-country nationals. Since there have been neither exclusive reference to justice nor any perception regarding possible injustices in the functioning of the Home of Affairs of AFSJ, analysis has been deepened to reveal the disregarded points in the documents. In this way, the securitized issues have been shed light. Thereby, first, part 4.2, "Justice for Growth: Establishing the Advanced Liberal Society" has put forward the aspects of the logic to establish an advanced liberal society in the EU within which the Foucauldian highlights of neoliberalism can be observed. Accordingly, the Ordo-liberal emphasis on competition, the sustainability of the market, enterprise society and economic-juridical order has been underlined.

In part 4.3, “Justice for Citizens, Businesses, and Consumers: Deepening the Advanced Liberal Society”, it has been argued that this kind of society has been deepened through an unlimited generalization of economic order with a homoeconomicus mentality in the sense of Chicago School neoliberalism. And finally, part 4.4, “Justice for a Europe that Protects: Securitization: Access to Justice for All in the Enclosure of Securitization”, has shown how this order is tried to be protected and managed while the population is circulated by the discourses and policies of securitization undermining the commitment to the principle of “the justice for all”.

As the senior officer from the DG Justice and Consumers frequently repeats during the interview held in 2019, that “the EU is a rule-based union” (Interview I:2019). What is confirmed by the analysis in section 4.2 of this study is that the EU has a very strong network of expansion in terms of legislation. In fact, one of the main mechanisms that enable this legislation to spread fast and effectively across all the EU policy areas is the new economic governance system of the EU. In this way, economic oriented prioritized policy issues that are highlighted in any level of the European Semester deeply pervade other policy areas. Justice policy area in which neoliberal governmentality functions well, appears as the most salient case to follow this reflection. So, it can be deduced from the above analysis that by this legislation-economic governance mechanism, the economic priorities are associated with the priorities of justice easily. Accordingly, one of the greatest conditions for the sustainability of the economy is deemed as the sound functioning legal structure. This explains how “increasing investment” becomes the priority of the justice policy area. Specifically, as can be followed from 2013 onwards while in AGS the social priorities have started to be set besides economic ones; in WP of 2013, “the businesses” have been started to be named as the new addressees of the justice policy and the EU regime of rights. In other words, while the economic oriented policies have started to include *the*

social, *the social* has started to include *the economic* in itself. One can draw two conclusions from this convergence of the objectives of the *social* and *economic*. Firstly, the economic governance mechanisms are both being legitimized and function better through the practices of the economic-juridical order. Whereas, the justice policy is fused to the economic targets and referred to as "justice for growth" or "justice for the investment-friendly environment". Although these expressions reveal the intention and conceal the type of justice to be established, it cannot be openly pronounced. The official representative from DG Justice and Consumers who has been interviewed for this study in 2019, clearly rejected that these expressions do not refer to any type of justice (Interview I:2019). According to him, neither justice for growth nor justice for the investment-friendly environment was a "type" like distributive or social justice. These were the goals that justice should pursue in the EU. When the same question has been asked to the high level representative from EU Delegation to Turkey in 2019, a similar answer has been received (Interview II: 2019). Then what was the reason of positioning the justice as such? It was asked whether it was for standardizing the policies at an optimal level. It has been confirmed in this interview that the EU sets the minimum criteria to sustain the smooth functioning of the market. In addition, it also sets criteria for the states to be fulfilled for the integration of the EU as the "united in diversity" (Interview II:2019). Although, these interviews have been denying the emergence of a new type of justice, they have been both confirming its transformation by the attributions of market-based objectives. In other words, it can be deduced that the effectiveness and the ability of justice to meet these functions is what ultimately matters for the EU justice policy. As a result, securitizing justice appears as the predominant form of justice that frames, legalizes, facilitates, monitors prevents, corrects and securitizes the EU single market. It can also be inferred that the economic-juridical order is not only constituted through the laws, regulations, and directives but also with several

economic governance practices. The Justice Scoreboards, which function as the tools of this regime of truth, are picked as good examples of such practices in this study. They both show the economization of the justice policy area in the EU and give "political messages" to the countries whose justice structures are measured in terms of independence, quality, and efficiency (Interview I:2019). The performances of the countries are compared as if they are the enterprises or the parts of a machine. If one of them has a low performance, it affects all the rest parts of the apparatus in the EU; so they are being carefully monitored and tried to be fixed by these messages and recommendations. Especially the countries such as Greece, Hungary, Malta, Cyprus, and Romania are heavily criticized of being slow, inefficient and not independent (Interview I:2019). It is also worth mentioning that the rationality of the Justice Scoreboards is not towards attaining the social justice within these countries but providing basic standards for the proper functioning of the single market. That's why the social injustices which are consequences of the conditionality agreements and the austerity policies are not brought into agenda. Indeed, the comparison of the countries which are being done in the Justice Scoreboards is based on securitizing justice. Actually, the EU does not refer to "social justice" except from the 2009 WP of the Commission. Even at that document, there is no clear stance. And so, neither this nor the references to social justice in the Treaty of EU have been turned into an active policy. Even, it has not refrained from pursuing policies to the contrary. As Douglas-Scott argues, the conditionality clauses in the bailout agreements which impose the measures on unilateral cuts on wages, pensions and public spending, and restrict collective bargaining, do not enhance the objective of social justice set out in Article 3 of the TEU (Douglas-Scott, 2017, p.60-64). Instead, EU sets the raison d'être "to improve the well-being of its citizens and to further their interests" in WP 2010 and "the freedom to explore opportunities across borders" in WP 2012 and puts the mission of "effective justice" to establish secure,

investment-friendly and predictable environment, mutual confidence and sustainable growth.

The historical context of justice as a policy area in the EU, narrated in part 3.2 shows that there is a tendency from intergovernmental toward supranational approach for conducting policy in this field. In that context, it has been exposed that in order not to jeopardize the internal functioning of the free movement of goods, services, and people and to secure the price stability, the supranational values and policies have been gradually adopted throughout the European integration process. The reference documents of the EU that have been analyzed within part 4.2 also confirm that the economic and political conjuncture defines the focus of the economic-juridical structure. Indeed, throughout the process of transition from intergovernmental to supranational approach against global threats, this focus appears as either security or economic growth. Specifically, it can be seen from the documents that the terrorist attacks that arose beginning from the 2000s and the financial crisis that began to be felt by the 2010s have predominated the related agenda by the call for securitization in the AFSJ and stronger economic governance respectively. This also leads to the mediation between freedom and security in the AFSJ.

In connection with the mediation of freedom and security, part 4.3 demonstrates the deepening of the advanced liberal order in which the neoliberal freedom predominates. Specifically, this is an order in which the consumer plays the leading role as the new subject of the de-governmentalized state. The more the consumer and/or the citizen and businesses act freely, the more they liberated and the more the system is improved. It is nothing but the individualizing and totalizing power of neoliberal governmentality. And the role of the securitizing justice here is to act as a facilitator and make the EU citizens feel at ease. The connection between the economic governance structure and the justice policy area

also can be seen here. Actually, the priority of the Digital Single Market (DSM) strategy set in the AGS of 2015 appears as a priority for the justice policy area as well. Thus, to ensure that citizens have more control over their personal data, to strengthen confidence in the digital economy and support the growth of the digital single market are starting to be listed as the main points of the justice policy. Although it has not been originated from the DSM strategy, the e-justice Portal is among the policy tools that are implemented with this perspective. In fact, it has been concluded that being a typical tool of neoliberal governmentality, e-justice Portal also functions multi-purposively. It has many irons in the fire;it claims to "make life easier" by providing access to justice for the citizens, consumers, and businesses, acting as a business portal and database and a tool for monitoring. In short, the e-justice portal aims at shortening the processes, transparency of the enterprises doing business in the EU, sharing information and solving the problems in a short time and so facilitating the life of the actors involved in this process. Within this line of thought, the fact that the system works in accordance with the rules of the game shows that justice works.

Consumer Scoreboards have been picked as other policy tools to build mutual trust between the individual and the market and to liberate both of them. In this sense, while Consumer Markets Scoreboards are to monitor how consumers assess the performance of key goods and services markets; Consumer Conditions Scoreboards are to monitor the consumer environment by looking at knowledge and trust; compliance and enforcement; complaints and dispute resolution. In addition, these tools also follow the latest trends of DSM strategy such as e-commerce to liberate the consumer and the digital market by securing the judicial infrastructure. The final remark that can be said on this subject is that these tools were previously carried out by different DGs (DG Health and Consumer/and DG Competition) and later by DG Justice and Consumers. The merge of DG Just with the Consumer focus in 2014 and conducting these tools from that year on are also

worth mentioning in terms of highlighting the neoliberal governmentality logic within the justice policy. That is to say, while the individual's (consumer-citizens) preferences concerning the market are taken into consideration and further extended, they are monitored and managed.

As a result, an understanding of procedural justice emerges to establish an economic-juridical order and for the need to secure the single market. What is aimed is not justice as a core value in the first place but the economic growth. That's why it's called "justice for growth" instead of "growth for justice". There is a justice that secures the freedom of movement and makes economic integration safe. In other words, justice does not appear to be a policy instrument for justice itself, but as a discourse that legitimizes economic integration.

Part 4.4 of the analysis has been on the EU that protects and manages its borders and circulates the population in favor of the insiders' security. Hereby, the neoliberal governmentality, which takes the population as its target, political economy as its major form of knowledge, and apparatus of security as its essential technical instrument; manifests itself with securitization. And more importantly, all the securitization done towards these objectives include the promise of "justice for all". Since it is a matter of preference for the "good freedoms" among "bad freedoms" for the EU, the securitization policies are grounded on the discourse of the "need" and do not necessarily pursue human rights in each and every scope. But admittedly, in any case, the EU articulates the fundamental values of human rights by means of the EU Charter to its discourses. In this framework, it can be seen from the analysis that a complete system with professionals, policies, tools, institutions bounded by legal contracts and continuously renovated discourses have been established and expanded continuously. Besides, it is very vital for this study to show this legal extension on the one side and the silences of the justice policy especially to the asylum-seekers, migrants and third-country nationals in

parallel to the securitizing practices on the other. The implementation of the roadmap called “Back to Schengen” and the refugee crisis in 2015 are turning points in analyzing the extension of securitization movements.

In this frame, some of the policies on migration, the external border management, and the large IT databases have been chosen as three cases to elaborate on the neoliberal governmentality perspective and the securitizing practices in line with it. In this way, the coupling of the security and justice, (especially the issues pledged to EU citizens such as control over the personal data, right to an effective remedy, “feel at ease” etc) has been tested once more for non-EU nationals this time. The first emphasis in the findings is that the EU perceives the irregular migration as an unwanted phenomenon and a security threat. However, it is not excluded completely. It is tried to be managed, circulated and set under control. Moreover, it is tried to be transformed into an opportunity by welcoming the high skilled migration. The facilitating digital web portals such as EURAXESS, EU Immigration Portal and the Blue Card Scheme basically put forth the perception that migrants are deemed as the calculative agents of having the free capacity to act. While their access is being facilitated by these tools and programs, the EU pursues its aim on the “safer Europe” based on a balanced and comprehensive EU migration policy in line with Europe 2020 strategy which makes an important contribution to the Union's economic development and performance. In this sense, the logic of the securitizing justice, which has the common denominator of securitarian and neoliberal concerns, has been implemented for the management of migration. As such, the population is tried to be circulated by means of calculating the costs and benefits and defining the risks. Always shooting two birds with one stone, securitizing justice again manifests itself as the procedural form of necessary legislation. Besides the “welcomed migration”, the irregular and unwanted migration are managed through the external border management in the EU. It can be demonstrated as the exact point that the extended notion of

securitization and neoliberal governmentality, which manages and curbs the risks and circulates the population and verifies itself in the end.

In the same context, Frontex, hotspot approach, the readmission agreements, and EU large-scale information technology systems have also been looked through. The securitization movements following the Back to Schengen agenda have been listed in this part. It is concluded that the EU calculates risks and shows, on the one hand, the diminishing revenues in each sector in the case of suspension of the Schengen agreement and the security threats on the other. The "need" is demonstrated explicitly and the Frontex, which has been established as coordinating agency for the operational cooperation of EU Member States at the external borders with a limited mandate, gains its "real power". And it does not end with it; by April 2019, it has been agreed to set up a standing corps of 10.000 border guards until 2027. Therefore, Frontex not only expresses the extended securitization but also the main example for the supranational power of the EU merging the national and international competencies. This can be analyzed as one of the capabilities of the neoliberal governmentality, which can articulate several intertwined interests for the sake of security of the neoliberal order. However, the FRA reports are important to expose that the adjustment of the fundamental rights protection is not developed at the same speed with the expanded mandate and the scope of activities of the Frontex. This also shows the primacy of the securitizing concerns for the EU integration rather than the motivations to attain justice for all.

Afterward, the hotspot approach and the readmission agreements show how much sacrificed for the sake of the protection of the borders. The hotspot approach, which has been initiated to deal with "exceptional" migratory flows and still continued, is also a case to secure the external borders. Although claimed the opposite, it can be seen that while the refugee and the "economic" migrant distinction blurred and the overcrowded camps are hard to manage, this approach

has been continued to be implemented. Moreover, lack of operating courts and physical access to justice are also listed as the deficiencies for the access to justice and restrictions of freedom and equality. Complementary to this approach, the readmission agreements have also been highlighted as "successful" tools for protecting the borders although they are criticized as being pragmatist tools to impose the third countries the EU governance system based on the conditionalities on the one side and to eliminate the unwanted migration on the other side. In addition, leaving the unwanted population by not guaranteeing the access to asylum and treating them inhumanely in the hotspots are also the points that are put forth by the agencies working on human rights.

Finally, EU large-Scale IT Systems have also been addressed in this study to expose the tension between the extended securitization network and the restrictions of the fundamental rights of data protection, privacy, and access to justice. Especially, the discussion of the interoperability shows how the EU is moving away from its original motivation to establish these databases. In this sense, FRA and EDPS opinions and reports also acknowledge this case and warn the EU legislator to clearly define the system's purpose and not to use them for immigration law enforcement. And they add that "recording and storing data in large-scale IT-systems in the field of migration and asylum raises always serious legal questions on how to reconcile the immigration law enforcement and security related purposes of such databases with the data subjects' rights to the respect for private life, data protection and access to justice"(FRA 2016, p.35). Therefore, these reports propose that any restriction should be provided by law and be proportionate"(FRA 2016, p.35). One of the most criticized implementations is that third-country nationals are perceived by definition a "security threat" and it puts the EU into a discriminatory position. This understanding can also be found in the language of several legal documents of the EU as well. Actually, FRA also warns that the Commission should avoid using "illegal migration" and

recommends using “irregular migration” to highlight that “illegal” carries a criminal connotation, even though entering a country in an irregular manner, or staying with an irregular status, is not necessarily a criminal offense but an infraction of administrative regulations (FRA, 2018b, p.25). The emphasis on this discriminatory language indeed points out that all persons have rights, including migrants who enter or stay in the EU without permission (FRA, 2018b, p.25). Furthermore, recording, storing and sharing the sensitive personal data of third-country nationals are all contradictory with the protection of fundamental rights to privacy and data protection. In the same manner, these large IT-databases seem problematic in terms of providing the right to an effective remedy for the damages resulted during the processing of data and/or inaccurate or unlawfully stored data. In this context, the arguments of EDPS and FRA have been demonstrated that the rights to privacy, the data protection, and effective remedy declared in the EU Charter of fundamental rights are not limited to the EU nationals.

The discourses lying behind these securitization movements indicate briefly that “the abolition of internal border controls, transnational flows of goods, capital, services, and people will challenge public order and the rule of law” (Walters & Haahr, 2005, p.95). And indeed since the security threats are directly connected with transnational flows of goods, capital, services, and people they should be turned into something manageable. In this way, all the conditions have been established once again for neoliberal governmentality to come into play. But this time while justice works with its procedural, legislative power as a practice that securitizes the acts of free movement; the justice policy is also intrinsically being securitized since it is silenced for the non-EU nationals.

Therefore, one might conclude that securitizing justice manifests itself within three cases. In the first case, it appears as the guarantee of the economic-juridical order. That is, justice policy is considered as foundational in terms of the juridical

constitution of the economic "base" rather than being a factor of the "superstructure". Indeed, it both establishes the endlessly extending legislation and procedures of the economic governance system in the EU and it is at the same time fed by this system. Because all the governance structure to attain the goal of economic growth is notable for justice and justice is inevitable for economic growth. Similarly, in the second case, securitizing justice expands itself deeply in the advanced liberal society in a variety of forms. These include the necessary legislation and the continuously renewed discourses for the institutions, practices, and instruments that enable the homoeconomicus subjects (citizens, consumers, and businesses) to act at ease and safe within the internal single market towards the economic growth. Within this advanced liberal society, justice is constructed as a facilitator of the homoeconomicus subject and a very accessible tool for the digital market counterparts, EU citizens, consumers, and businesses. Moreover, besides facilitating; the agencies, actors, and tools that it produces also measures, examines, confirms and so manages the whole economic governance system. Therefore first two manifestations of securitizing justice establish and deepen the advanced liberal order while securitizing the items that may challenge the functioning of the single market. Furthermore, it implicitly narrows down its meaning to the economic sphere. In the third case that is exposed, the facilitating and managing roles of securitizing justice step aside and; the cooperation between the security and justice under the priority of "justice and fundamental rights" leans towards security. It has been showed that migrants, potential migrants and third-country nationals are not, in fact, enjoying the same rights with the "legal" subjects acting at ease within the EU borders. The procedures of security dominate the policy area and the protection of fundamental rights to privacy and data protection, the right to effective remedy and non-discrimination are all taking a backseat. Thus, justice is being redefined as securitizing justice by these three cases.

CHAPTER 6

CONCLUSION: THE TRIUMPH OF THE REGIME OF TRUTH AND SECURITIZING JUSTICE

Figure 16 The Painting of Hans von Aachen: "The Triumph of Truth and Justice", 1598.

The German artist Hans von Aachen tells the allegory of justice in his famous painting called "The Triumph of Truth and Justice" in 1598. In this composition, "Justice" protects the "naked Truth" with her sword from the ferocious lion.[188] The triumph that is heralded belongs to the Justice, or the God, who is the bearer

[188] See https://painting-planet.com/the-triumph-of-truth-and-justice-hans-von-aachen/

of scales of justice and the Truth. It is argued that the painting symbolizes that all men are judged by God.[189] Assuming that the artworks are inspired by the era in which they are created and they shed light on the next era, this painting actually says a lot. In fact, in this piece of art, a product of 16th, many things are deciphered about justice. At first, it displays the complex relationship within which justice is in the leading role. And at the same time, it shows that the "naked" truth is being survived by justice.

It can be concluded that although the elements in this complicated network of power relations having remained; the nature and the kind of relations between them shifted in many ways. That's to say, although this portrait continued to exist and it always included "Justice", "Truth", "oppressed people" and an "adversary lion"; the attributions to these actors and the relations between them have been redefined perpetually throughout the history. The questions on *what kind of meaning and power is attributed to justice, what kind of truth it establishes, who is oppressed, who is the adversary* all require the analysis of power relations and all belong to the politics. In this sense, this transformation and inferring the analytics of it is a challenging starting point for this study. Therefore, this thesis has analyzed this transformation of justice, particularly for the contemporary EU by revealing the new regime of truth established through the nexus between governmentality and securitization. Indeed, the analysis of this nexus has demonstrated the "Triumph of *the Regime of* Truth and the *Securitizing* Justice" for the EU since 1999.

In the portrait of this thesis, it has been shown that the truth is still hand in hand with justice. However, neither the truth nor justice is representing the power relations of the 16th century. First, the bearer of the scale of justice is not identified with God. Justice leaves its spirituality and begins landing on the

[189] See https://useum.org/artwork/The-Triumph-of-Justice-Hans-von-Aachen-1598

neoliberal world. And the “truth” is not as naked as before, but it appears in a veiled form, concealing its private parts and hidden agenda by hanging on to "justice". The new “truth” is nothing but the market. All men have started to act under this new regime of truth and her foundation: *securitizing justice*. In this thesis, the findings that lead to the emergence of this portrait can be split up into two groups. These are on the one hand the conclusions regarding the conceptualization and on the other hand, the conclusions on the analysis of the EU based on this conceptualization.

In this regard, one of the main outcomes of this thesis is the new conceptualization of justice as “securitizing justice”. It has been described as the consequence of securitizing politics, which points out to the politics which has managed to penetrate security concerns into all “non-security” areas. The securitizing politics appears at the point where the sociological approach to securitization and the dispositif of security of the Foucauldian governmentality meet. This type of politics taking effect after the 2000s, has been highlighted with its structure that governs, circulates and manages through liberal freedom and allocates a room for maneuver instead of direct control. The professionals and the agencies that provide this functioning such as politicians, police organizations, custom officers, border patrols and agencies, secret services, private corporations, etc all have been underlined. It has been especially emphasized that neoliberal discourse is always associated with danger and need for security under securitizing politics. It has been indicated that securitizing justice is the new understanding to justice which appears in line with this politics.

Therefore, securitizing justice has been presented with its characteristics of neoliberal governmentality and concerns of extended securitization. First of all, it constructs the basic pillars of the neoliberal governmentality, by setting the legal rules and regulations and facilitating the governing of individuals from a distance.

This distance contains both the discourses and the practices regarding freedom and security. The prohibited actions and punishments are well-defined in juridical code and thus, the population is monitored, circulated and corrected regularly. It sets the rules and instruments of the game; provides the playground and defines the players. The homoeconomicus rationality of both the individuals and society appears as the source of freedom for all. And the enterprise society is being established on this rationality. In fact, the homoeconomicus rationality is the point of "the veil of ignorance" of the securitizing justice; and it is never ignored in advanced liberal societies. So, in securitizing justice, the interests of the citizens and consumers are always intertwined. Therefore, it welcomes new understandings of equality, freedom, and rights based on this rationality. It does not need to be based on universal human rights or egalitarian perception or claim of distribution of wealth. The competitiveness of the order and the contract-based relations and rights are fundamental for the definition of justice. As long as the competition is provided by the legal contracts and the actors can opt-in and opt-out; justice is deemed attained. In this sense, injustice is associated with what is "unjudicial" but not with the "unfair". This constructs the basis of legitimacy for any exclusion, inclusion or securitization for the benefit of the neoliberal order. In fact, this character of securitizing justice appears as the main subsidiary element of securitizing politics. The rules and regulations that are set, legitimize the issues to be securitized. Besides, the professionals and the agencies that are functioning within this system popularize the practices of neoliberal governmentality and the securitization. It disguises the practices of neoliberal society as the practices of justice. Likewise, it produces practices that feed the neoliberal order. In this way, it legitimizes and deepens the advanced liberal order by conducting the individuals that have the freedom to conduct themselves. That is to say, it establishes and nourishes the neoliberal regime of truth.

The emergence of such an understanding of justice in the EU primarily concerns the policy field of justice. On the other hand, the way that securitizing justice emerges; the use of discourses and the practices of neoliberal governmentality and securitization, the construction process of the regime of truth also requires analytics for other policy areas as well. In other words, securitizing justice, which is built on the pillars of neoliberal governmentality and the securitization, can be found within other policy areas. Indeed, the priority area of "justice and fundamental rights" has been targeted through the cooperation of security and justice in the EU. In this sense, the policy areas related to migration, home affairs, economic growth, etc which are not directly related to justice at first glance, can also intersect with securitizing justice. Thus, it is crucial to analyze the relations of power, to understand the impact and the instruments with which they drain, penetrate into and disguise with other forms, and to realize the regime of truth that they establish. In this regard, special attention has been drawn to the issues that were not previously addressed as a matter of justice. With this feature, this study aimed to make a new contribution to the related literature and argued that justice remains submerged in the other securitized policy fields. As has noted before, deprivations of rights, discriminatory policies and unequalities towards third country nationals and migrants all have been deemed reasonable for the sake of security. These are all perceived as outcomes of the policies of economy, security, migration or home affairs. It is underlined that it is more of a matter of justice and rights beyond a technical rationality.

To be able to reveal a portrait of "securitizing justice" as such in the EU, the analysis has been conducted within three interrelated parts on the basis of the literature of Foucauldian governmentality and the contemporary approaches to the securitization. In the first two instances, securitizing justice has been manifested with its legal, procedural and instrumental forms. It has been exposed that the EU has established and secured an enterprise society through laws and regulations.

That is, securitizing justice has been described as the source of legitimacy to consolidate the neoliberal order. Then it has also put forth that this economic-juridical order has been strengthened through various, interconnected policies and instruments by individualizing and totalizing power of neoliberal governmentality. It has been come out that justice policy is not only made up of laws and regulations but also instruments belonging to the economic governance or user-friendly tools in the digital market. This finding showed the mentality of killing two birds with one stone on the policy of justice. In fact, the scoreboards, e-portals and web applications not only measure justice, give political recommendations and provide access to justice; but also give support for economic recovery, growth, and structural reforms. Having accepted that the securitizing justice has attained its goal in construction and deepening of the advanced liberal order, in the last part it has been analyzed and criticized in terms of its promises, discourses, and operations towards non-EU nationals. It has been concluded that even the legal, procedural and functional forms of justice have been securitized towards the third-country nationals, migrants, and asylum-seekers; and the discourse of access to justice for all has been silenced. In addition, in line with the "Back to Schengen" roadmap analysis, the explicit cost-benefit calculation has been emphasized and it has been pointed out that securitizing justice mainly contributes to the goals of advanced liberal EU. In conclusion, it has been argued that after 1999 justice has become a policy area in its own just like other policy areas in the EU. Since then, although justice has been polished and idealized in the discourse, it has been implemented in a procedural and functional manner like other policy areas in the annual cycle. In other words, justice has become part of economic governance just like other policy areas. The findings of this study acknowledge that justice policy in the EU is almost composed of procedural and functional norms, but not treated as a core value. It has been put forward that the concerns of securitization for the sake of

the sustainability of the EU internal order has prevailed the matter of justice. Thus, even if there is a discrepancy in terms of freedom and rights , it has not been perceived as a matter of justice but a matter of the policy area where it's hidden behind; economy, security or home affairs. That's why; the controversies in the area of Home Affairs have been put forward as security issues, but not justice. And therefore, it is inevitable not to provide "justice for all" as a result of not addressing these issues as a matter of justice.

Besides, justice that is remarked in this study is crucial to demonstrate the described regime of truth. In fact, within the regime of truth that is set, justice creates an illusion that it is touched upon while implementing the legal necessities of the economic governance and other policy areas for the sustainability of the single market. Thus, the need for justice becomes an issue that cannot be raised. It is designed as already done. It is already there for economic growth; for consumers, businesses and citizens. To reveal the transformation of justice and even attempt to criticize this "well-functioning" system for justice policy was the toughest and the most challenging point of this study. This analysis has demonstrated the rationality behind the policy of justice, which was discursively brought to the fore since 1999. In fact, it is the functioning of the "good government" based on the "truth" but not justice as a horizon. Besides, this functioning also implicates the homoeconomicus rationality inside. The rationality which is disguised as the "moral autonomy"[190] of rational agents, in fact, indicates the rationality of the homoeconomicus. This rationality either targets the consumer instead of the citizen or defines a consumer-citizen by embracing both. In this system of well-defined contracts, justice is not perceived as the "realization of good" but "access" to a certain legal framework for the sake of the security of the neoliberal order. The parties of this contract are defined as the beneficiaries of the order having access to this legal framework. Fairness,

[190] See Kant, I. (1999), *Metaphysical Elements of Justice*, Hackett Publishing Company: Indianapolis

inclusiveness, equality, non-discrimination, freedom, human rights, and universal values need not be addressed through these legal contracts and instruments but the mechanical and practical regulation is aimed to realize the circulation and conduct of the population. The more the parties are "empowered" and "individualized" by the contracts and the instruments, the more the system is strengthened and totalized. As has been revealed, justice scoreboards may not measure the member countries' level of justice, fundamental rights and freedoms but it ensures that the members will provide investment-friendly environment for the internal market. Consumer and market scoreboards monitors whether the rules of the game are properly implemented by the actors in the single market. As long as the consumers and investors enter and act freely in the market, the mission is deemed accomplished. The e-justice mechanisms provide good practices on the way to establish the digital single market. Indeed, not all the affected actors have the access to these tools or not all the voices are heard in each of these cases. Thereby, the elements of targeting, selecting and excluding of this regime of truth are justified instinctively. For now, this exclusionary order, which has been established for the EU citizens, businesses and consumers could expand its circle for the sake of the security of the EU integration or neoliberal order in the future. The EU, with its flagship position for spreading the values and norms, is in fact implicitly spreading this understanding of justice through all-pervasive mechanisms of governmentality. In this regard, justice, which is securitizing and being securitized, should be brought into the agenda and the inconsistencies should be popularized. Otherwise, the discriminatory processes that are silently approved today, would exclude anyone that is against the system tomorrow.

Within this context, this study points out to the securitizing and securitized aspects of justice and reveals that justice has begun to disappear as a value in the process of transforming into a facilitating tool of the economic-juridical order. At the same time, this study emphasizes that securitizing justice establishes and

consolidates the neoliberal regime of truth. This vicious circle means that as long as the neoliberal system continues, it requires securitizing justice; and so long as securitizing justice functions, the neoliberal order subsists. Therefore, this study accepts that it is hard to offer alternatives to securitizing justice. In this line of thought, it has also been acknowledged that it would also be unrealistic to assert for the EU that an understanding of universal justice should replace securitizing justice at all. Indeed, it has been exposed that securitizing justice sustains European integration which is primarily an economic integration on a neoliberal basis and it wouldn't be replaced easily with a conception of justice that may overshadow this integration. Universal justice, which aims to protect individuals based on human rights without making any discrimination, seems to be the best in the ideal world. However, this type of justice would be interpreted as an intervention to the national sovereignty of the member state if it contradicts with national interests. Each and every nation state would like to rely on its own understanding of justice based on her national dynamics, traditions, values and laws to preserve their interests. Then, member states would be so competitive to provide non-domination for their sovereignty and this would, in the end, harm the supranational structure of the Union. Thereby, they would begin implementing individual, tough policies by moving away from standardization and integration. This would also have harmful consequences for both the European integration and the fate of justice. Moreover, there would be much tougher, peculiar national policies based on distinctive conceptualizations of justice damaging the liberal norms and values of the EU. On the other hand, securitizing justice would evacuate justice as a value day by day and would make an exclusionary effect in the society. Therefore, while designing new horizons, it should be considered that even if justice cannot be fixed by a single, universal principle; it should be approached as a unifying value primarily. In addition, it should include all the affected parties based on the denominator of the fundamental freedoms, human

rights, and rule of law, but not only the targeted/selected ones. The "interoperability" of these common values will make a much more valuable contribution to everyone in the long run.

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APPENDICES

A. LIST OF INTERVIEWS AND THE QUESTIONS

- Interview I: 2019, Aristotelis GAVRILIADIS, European Commission Directorate General for Justice and Consumers Unit for Justice Policy and the Rule of Law.

- Interview II: 2019, Christian BERGER, Ambassador, Head of Delegation, Delegation of the European Union to Turkey.

- Interview III: 2019; Alexander IVANTCHEV, Head of Sector e-Justice Policy and Grant Management Directorate-General for Justice and Consumers

- Interview IV: 2019, Didem BULUTLAR-ULUSOY, Political Officer – Legal issues, Delegation of the European Union to Turkey.

Interview Questions for DG Justice and Consumers / Unit for Justice Policy and the Rule of Law

1. What is the importance of justice for the EU? Is there a special emphasis on justice in the EU as a superior ideal/target which depends on equality, human rights, fundamental rights and freedoms? Or is it more like procedural and based on the rule of law framework?
2. Justice, especially in the case of the EU, stands out as a policy area where more than one policy area/institution/agency are intertwined. (Security, fundamental rights and freedoms, economy, etc.) Do you think the EU's

justice policy in a structure that the home affairs and foreign policy are intertwined as well? If it is true, do you think that this nesting situation creates any inconsistency in the politics of justice?

3. In the mapping of the area of justice, freedom and security (AJFS) as a whole; there are many DGs and related agencies. Is there any specific DG or any EU agency that you have more interaction with in the area of justice policy?

As a priority area of the Commission, "the justice and fundamental rights" targets the cooperation on security and justice in the EU and preserving the rule of law. Thus, it points out the policy areas of "security union", "judicial cooperation", "fundamental rights", "data protection" and "consumer protection". Within this structure, the main Commissioner working in the area of security, justice and freedom is called "the Commissioner of Justice, Consumers and Gender Equality". And the related DG is DG JUST under this structure. Although not functioning under the Commissioner of Justice, Consumers and Gender Equality; and in fact belonging to two different Commissioners[191] in terms of the policy areas, there is one more policy department which is listed under the priority area of "justice and fundamental rights". It is DG Migration and Home Affairs (DG HOME):

4. In DG JUST one can see the emphasis on focus on the free internal market and economic growth and the DG HOME there is the emphasis on the internal and external security and migration. Based on the work of these two DGs, can we define justice as a unifying area where the fields of freedom and security are well-articulated? Does this situation create a disadvantage in terms of justice?

[191] Dimitris Avramopoulos, Commissioner of Migration, Home Affairs and Citizenship and Julian King, Commissioner of Security Union for the years 2014-2019.

In line with the Stability and Growth Pact and European 2020 Strategy, we can see a serious restructuring towards stability and growth in the EU. "The EU Justice Agenda 2020-Strengthening Trust, Mobility and Growth within the Union" is one of the repercussions of this tendency. When we look at the work of DG JUST after 2013, we see that there are tools such as Consumer Justice Scoreboard / Consumer Scoreboards (ESIF, European Semester, Annual Growth Survey Reports, Country Recommendations etc.). The policy area of justice seems to be an element of the EU economic governance system:

5. How do you interpret this in terms of the justice policy area?

Again in the EU Justice Agenda for 2020, justice was approached under four titles. These were; "Enhancing Mutual Trust", "Justice for Growth", "Justice for Citizens: Making Justice Simple for Citizens" and "Protecting Fundamental Rights".

6. How does EU position the type of justice "justice for growth" among the other types such as distributive, procedural, fairness etc?
7. Do you think that "the justice is for growth" or "growth is for justice"? Can anyone conclude that there is a straight relation between economic growth and justice?
8. In an article, Karnell[192] (scholar) claims that the effort to build high-level security could harm the construction of the justice sphere, and do you see any contradiction between justice and security? The issue of security in the EU also covers many areas (from environmental / natural disasters, to economic crisis, terrorism and illegal immigration), which area can cause the most conflicts with justice?

[192] Karnell, H. (2014, "Two Conceptions of Justice in EU Constitutionalism. The shaping of security law in Europe", https://www.researchgate.net/publication/268790661.

9. In the recent period, especially in the post-2015 debate on migration, the EU's migration policies are said to have prioritized protecting the security policy framework of the Schengen Agreement, rather than compliance with the principles of human rights, fundamental rights and freedoms. How do you interpret this, does it create a justice deficit for the EU?

Interview Questions for DG Justice and Consumers / Unit for e-Justice Policy

1. When was the e-justice portal opened? And what were the main motivations to establish it?
2. How many users are registered in the portal? Do you have a counter to find out how much it is visited per day?
3. Is the e-justice portal well-known, how do you promote or announce it? (what additional advantages do you provide?)
4. How many companies are registered in the portal-BRIS? How the companies are registered, is it compulsory?
5. Can we use the database for searching companies and get in contact with them as well, as non-EU members? Can I just search and contact for any of them for any purpose?
6. Which section of the e-justice portal is used the most?
7. Do you further provide the information you get for other departments or agencies?
8. There is a shopping cart sign in the screen, what is it for?

9. Do you have e-sales section in the e-justice portal such as in Turkey? (In Turkey: Information on the assets to be auctioned by enforcement and bankruptcy offices are posted on the E-Sales Portal. Using an e-signature you can select the asset to offer an e-bid and view general information and pictures of the asset and you can deposit the security for the asset online and offer a bid.)

10. What kind of messages do you receive most for the “spread the word” section?

11. Do you think e-justice portal facilitate access to justice?

12. Do you make impact assessments for e-justice?

13. Can you define the conception of justice on which "e-justice portal" depends?

Interview Questions for EU Delegation/Head of Delegation

1. What is the importance of justice for the EU? Is there a special emphasis on justice in the EU as a superior ideal/target which depends on equality, human rights, fundamental rights and freedoms? Or is it more like procedural and based on the rule of law framework?
   Did you realize any special emphasize on justice in matters that fall under the jurisdiction of the EU delegation?

Justice, especially in the case of the EU, stands out as a policy area where more than one policy area/institution/agency are intertwined. In fact, security, fundamental rights and freedoms, economy, etc. are all interconnected in the AFSJ:

2. Does this interdependence among policy areas create any inconsistency for the politics of justice?

   And does this interdependence connect the domestic and foreign policy of the EU in terms of justice policy? (The policies such as the "*effective justice" inside the EU for the internal market and "judicial reforms"* demanded from the countries in the pre-accession process and *"external border management"*: It is argued that the functioning of the single market requires removal of the borders inside the EU based on mutual trust, however, this cannot be achieved without securing the external borders.)

3. In the mapping of the area of freedom, security and justice (AFSJ) as a whole; there are many DGs and related agencies. Is there any specific DG or any EU agency that you have more interaction with in the area of justice policy?

What kind of interaction do you have with FRA?

As a priority area of the Commission, "the justice and fundamental rights" targets the cooperation on security and justice in the EU and preserving the rule of law. Thus, it points out the policy areas of "security union", "judicial cooperation", "fundamental rights", "data protection" and "consumer protection". Within this structure, the main Commissioner working in the area of security, justice and freedom is called "the Commissioner of Justice, Consumers and Gender Equality". And the related DG is DG JUST under this structure. Although not functioning under the Commissioner of Justice, Consumers and Gender Equality; and in fact belonging to two different Commissioners[193] in terms of the policy areas, there is one more policy department which is listed under the priority area

[193] Dimitris Avramopoulos, Commissioner of Migration, Home Affairs and Citizenship and Julian King, Commissioner of Security Union for the years 2014-2019.

of “justice and fundamental rights”. It is DG Migration and Home Affairs (DG HOME):

4. In DG JUST one can see the emphasis on the free internal market and economic growth and the DG HOME there is the emphasis on the internal and external security and migration. Based on the work of these two DGs, can we define justice as a unifying area where the fields of freedom and security are well-articulated? Does this situation create a disadvantage in terms of justice?

In line with the Stability and Growth Pact and European 2020 Strategy, we can see a serious restructuring towards stability and growth in the EU. “The EU Justice Agenda 2020-Strengthening Trust, Mobility and Growth within the Union” is one of the repercussions of this tendency. When we look at the work of DG JUST after 2013, we see that there are tools such as Justice Scoreboards/ Consumer Scoreboards (ESIF, European Semester, Annual Growth Survey Reports, Country Recommendations etc.). The policy area of justice seems to be an element of the EU economic governance system:

5. How do you interpret this in terms of the justice policy area?

Again, one of the projections of the EU Justice Agenda for 2020 is the judicial reforms (for national justice systems and rule of law) which are being implemented in the candidate countries in the pre-accession term such as Turkey:

6. How does the EU monitor the steps taken towards the independence and impartiality of the judiciary, effectiveness and efficiency, and administration in Turkey? Is there any Scoreboard-like reports?

7. Do you think the mechanisms TAIEX (Technical Assistance and Information Exchange), and Twinning as such are effective in Turkey for the area of justice?

Again in the EU Justice Agenda for 2020, justice was approached under four titles. These were; "Enhancing Mutual Trust", "Justice for Growth", "Justice for Citizens: Making Justice Simple for Citizens" and "Protecting Fundamental Rights".

8. How does the EU position the type of justice "justice for growth" among the other types such as distributive, procedural, fairness etc?
9. Do you think that "the justice is for growth" or "growth is for justice"? Can anyone conclude that there is a straight relation between economic growth and justice?
10. In an article, Karnell[194] (scholar) claims that the effort to build high-level security could harm the construction of the justice sphere, and do you see any contradiction between justice and security?

The issue of security in the EU also covers many areas (from environmental / natural disasters, to economic crisis, terrorism and illegal immigration), which area can cause the most conflicts with justice?

11. In the recent period, especially in the post-2015 debate on migration, the EU's migration policies are said to have prioritized protecting the security policy framework of the Schengen Agreement, rather than compliance with the principles of human rights, fundamental rights and freedoms. How do you interpret this, does it create a justice deficit for the EU?

[194] Karnell, H. (2014), "Two Conceptions of Justice in EU Constitutionalism. The shaping of security law in Europe", https://www.researchgate.net/publication/268790661.

Interview Questions for EU Delegation/Unit of Legal Issues

1. 1999 Amsterdam Anlaşması'ndan itibaren başlayan süreçte giderek başlı başına bir politika alanı olan "adaletin" AB için önemi nedir? AB kimliği ve evrensel değerler açısından yeri nedir? AB'de adalete ilişkin, "hukukun üstünlüğü (rule of law)" dışında bir üst ideal olarak adalet vurgusu var mıdır? (eşitlik, insan hakları, temel hak ve özgürlüklere dayanan)
2. Adalet, özellikle AB örneğine bakıldığında, birden fazla politika alanının, kurumun/birimin iç içe geçmiş olduğu bir politika alanı olarak öne çıkıyor. (Güvenlik, temel hak ve özgürlükler, ekonomi gibi) Sizce bu tespit doğru mu? Doğru ise, bu iç içe geçmişliğin adalet politikası konusunda bir tutarsızlık yaratacağını düşünüyor musunuz?
3. Adalet politika alanının birçok politika alanı ile iç içe olması, adaleti (ya da bu alanda kullanılan araçlar/kurumlar vs) AB'nin yönetişim sistematiği içerisinde de önemli bir konuma sokuyor. Bu durum AB'nin adaleti hem bir amaç hem de etkin bir araç olarak ele alabilmesini sağlıyor. Sizce hem amaç hem araç olmak bu politika alanını güçlendirir mi, etkisini azaltır mı?
4. Komisyonda adalet alanı ile ilişkilendirilebilecek 2 DG bulunuyor. (DG JUST ve DG HOME.) Birinde adalet ve tüketici/ekonomi odağını; diğerinde ise iç işleri ve göç odağını görüyoruz; yine birinde piyasaya ilişkin özgürlük vurgusunu, diğerinde ise iç ve dış güvenlik vurgusunu görüyoruz. Bu iki DG'nin çalışmalarından yola çıkarak AB'de adalet alanının özgürlük ve güvenlik alanlarının eklemlendiği, birleştirici bir alan olarak tanımlayabilir miyiz? Bu durum adalet hususunda bir eksiklik bir dezavantaj yaratır mı?

5. Bir makalede[195], Prof. Karnell, yüksek seviyeli güvenlik inşaa etme çabasının adalet alanı inşaasına zarar verebileceğini iddia ediyor, siz adalet ve güvenlik arasında bu türlü bir çelişki görüyor musunuz? AB'de güvenlik konusu da birçok alanı içeriyor (çevre/doğal felaketlerden, ekonomik krize, teröre ve yasal olmayan göçe kadar), sizce en çok hangi alan bu türlü bir çelişkiye sebebiyet verebilir?
6. AB'nin iç ve dış güvenlik politikalarına baktığınızda adalet ve demokrasi açısından nasıl bir fark bulunuyor? (AB'nin üye ülkeler üzerindeki egemenlik gücü ve üye ülkelerin AB ile etkileşimi ve üye olmayan ülkelere karşı politikalar bağlamında)
7. Son dönemde, özellikle 2015 sonrası, göç konusuna ilişkin tartışmalarda, AB'nin göç politikalarında, insan hakları, temel hak ve özgürlükler ilkelerine uyumdan çok Schengen Anlaşması'nın güvenlikçi politika çerçevesini korumaya öncelik verdiği söylenmekte. Bu konuyu nasıl yorumlarsınız, bu AB açısından bir adalet açığı yaratır mı?
8. Avrupa 2020 Stratejisi ve İstikrar ve Büyüme Paktı (Stability and Growth Pact)'nı takiben adalet alanının iktisadi yenilenme, büyüme ve yapısal reformları destekleyeceği 2014 tarihli Com. Ile belirtiliyor. (In a Communication from the Commission, in 2014 and titled as "The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union", it is indicated that "…in line with Europe 2020 strategy, EU Justice policy has become also a support for economic recovery, growth and structural reforms".) Daha sonraları adalet politikasına ilişkin bir çok dokümanda bu vurguyu görebiliyoruz. 2013 sonrasında DG JUST'ın çalışmalarına bakıldığında, "Justice Scoreboard/Consumer Scoreboards" gibi araçların (ESIF, European Semester, Annual Growth Survey Reports, Country Recommendations vs

[195] Karnell, H. (2014, "Two Conceptions of Justice in EU Constitutionalism. The shaping of security law in Europe", https://www.researchgate.net/publication/268790661.

ile bağlantılı olarak) olduğunu görüyoruz. Adalet politika alanı AB ekonomik yönetişim sistematiğinin bir unsuru gibi görünüyor. Bunu adalet politika alanı açısından nasıl yorumlarsınız?

9. AB'nin adalet alanı için kullandığı tanımlardan biri olan "justice for growth" hedefini nasıl bir adalet olarak yorumlayabilirsiniz? (Yasal-Prosedürel A, Dağıtıcı A., Hakkaniyet Temelli A., Sosyal A. ?)
10. Justice for Growth or Growth for Justice?- Ülkedeki iktisadi durum ile adalet arasında bir doğru orantı var mıdır?
11. Yukarıda bahsedilen AB araçlarının yanı sıra; TAIEX (Technical Assistance and Information Exchange), twinning gibi araçların AB adalet alanı için ne gibi katkılar sağladığını söyleyebilirsiniz? (TR özelinde)

B. CURRICULUM VITAE

A. PERSONAL INFORMATION

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B. EDUCATION

Degree	Institution	Year of Graduation
MS	Ankara University, Political Science	2008
BS	METU, Political Science and Public Administration	2005
High School	Mehmet Emin Resulzade Anadolu High School, Ankara	2000

C. WORK EXPERIENCE

Year	Place	Enrollment
2008-Present	TÜBİTAK/ Directorate for International Cooperation	Program Coordinator
2007-2008	Halkbank General Directorate/Management of Budget and Performance	Assistant Expert

D. FOREIGN LANGUAGES

Advanced English

E. PUBLICATIONS

Theses:

1. Doğan-Arslan, E. (2011), "Internationalisation of India On Science and Technology and Policy Recommendations For Turkey in This Process" *(TÜBİTAK Expertise Thesis)*

2. Doğan-Arslan, E. (2008), “Politics of Poverty in Developing Countries: The Case of Turkish Social Solidarity Fund”, Supervisor: Prof. Filiz ZABCI, Department of Political Science and Public Administration, Ankara University (*masters thesis*)

Papers:

1 Doğan- Arslan,. E (2019), "İzlanda Tencere Tava Devrimi", Toplum ve Bilim, Sayı:149, 129-146, İletişim Yayınları: Ankara

Conferences:

2 Doğan-Arslan, E. (2011), “Analytical Report on the Regional Europe-Africa S&T Cooperation Landscape, including FP7 Projects and Other Relevant Initiatives”, Seventh Framework Programme Capacities International Cooperation, ERAfrica Project, Grant Agreement Number: 266603, Lisbon.

3 Doğan-Arslan, E.(2008), “Gelişmekte Olan Ülkelerde Yoksulluk Siyaseti”, Uluslararası Yoksulluk Sempozyumu, İstanbul.

Short Stories:

4 Doğan, E. (2001), “Çıkmaz Sokak”, Glokal, Sayı:11, 60-61, Odtü İşletme Topluluğu: Ankara.

5 Doğan, E. (2001), “Ölüm”, Aykırı Sanat, Sayı:49:17.

6 Doğan, E. (2001), “Yaz Bitti Kışa Merhaba”, Aykırı Sanat, Sayı:52, 4-5.

7 Doğan, E.(2003), “Son Öykü”, Bilim ve Aklın Aydınlığında Eğitim, Sayı:37, 52, MEB:Ankara.

8 Doğan, E.(2004), “Köprüde Yürüyen Adam”, Türk Edebiyatı, Sayı:369, 46, Türk Edebiyatı Vakfı Yayınları: İstanbul.

9 Doğan, E.(2004), “Tadından Yenmez”, Türk Dili, Sayı:627, 271-273, TDK:Ankara.

10 Doğan, E.(2004), “Cilalı Televizyon Devri”, Bilim ve Aklın Aydınlığında Eğitim, Sayı:48, 10-11, MEB:Ankara.

11 Doğan, E.(2005), “Uzun Yaşamanın Sırrı”, Türk Dili, Sayı:640, 382-384, TDK:Ankara.

12 Doğan, E.(2006), “Yazar”, Türk Dili, Sayı:651, 286-288, TDK:Ankara.

13 Doğan, E.(2008), “Ayna, Ayna”, Türk Dili, Sayı:684, 595-600, TDK:Ankara.

14 Doğan-Arslan, E. (2019), “Buğday Tarlasına Yolculuk”, *Bilim Kurgu Öyküleri*, Odtü Yayıncılık: Ankara.

C. TURKISH SUMMARY/TÜRKÇE ÖZET

Bu çalışmada, neoliberal yönetimsellik ve güvenlikleştirici siyasetin bileşiminden oluşan yeni hakikat rejimi çerçevesinde 1999'dan sonra AB'de adaletin bir politika alanı olarak dönüşümü incelenmiştir. Bu doğrultuda, neoliberalizmin küresel olarak yerleştiği ve Soğuk Savaş'ın sona ermesinden sonra güvenlik algısının ve iktidar ilişkilerinin buna göre değiştiği süreçte, AB'nin Özgürlük, Güvenlik ve Adalet Alanındaki (AFSJ) adalet politikası çalışma kapsamına alınmıştır. Araştırma, AB'nin ve ilgili bağımsız kuruluşların dokümantasyonlarının incelenmesi ve ilgili temsilcilerle yapılan görüşmelere dayanan kapsamlı bir nitel analizle yürütülmüştür.

Analiz, Foucault'cu yönetimsellik kavramsallaştırılması ve çağdaş güvenlikleştirme literatürü temelleri üzerine kurulmuştur. İlk bölümde, AB örneğinde "güvenlikleştiren adalet" anlayışının ortaya çıktığı teorik ve tarihsel arka plan araştırılmıştır. Bu amaçla, Foucault tarafından ortaya koyulan "yönetimsellik" kavramı ve Foucaultcu literatürdeki "ileri" neoliberal toplumlar bağlamında "neoliberal yönetimsellik" kavramsallaştırmasına değinilmiştir. Bu, hem Foucault'nun orijinal makalelerini hem de ilham verdiği ikincil kaynakları içermektedir. Bu bağlamda, ileri neoliberal toplumlarda yönetimsellik ve post-yapısal güvenlikleştirme yaklaşımları arasında tarihsel bir bağ oluşturmak için ikincil kaynaklardan faydalanılmıştır.

AB'de ortaya çıkan adalet anlayışının böyle bir bağlantının sonucu olduğu iddia edildiğinden, ilk amaç, böyle bir noktaya varmamızı sağlayan kavramsal ve tarihsel yapılandırmayı ortaya koymaktır. Foucault'nun yönetim/yönetimsellik ile altını çizdiği şey, zorlama yerine özgürleştirerek yöneten bir iktidar biçimidir. Bu çerçevede, yönetimsellik çalışmaları devlet merkezciliğinden kaçınmaya ve iktidar ilişiklerinin yayıldığı tüm sosyal, politik ve ekonomik alanlara

odaklanmaktadır. Dolayısıyla, buradan kaynaklanan hakikat rejimi herhangi bir alandan, bir söylemden veya pratikten türetilebilmektedir. Foucault'nun da vurguladığı gibi, hakikat rejimi, siyasetin veya yönetim sanatının nihayetinde rasyonel veya bilimsel hale geldiği anlamına gelmemektedir. Hakikat rejimi ile kastedilen, anlaşılabilir bir bağlantıyla birbirine bağlanan bir dizi pratik oluşturabilen ve bu pratikleri doğru ve yanlış olarak düzenleyen belli bir söylem türünün bu pratiklerle birbirine eklemlenmesidir. (Foucault, 2008: 18). Bu açıdan, siyaseti kuşatan hakikat rejiminin, ancak onu oluşturan söylem ve pratikleri parçalarına ayırarak yorumlanabileceği düşünülmektedir.

Bahsedilen bu yeni hakikat rejimi, içinde neoliberal yönetimselliğin söylem ve pratiklerini içermektedir. Dolayısıyla, AB'de oluşan yeni hakikat rejimini ortaya koymayı planlayan bu araştırmada yönetimsellik incelemesi gerçekleştirilmiştir. Neoliberal yönetimsellik, temel hedefi nüfus, temel bilgi biçimi ekonomi politik ve ana teknik aracı güvenlik mekanizmaları olan yeni iktidar biçimini ifade etmektedir. (Foucault, 2007: 144). Analizde ilk olarak, AB'de neoliberal ekonomi, ekonomik yönetişim mekanizmaları ve homoekonomikus rasyonalitesinin gelişimi, daha sonra ise, güvenlikleştirme söylemleri incelenmiştir. Neoliberal yönetimsellik, hem egemenlik hem de disiplinci iktidar biçimlerinin öğelerini barındıran ve özgür bireylerin yönetildiği bir yönetim sanatı olarak ortaya çıkmaktadır. Rasyonel ve özgür bireyler bu neoliberal düzende özgür iradeleriyle seçimler yapmakta ve tüm sorumluluğu üstlenmektedir. Bu anlamda, ortaya çıkan hakikat rejimi neoliberal yönetimselliğin bireyselleştirici ve totaliterleştirici gücüne dayanmaktadır.

Bu düzenin sürdürülebilirliği, nüfusu makul seviyede kontrol etmek, yönetmek ve dolaşımı sağlamak için güvenlik aygıtlarının kullanılmasını gerektirmektedir. Bu nedenle, Foucault'cu yönetimsellik, güvenlik çalışmaları açısından da analiz edilmiştir. Neoliberal yönetimsellik içinde güvenliğin öne çıkan rolünü ortaya

koyabilmek için, Soğuk Savaş'tan bugüne güvenlik yaklaşımları gözden geçirilmiştir. Soğuk Savaş'ın iki kutuplu dünyasının geleneksel, devlet merkezli güvenlik bakış açısı terk edildikten sonra ortaya çıkan yeni yaklaşımlar ortaya konmuştur. Güvenlik ile ilişkilendirilen askeri tehditlere ekonomik, toplumsal, politik ve çevresel risklerin eklenmesiyle genişleyen güvenlik kavramı ve bu doğrultuda, realist, felsefi ve sosyolojik yaklaşımlar kısaca gözden geçirilmiştir. Bu incelemenin amacı, bu teorileri derinlemesine incelemek değil, neoliberal yönetimsellik tarafından kurulan yeni iktidar ilişkileri ağını güvenlik yaklaşımları açısından ilişkilendirebilmektir. Bu vesileyle, güvenlik kavramının güvenlik dışı alanlara doğru genişlemesinin, "siyasallaşmanın aşırı bir versiyonuna" (Buzan ve ark. 1998: 23) yol açması bu çalışmada güvenlikleştirici siyaset olarak ele alınmıştır. Güvenlikleştirici siyaset, Soğuk Savaş sonrası dönemde, neoliberal yönetimsellik ve güvenlikleştirme ile birlikte tezahür etmektedir. Çalışmanın ilk bölümü güvenlikleştirici siyasetin ve AB'de faaliyet gösteren yeni adalet anlayışınının ana unsurlarını tanımlamak için zemin oluşturmaktır. Bu bağlamda, bu yeni iktidar biçimi tarafından belirlenen yeni iktidar ilişkileri, araçlar, aktörler ve roller analiz edilmiştir.

AB'de bu kavramsallaştırmanın izlerini takip edebilmek için, bir sonraki bölümde, güvenlikleştirici adaletin bulguları AB politika gündeminde araştırılmıştır. Öncelikle, AB'de neoliberalizmin ve neoliberal yönetimsellik mantığının yerleşme süreci gözden geçirilerek, güvelikleştiren adaletin yasal kurumsal çerçevesi ortaya koyulmaya çalışılmıştır. Ardından ise adaletin diğer AB politika alanları gibi bir politika alanı olarak önceliklendirilme süreci, ilgili kurum ve kuruluşlar ile öncelik/politika alanları haritalaması yapılarak aktarılmıştır. Bu yeni adalet biçiminin AB'de nasıl işlediği öncelikle ilgili mevzuat ve AB adalet politika alanındaki ana aktörlerin faaliyetleri temelinde incelenmiştir. Bu doğrultuda; AB'nin resmi açık kaynak ve veri tabanlarındaki ilgili mevzuat; ekonomik yönetişim döngüsüne ait Yıllık Büyüme Araştırmaları,

Çalışma Programları, Stratejik Planlar ve Faaliyet Raporları; ilgili Genel Müdürlükler'in (DG) ilgili politika araçları ve bağımsız kurumların raporları analiz edilmiştir. Buna göre, ilgili AB Bildirimleri, Yönetmelikleri ve Direktifleri (1999-2019); Yıllık Büyüme Araştırmaları (2011-2019); Komisyon Çalışma Programları (1999-2018); DG Adalet ve Tüketiciler ve DG İç İşleri'nin Yıllık Faaliyet Raporları (2013-2017); 2016-2020 DG Adalet ve Tüketiciler Stratejik Planı; Adalet Skorbordları ve Ülkeye Özgü Öneriler (2013-2020); Tüketici Pazarı ve Koşulları Skorbordları (2013-2020); Temel Haklar Ajansı (FRA), Avrupa Veri Koruma Denetmeni (EDPS) ve İnsan Hakları İzleme Örgütü (HRW) (2011-2019) ve ilgili web sitelerinin çeşitli raporları ve tüm kaynaklarla ilgili sosyal medya bağlantıları incelenmiştir.

Analiz boyunca, Foucault'nun "yönetimsellik krizleri" tartışmasına atıfla; özgürlük ve güvenlik arasındaki gerilimden beslenen söylemler ve politikalar gündeme getirilmiştir. Neoliberal yönetimselliğin bireyselleştirici ve totaliterleştirici iktidarı, özgürlük, denetim, izleme, kısıtlama, optimal sınırlarda tutma ve döndürme prosedürleri bağlamında ele alınmıştır. Adalet politikası, özgürlük ve güvenlik arasındaki gerilimi gösteren bir politika alanı olarak vurgulanmış ve adalet politikasını özgürlük ve güvenlik arasında arabulucu olarak kullanmanın temel motivasyonları ve sonuçları çok boyutlu olarak araştırılmıştır. Bu noktada, adalet söyleminin ve politikalarının evrensel insan haklarına ve özgürlüklerine ne ölçüde katkıda bulunduğu; ne ölçüde "ileri liberal" AB'nin güvenlikleştirici kaygılarını gizlediği tartışılmıştır. Bu tartışmada, adalet politikası alanına ilişkin "gösterilmeyen" ve/veya "sessiz bırakılan" unsurlara dikkat çekilmeye çalışımıştır. Adaletin yasal/prosedürel bir araç olarak güvenlikleştirme politikalarını meşrulaştırması ve kolaylaştırması; yanı sıra üstü örtük bir biçimde güvenlik politikaları altında arka plana atılarak içinin boşaltılmasına dikkat çekilmiştir. Bunun için, resmi söylemde bahsedilmeyen ama AFSJ alanında benzer problematiği yansıtan çalışmalar da taranmıştır. Ayrıca, adalet politikası

alanına ait politika faaliyetleri ve çıktıları, bu alanla ile ilgili çalışmalar yapan FRA, EDPS ve HRW gibi uluslararası kurumların raporlarında da incelenmiştir. Aynı bakış açısıyla, DG Adalet ve Tüketiciler'de Adalet Politikası ve Hukukun Üstünlüğü biriminden ilgili kıdemli memur, DG Adalet ve Tüketiciler'deki e-Adalet Politikası ve Hibe Yönetimi Bölümü'nden sorumlu Başkan, Hukuki Sorunlardan sorumlu siyasi memur ve AB Türkiye Delegasyonu Başkanı ile görüşümeler gerçekleştirilmiştir. Bu görüşmeler sayıca sınırlı olmakla birlikte, dokümantasyon analizinde yer alan resmi söylemin, AB temsilcilerinin kendi ifadeleriyle karşılaştırılması açısından önemlidir. Buna ek olarak, görüşmelerin hem AFSJ'nin politika araçlarının yöneticilerini hem de üst düzey siyasi temsilini yansıttığı için faydalı olduğu düşünülmektedir. Adalet üzerine resmi söylemi araştırmak için bu temsilcilere açık uçlu sorular yöneltilmiş ve cevapları yorumlanmıştır.

Çalışma, Foucault'cu neoliberal yönetimsellik ve post-yapısalcı güvenlikleştirme yaklaşımlarına dayanarak kendi kavramsallaştırmasını çıkaran bir analiz sunmayı amaçlamıştır. Bunun için, "güvenlikleştiren adalet" kavramı tanımlanmış ve bu kavramın genel özellikleri belirlenmiştir. Özellikle ekonomik işletmeler toplumu yaratmak için yasaları bir araç olarak kullanan Ordo-liberal anlayıştan ve Amerikan neoliberalizminin homoekonomik rasyonalitesinden unsurlar barındıran neoliberal yönetimselliğin özellikleri incelenmiştir. Daha sonra, Ordo-liberaller tarafından hukuku üstyapı yerine ekonomik altyapıda konumlandıran "ekonomik hukuki düzen" in AB'deki yansımaları belirlenmiştir. Ayrıca, ileri liberal toplumlara özgü homoekonomik rasyonalitenin ekonomi dışı alanlara nüfuz etmesine dikkat çekilerek, iktidarın işletmeler, kuruluşlar, topluluklar, profesyoneller, bireyler ağı aracılığıyla merkezden kopması da Avrupa entegrasyon süreci bağlamında analiz edilmiştir. AB'deki politika alanlarındaki önceliklendirmede ekonomi politkalarının etkisi gösterilmeye çalışılmıştır. Bu analizde neoliberal yönetimselliğin; *ekonomik hukuki düzen, dolaşım, yönetim ve*

nüfusun düzenlenmesi, genişletilmiş güvenlik anlayışı, bireyselleştirme/totaliterleştirme, çok amaçlı pragmatizm, hedef alma/ dışlama/içerme, rekabet gücü ve pazar yönelimi, tüketici-vatandaş, egemen iktidar ve disiplinci iktidar: yasa, gözetim/düzeltme, güvenlik mekanizmaları gibi unsurları temel alınmıştır. Neoliberal yönetimsellik ve güvenlikleştirmenin unsurlarını taşıyan güvenlikleştirici siyaset sonucu ortaya çıkan "güvenlikleştiren adalet" ise; *bir güvenlik mekanizması olarak işlemesi (meşrulaştıran, çerçeve belirleyen, kolaylaştıran, denetleyen, engelleyen, hedefleyen, seçen ve döndüren), çok amaçlı pragmatikliği ve hakları tüketici-vatandaş hakları olarak ele alması, sözleşme temelli olması, ileri neoliberal toplumu beslemesi, diğer politika alanlarının etkinliğini artırmaya yönelik oluşu, ekonomik büyüme vurgusu* gibi özellikleri AB bağlamında ortaya koyulmuştur.

Bu kavramsallaştırma üzerine, Bölüm 4'teki analiz üçe ayrılmıştır. Bu üç alt bölüm aslında AB'nin adalet politikası alanında vurguladığı ana başlıklardır ve hepsi neoliberal yönetimsellik ve güvenlikleştirme kavramsallaştırmasının farklı unsurlarına işaret etmektedir. Bu bölümler şöyle adlandırılmıştır: "Büyüme için Adalet: İleri Liberal Toplumun Kurulması", "Vatandaşlar, İşletmeler ve Tüketiciler için Adalet: İleri Liberal Toplumun Derinleştirilmesi" ve "Himaye Eden Bir Avrupa İçin Adalet: Güvenlikleştirme Kuşatması altında Herkes için Adalete Erişim". Böylece, AFSJ'de "güvenlikleştiren adalet" i ortaya koyan hakikat rejimi, onun özgürlük ve güvenlik arasındaki arabuluculuktaki rolü ile ele alınmıştır. Gücünü yasal/prosedürel adaletten alan güvenlik mekanizmalarının, "herkes için adalet" vaatlerini baskıladığı gösterilmeye çalışılmıştır. AFSJ DG İç İşleri'nin işleyişinde adalete ilişkin ya da burada oluşabilecek adaletsizliklere ilişkin herhangi bir atıf yapılmadığından, analiz özellikle bu bölümde, göçmenler, sığınmacılar ve üçüncü ülke vatandaşları için göz ardı edilen bazı noktaları ortaya çıkarmak için derinleştirilmiştir. Bu şekilde güvenlikleştirilen meselelerin aydınlatılması amaçlanmıştır. İlk olarak, bölüm 4.2, "Büyüme için Adalet: İleri

Liberal Toplumun Kurulması", AB'de Foucault'cu neoliberal yönetimselliğin öne çıktığı noktaların gözlenebileceği gelişmiş bir liberal toplumun kurulması mantığının yönlerini ortaya koymuştur. Buna göre, AB'de rekabete, piyasanın sürdürülebilirliğini, ekonomik işletme toplumunu ve ekonomik-hukuki düzeni vurgulayan Ordo-liberal liberalizme ilişkin unsurların ilgili resmi dokümanlarda altı çizilmiştir. Ekonomik-hukuki sistemin tüm AB politika alanlarına hızlı ve etkili bir şekilde yayılmasını sağlayan ana mekanizmalardan biri, AB'nin yeni ekonomik yönetişim sistemi olarak vurgulanmıştır. Bu şekilde, Avrupa Sömestr'nin herhangi bir düzeyinde vurgulanan ekonomik öncelikli politika konuları, diğer politika alanlarını derinden etkilemektedir. Adalet politika alanında, ekonomik yönetişim mekanizması aracılığıyla ekonomik önceliklerin adaletin öncelikleri ile kolayca ilişkilendirilebileceği sonucuna varılmıştır. Böylelikle, ekonominin sürdürülebilirliği için en büyük koşullardan biri sağlam işleyen yasal bir yapı olarak tanımlanmış; "yatırımların artması" ise adalet politikası alanının önceliği haline gelmiştir. Ekonomik ve sosyal politikaların bu şekilde yakınsamasından iki sonuç çıkarılmıştır. Birincisi, ekonomik yönetişim mekanizmaları, ekonomik-hukuki düzenin uygulamaları yoluyla hem meşrulaştırılmakta hem de daha iyi işlev görmektedir. Adalet politikası da ekonomik hedeflerle birleştirilmekte ve "büyüme için adalet" veya "yatırım dostu çevre için adalet" olarak adlandırılmaktadır. Her ne kadar, bu bulgular adaletin geçirdiği dönüşüm hakkında ip uçları verse de, AB temsilcileriyle yapılan görüşmelerde bu dönüşüm kabul edilmemiş ve bu türlü bir adaletin bir adı koyulmamıştır.

İleri neoliberal toplumu oluşturan bu hakikat rejiminin araçlarından biri olarak işlev gören Adalet Skorbordları, bu bölümde incelenen pratiklerden birisidir. Adalet Skorboardları AB'deki adalet politikası alanının ekonomikleşmesini göstermekte ve adalet yapılarını bağımsızlık, kalite ve verimlilik açısından ölçülen ülkelere "siyasi mesajlar" vermektedir. Ülkelerin performansları sanki

ekonomik işletmeler ya da bir makinenin parçalarıymış gibi karşılaştırımakta; birinin performansı düşükse, AB'deki mekanizmanın geri kalan kısımlarını etkileyeceği düşünülerek; ülkeler uyarılmakta, verilen önerilerin yapılıp yapılmadığı dikkatle izlenerek düzeltilmeye çalışılmaktadır. Adalet Skorbordlarının mantığı, üye ülkelerde sosyal adalet ya da eşit haklara ulaşılmasını amaçlamamakta, piyasanın düzgün işlemesi için temel standartları sağlamaktır. Bu nedenle şartlılık anlaşmaları ve kemer sıkma politikalarının sonucu ortaya çıkabilecek sosyal adaletsizlikler bu denetim aracının konusu değildir. Bunun yerine, ekonomik büyümeye odaklı"etkili adalet" misyonunu çerçevesinde güvenli, yatırım dostu ve öngörülebilir bir ortam, karşılıklı güven ve sürdürülebilir büyüme hedefleyen güvenlikleştiren adalet öne çıkmaktadır.

"Vatandaşlar, İşletmeler ve Tüketiciler için Adalet: Gelişmiş Liberal Toplumun Derinleştirilmesi" başlıklı bölüm 4.3'te, bu tür bir toplumun Chicago Okulu'nun ortaya koyduğu homoekonomik zihniyetle sınırsız bir ekonomik düzen ile derinleştirildiği öne sürülmüştür. Burada bahsedilen, tüketici ve/veya vatandaş ve işletmeler ne kadar özgür hareket ederse, o kadar özgürleşir ve sistem o kadar iyileştirilir mantığının hüküm sürdüğü neoliberal yönetimselliğin bireyselleştirici ve totaliterleştiren gücüdür. Güvenlikleştiren adaletin rolü, kolaylaştırıcı olarak hareket etmek ve AB vatandaşlarının kendilerini AB sınırları içerisinde rahat hissetmelerini sağlamaktır. 2015 Yıllık Büyüme Araştırması'nda belirlenen Dijital Tek Pazar (DSM) stratejisinin oluşturulması önceliğinin adalet politika alanı için de bir öncelik olarak belirlenmesi buradaki analizde ana atıf noktalarından biridir. Vatandaşların kişisel verileri üzerinde daha fazla kontrole sahip olmalarını sağlamak, dijital ekonomiye olan güveni güçlendirmek ve dijital tek pazarın büyümesini desteklemek adalet politikasının amaçları olarak sıralanmaya başlanmıştır. e-Adalet Portalı da bu amaçlarla oluşturulmuş neoliberal yönetimselliğin tipik bir aracı olarak bu bölümde ele alınmıştır. Aynı anda birçok amaca hizmet eden bir yapısı olan portal, vatandaşlar, tüketiciler ve

işletmeler için adalete erişim sağlamakta, diğer yandan iş portalı/veritabanı ve izleme aracı olarak hareket ederek süreçleri şeffaflaştırıp kısaltmakta ve bu aktörler için "hayatı kolaylaştırmak"tadır. Bölümde ayrıca, DG Adalet ve Tüketiciler'in yürüttüğü izleme/denetim/düzeltme araçlarından biri olan Tüketici Skorbordları incelenmiştir. Bu skorbordlar, birey ve piyasa arasında karşılıklı güven oluşturmak ve her ikisini de özgürleştirmek için uygulanmaktadır. Bu anlamda, Tüketici Piyasa Skorbordları tüketicilerin mal ve hizmet piyasalarının performansını nasıl değerlendirdiğini izlemekte; Tüketici Koşulları Skorbordları ise, haklar ve piyasaya ilişkin bilgi ve güvenI değerlendirerek tüketici ortamını izlemek; uyum ve icra; şikayetler ve anlaşmazlıkların çözümünü kolaylaştırmayı amaçlamaktadır. Bu araçlar da, adalet altyapısını güvenceye alarak tüketiciyi ve dijital pazarı özgürleştirmek için e-ticaretin geliştirilmesi gibi DSM stratejisinin en yeni trendlerini de takip etmektedir. Sonuç olarak, prosedürel adalet anlayışı ekonomik hukuki düzeni kurmak ve tek pazarı güvence altına almak için ortaya çıkmaktadır. Amaçlanan, en başta temel değer olarak adalet değil, ekonomik büyümedir. Bu yüzden "adalet için büyüme" yerine "büyüme için adalet" olarak adlandırılır. Hareket özgürlüğünü güvence altına alan ve ekonomik entegrasyonu güvence altına alan bir adalet ortaya çıkmaktadır. Başka bir deyişle, adalet, adaletin kendisi için bir politika aracı değil, ekonomik entegrasyonu meşrulaştıran bir söylem olarak görünmektedir.

Ve son olarak, bölüm 4.4, "Himaye eden bir Avrupa için Adalet: Güvenlikleştirme Kuşatması Altında Herkes için Adalete Erişim" ise, bir yanda hedef alıp seçilen nüfusun nasıl yönetildiği, diğer yanda ise dışarıda bırakılan nüfusun ilgili güvenlikleştirici söylem ve pratiklerle nasıl "herkes için adalet" prensibi dışında tutulduğunu gösterilmeye çalışılmıştır. Bu bölümde, 2015 yılında mülteci krizini takiben "Schengen'e Dönüş" adı verilen yol haritasının uygulanması ve güvenlikleştirme hareketlerinin genişlemesi belirleyici unsurlar olarak ele alınmıştır. Analiz için, *göç, dış sınır yön*etimi ve *büyük BT veri*

tabanları ile ilgili politikalardan bazıları, neoliberal yönetimsellik perspektifi ve buna göre güvenlikleştirme uygulamaları üzerinde durmak üzere üç örnek olarak seçilmiştir. Böylece, güvenlik ve adaletin beraber ele alınması, (özellikle kişisel veriler üzerinde kontrol, etkili bir hukuk yoluna başvurma hakkı, "rahat hissetmek" vb. gibi AB vatandaşlarına taahhüt edilen konular) AB üyesi olmayanlar için bir kez daha test edilmiştir. Bulgulardaki ilk vurgu, AB'nin düzensiz göçün istenmeyen bir fenomen ve güvenlik tehdidi olarak algılaması, ancak tamamen dışlanmamasıdır. Göç, yönetilmeye, dolaşıma sokulmaya ve kontrol altına alınmaya çalışılmaktadır. Diğer yandan, yüksek vasıflı göç memnuniyetle karşılanarak fırsata dönüştürülmeye çalışılmaktadır. EURAXESS, AB Göç Portalı ve Mavi Kart Programı gibi kolaylaştırıcı dijital web portalları, temel olarak göçmenlerin serbest hareket etme kapasitesine sahip, rasyonel bireyler olarak kabul edildiğini ortaya koymaktadır. Bu araçlar ve programlar tarafından bireylerin erişimleri kolaylaştırılırken, AB, Birliğin ekonomik kalkınmasına ve performansına önemli bir katkı sağlayan Avrupa 2020 Stratejisi doğrultusunda dengeli ve kapsamlı bir AB göç politikasına dayalı "daha güvenli Avrupa" hedefini sürdürmektedir. Bu anlamda, maliyet ve faydaların hesaplanması ve risklerin tanımlanması yoluyla nüfusun idaresi sağlanmaktadır. Güvenlikleştiren adalete düşen görev ise, bu tür politikaların yasal mevzuatını belirleyerek meşruiyet zemini oluşturmaktır.

AB'nin başta göç ve diğer küresel tehditler altında, Schengen Anlaşması'nın askıya alınması durumunda her sektördeki azalan gelirleri gösterdiği "Schengen'e Dönüş" gündemi ışığında artan güvenlikleştirme pratikleri ile güçlendirilen kurumlar da incelenmiştir. Bu bağlamda, Frontex, Sıcak Nokta (Hotspot) yaklaşımı, geri kabul anlaşmaları ve AB büyük ölçekli BT sistemleri araştırılmıştır. Memnuniyetle karşılanan göçün yanı sıra, düzensiz ve istenmeyen göç ise AB'deki dış sınır yönetimi ile yönetilmektedir. İlk olarak, AB üye ülkelerinin sınırlı bir yetkiyle dış sınırlarda operasyonel işbirliği için

koordinasyon ajansı olarak kurulan Frontex'in, güvenlik profesyonelleri ve artan yetki alanı ile "gerçek gücünü" kazanma süreci gösterilmiştir. Kurum, kısa sürede, bir koordinasyon birimi olmaktan çıkmış, risk ve kırılganlık analizleri yapan, eğitim veren, havada ve denizde kendi sınır ve kıyı koruma görevlilerini ve kolordusunu konuşlandıran, veri otoriterileri ile very paylaşımı yapan ve sınır ötesi suçla savaşan bir yapıya dönüşmüştür. Frontex, sadece güvenlikleştirmeyi değil, aynı zamanda AB'nin bu hususta eriştiği uluslarüstü gücünü de ifade etmektedir. Bununla birlikte, FRA raporları, temel haklar konusundaki hassasiyetin kurumun güçlenmesiyle aynı hızda gelişmediğini belirtmektedir. Bu da, herkes için adalet sağlama amacından ziyade AB entegrasyonu için güvenlikleştirici kaygıların öne çıktığını göstermektedir. Benzer şekilde, hotspot yaklaşımı ve geri kabul anlaşmaları, sınırların korunması uğruna temel haklardan ne kadar fedakarlık edildiğini göstermektedir. "Olağanüstü" göçmen akışları ile başa çıkmak için başlatılan ve halen devam eden hotspot yaklaşımı da dış sınırları güvence altına alma amaçlı pratiklerden biridir. Aksi iddia edilmesine rağmen, mülteci ve "ekonomik" göçmen ayrımı bulanıklaştığı ve hak ihlallerinin yapıldığı süreçlere; kalabalık, temel sağlık ve gıda ihtiyaçlarının güçlükle karşılandığı kamp uygulamalarına devam edildiği görülmektedir. Ayrıca, mahkemelerin olmayışı nedeniyle adalete fiziksel erişimin sağlanamaması ve kişilerin kabulü sırasında yaşanan sıkıntılar buradaki, adalet, özgürlük ve eşitlik kısıtlamaları olarak göze çarpmaktadır. Bu bölümde incelenen diğer bir pratik olan geri kabul anlaşmaları, sınırları koruyan ve istenmeyen düzensiz göç sayılarını azalatan "başarılı" araçlar olarak yansıtılmaktadır. Bununla birlikte, Avrupa sınırlarındaki göç/adaletsizlik sayılarını görünmez hale getirmesi, AB'ye giren göçmenlerin ve sığınmacıların, sığınma olanaklarına erişmelerinin ve insanca muamele görme konusunun güvence altına alınmaması ve iade prosedürünün insan haklarına saygıya dayalı olduğundan emin olunmaması nedenleriyle eleştirilmektedir. Son olarak, AB büyük ölçekli BT Sistemleri de ele alınmıştır. Özellikle birlikte

çalışabilirlik tartışması, AB'nin bu veritabanlarını oluşturmak için orijinal motivasyonundan nasıl uzaklaştığını göstermektedir. Bu anlamda, bu bölümde FRA ve EDPS görüş ve raporlarına dikkat çekillmiştir. En eleştirilen uygulamalardan biri, üçüncü ülke vatandaşlarının bir "güvenlik tehdidi" olarak algılanmalarına yönelik ayrımcı uygulamalardır. Üçüncü ülke vatandaşlarının hassas kişisel verilerinin kaydedilmesi, saklanması ve paylaşılması, gizlilik ve veri korumasının temel haklarının korunmasıyla çelişkilidir. Aynı şekilde, büyük BT veritabanları, verilerin işlenmesi ve/veya yanlış veya yasalara aykırı olarak saklanan verilerin işlenmesi sırasında ortaya çıkan zararlar için etkili bir çözüm yolunun sağlanması açısından sorunlu görünmektedir. Bu bağlamda, EDPS ve FRA'nın argümanları ile, AB Temel Haklar Şartı'nda beyan edilen gizlilik haklarının, veri korumasının ve etkili bir hukuk yoluna başvurma hakkının AB vatandaşları ile sınırlı olmadığı vurgulanmıştır.

Sonuç olarak, güvenlikleştiren adalet üç durumda incelenmiştir. İlk durumda, ekonomik-hukuki düzenin garantisi olarak öne çıkmıştır. Yani, adalet politikası, "üstyapının" bir faktörü olmaktan ziyade, ekonomik altyapının hukuki düzenleyicisi olmuştur. Nitekim, hem AB'de ekonomik yönetişim sisteminin neredeyse sonsuz ölçüde genişleyen mevzuatını ve prosedürlerini oluşturmakta, hem de bu sistem tarafından beslenmektedir. Çünkü ekonomik büyüme hedefine ulaşmak için tüm yönetişim yapısı adalet için önemlidir ve ekonomik büyüme için adalet olmazsa olmazdır. Benzer şekilde, ikinci durumda, güvenlikleştiren adalet, ileri liberal toplumları derinleştirme görevi üstelenmektedir. Bunlar arasında, homoekonomik öznelerin (vatandaşlar, tüketiciler ve işletmeler) ekonomik büyümeye yönelik piyasada rahat ve güvenli hareket etmesini sağlayan kurumlar, uygulamalar ve araçlar için gerekli mevzuat ve sürekli yenilenen söylemler bulunmaktadır. İleri liberal toplumda adalet, homoekonomik öznenin kolaylaştırıcısı ve dijital piyasadaki profesyoneller, AB vatandaşları, tüketiciler ve işletmeler için erişilebilir bir araç olarak inşa edilmiştir. Üstelik kolaylaştırmanın

yanı sıra; ürettiği aktörler ve araçlar ile tüm ekonomik yönetişim sistemini ölçmekte, incelemekte, onaylamakta ve yönetmektedir. Bu nedenle, güvenlikleştiren adaletinin ilk iki tezahürü, piyasanın işleyişine meydan okuyabilecek olan tehditleri güvenlikleştirip, ileri liberal düzeni oluşturmakta ve derinleştirmektedir. Ortaya çıkan üçüncü durumda ise, "adalet ve temel haklar" önceliği altındaki güvenlik ve adalet arasındaki işbirliğinde güvenlik ağır basmaya başlamaktadır. Göçmenlerin, potansiyel göçmenlerin ve üçüncü ülke vatandaşlarının aslında AB sınırları içinde rahatlıkla hareket eden "yasal" öznelerle aynı haklara sahip olmadıkları gösterilmiştir. Güvenlik prosedürleri politika alanına hakim olmuştur. Mahremiyet ve veri koruma ile ilgili temel hakların korunması, etkili hukuk ve ayrımcılık yasağı konularında "herkese adalet" sağlanması zımni olarak riskli hale gelmiş ve bir anlamda güvenlikleştirilmiştir.

Bahsedilen analiz ışığında, bu çalışma adaletin güvenlikleştiren ve güvenlikleştirilen yönlerine işaret etmekte ve adaletin ekonomik-hukuki düzenin kolaylaştırıcı bir aracına dönüşme sürecinde bir değer olarak ortadan kalkmaya başladığını ortaya koymaktadır. Aynı zamanda, bu çalışma güvenlikleştiren adaletin neoliberal hakikat rejimini oluşturduğunu ve pekiştirdiğini vurgulamaktadır. Bu kısır döngü, neoliberal sistem devam ettiği sürece güvenlikleştiren adalete gereksinim duyulacağı ve güvenlikleştiren adalet işlev gördüğü sürece, neoliberal düzenin devam edeceği anlamına da gelmektedir. Bu nedenle, bu çalışma güvenlikleştiren adalet için alternatifler sunmanın zor olduğunu kabul etmektedir. Bu düşünce çerçevesinde, AB için evrensel adalet anlayışının güvenlikleştiren adaletin yerini alması gerektiğini iddia etmenin gerçekçi olmadığını da kabul edilmiştir. Gerçekten de, güvenlikleştiren adaletin, Avrupa ekonomik entegrasyonuna katkı sağladığı bu çalışmada gösterilmiş ve bu entegrasyonu gölgede bırakabilecek başka bir adalet anlayışı ile kolayca değiştirilmeyeceği ortaya koyulmuştur. Herhangi bir ayrımcılık yapmadan insan

haklarına dayalı ve tüm bireyleri korumayı amaçlayan evrensel adalet, ideal dünyada en iyisi gibi görünmektedir. Ancak, bu tür bir adalet, üye devletin ulusal çıkarlarıyla çelişmesi durumunda ulusal egemenliğe müdahale olarak yorumlanacaktır. Her ulus devlet, çıkarlarını korumak için kendi ulusal dinamiklerine, geleneklerine, değerlerine ve yasalarına dayanan kendi adalet anlayışını talep edecektir. Bu da sonunda Birliğin uluslarüstü yapısına zarar verecektir. Bu durum, ülkeleri standardizasyon ve entegrasyondan uzaklaştırarak, bireysel ve baskıcı politikaların da önünü açacaktır. Bunun hem Avrupa entegrasyonu hem de adaletin kaderi için zararlı sonuçları olacaktır. Diğer yandan, güvenlikleştiren adaletin sürdürülmesi ise, adaletin her geçen gün bir değer olarak tahliye edilmesine ve toplumda dışlayıcı politikalar uygulanmasına yol açacaktır. Bu nedenle, yeni ufuklar tasarlanırken, adalet tek bir evrensel ilke ile tespit edilemese bile; öncelikle birleştirici bir değer olarak ele alınmalıdır. Buna ek olarak, temel özgürlükler, insan hakları ve hukukun üstünlüğü paydasına dayalı olarak sadece hedeflenen/seçilen nüfusu değil etkilenen tüm tarafları içermelidir. Ortak değerlerin "birlikte çalışabilirliği" uzun vadede herkese çok daha önemli bir katkı sağlayacaktır.

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