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## **AN ANALYSIS OF THE CRITICISM OF THE AREA OF FREEDOM SECURITY AND JUSTICE OF THE EUROPEAN UNION**

Key words:

*Area of Freedom Security and Justice, Police and Judicial Cooperation in Criminal Matters, European Union, Euro-scepticism*

### **Introduction**

In the process of European integration the matter of security is slowly becoming more and more important. Despite the fact that the Maastricht Treaty was first to establish an institutionalised form of cooperation in this matter, one must also notice previous efforts to cooperate in the field of security, particularly in the field of internal security that were conducted outside the European Communities. TREVI Group, Schengen Agreement (later implemented into the EU aquis) and the action of The Council of Europe are examples of such frameworks that provided important experience to the European Council in the process of forging the 3<sup>rd</sup> pillar of the European Union<sup>1</sup>. With the development of such cooperation it was obvious, that in terms of democracy, critics of this process would also emerge.

Since the Maastricht Treaty, the European Union became more and more concerned about matters of security. Two of the three pillars of the European Union are concerned with matters of the security: The Common Foreign and Security Policy dealt with the field of external relations (from 1999) as well as with matters of European Security and Defence Policy. Justice and Home Affairs (after the Nice Treaty Judicial and Police Cooperation in Criminal Matters) have always dealt with the internal security of the Member States. Furthermore, the recent political and social

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<sup>1</sup>J. Monar, *The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs*, "Journal of Common Market Studies", Vol. 39, No 4, 2001, pp. 748- 749.

situation in Europe, as well as the process of globalization and the fall of the Soviet bloc led to the blurring of the distinction between internal and external security of the states, causing them on occasion to become less distinguishable<sup>2</sup>. This resulted in the increasing interest of both European governments and the European Union, as an inter- and supra-national body, in the development of the process of securitization.

This process is being criticised both on the national and European level by multiple and various critics. In this paper the Author intends to show the criticism of the “European level of securitization”. The figures of public life criticizing this process are presented, as well as the subject of this criticism (in many dimensions) and some subjective opinions and discussion on this criticism.

This paper is based on the variety of the materials provided by the abovementioned critics. The other types of sources which are used in this paper include the articles of the European public sphere and the publications, which analyze and criticize the idea of securitization and some statistics from secondary sources concerning the question of research.

### **The object of the criticism – securitization of the EU**

The process of securitization of the EU started with the establishment of the European Union in the Maastricht Treaty (1992). Security matters have become more and more important to the European Union, since its leaders realised that such an organisation with a huge, effective single market and freedom of movement requires a proper means of security. That is why the European Union developed its security policies – Common Foreign and Security Policy (the former second pillar of the EU) and Police and Judicial Cooperation in Criminal Matters (the former third pillar of the EU and a part of the Area of Freedom Security and Justice of the EU). In this paper the matters of the so called “soft” security will be analyzed, and therefore the focus will be focus on the Police and Judicial Cooperation in Criminal Matters (PJCCM), as well

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<sup>2</sup> M. Anderson, J. Apap, *Changing Conceptions of Security and their Implications for EU Justice and Home Affairs Cooperation*, “CEPS Policy brief” no 26, 2005, p. 3.

as on the EU policies that can be linked to security matters, and which together with PJCCM constitute the Area of Freedom Security and Justice (AFSJ).

The process of building the European framework for security cooperation had not started in 1990's. The framework for such cooperation existed before the establishment of the European Union. Such initiatives as TREVI group or the activity of the Council of Europe in this field created a background for a more advanced and far more institutionalized policy of the EU (after its creation)<sup>3</sup>. Therefore in Maastricht the Member States have already had some experience in the field of coordinating (internal) security policies, as well as integration experience provided by decades of economic cooperation. This process has also been developed and improved by Amsterdam and Nice Treaties. The Lisbon Treaty brought the pillar construction of the EU to the end and strengthened certain aspects of cooperation between the Member States in the field of internal security. The Treaty of Lisbon provides even more opportunities for further securitization, with art. 86 TFEU providing bases for the creation of a European Public Prosecutor's Office from Eurojust and art. 77 requiring the EU to gradually introduce an integrated management system for external borders, which may be perceived as a "green light" for the creation of the European Corps of Border Guards<sup>4</sup>.

Yet despite the development of the AFSJ of the EU and its implementation, the EU remains only a part of securitization in Europe. The whole process has two levels – national and European. On the national level, the legal and technical aspects are "securitized" – it includes increasing funds on law enforcements, development of such programmes as CCTV, police databases and Airport Security improvements, as well technological development of certain national law enforcement agencies. European securitization (or securitization on the European level) is a process, in

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<sup>3</sup> J. Monar, *The Dynamics of...*, pp 748-749.

<sup>4</sup> The issue of European Corps of Border Guards was debated in 2004, but the member states could not reach consensus on this subject. See: H. Jorry, *Construction of a European Institutional Model for Managing Operational Cooperation at the EU's External Borders: Is the FRONTEX Agency a decisive step forward*, CEPS Challenge Research Paper No 6 2007, p. 2. Retrieved on 24.10.2011 from: [http://www.libertysecurity.org/IMG/pdf\\_Construction\\_of\\_a\\_European\\_Institutional\\_Model\\_for\\_Managing\\_Operational\\_Cooperation\\_at\\_the\\_EU\\_s\\_External\\_Borders.pdf](http://www.libertysecurity.org/IMG/pdf_Construction_of_a_European_Institutional_Model_for_Managing_Operational_Cooperation_at_the_EU_s_External_Borders.pdf), p. 2, 24.10.2011.

which the EU is rather a framework provider for the improvement of cooperation between Member States, than a real force able to enforce some regulations on the security policy of the Member States. Even the institutionalized examples of such cooperation – European agencies such as FRONTEX or EUROPOL are just frameworks of cooperation and training, rather than real law enforcement institutions able to fight threats to the security of the EU directly. Of course some the aforementioned institutions have certain operational competences (Joint Investigation Teams organized by Europol and Rapid Border Intervention Teams organized b Frontex), but the operational activity of these agencies is only subsidiary to the activity of the national law enforcement agencies.

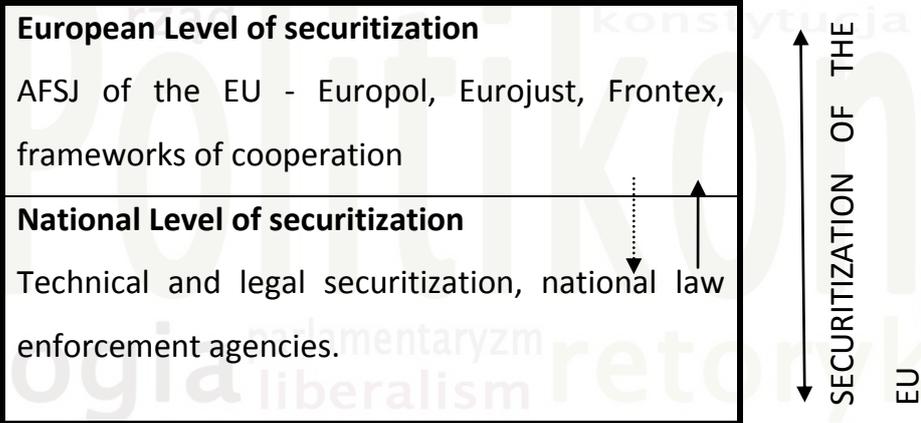


Figure 1: Securitization of the EU

In this paper, the Author presents and analyzes the current criticism of the European Level of securitization (the criticism of the efforts of the EU to provide security, through institution and multilateral cooperation within the institutional structure of the EU). There are many aspects of the criticism of the AFSJ in general and the securitization of the EU in particular. Some critics attack certain institutions, pointing out their weaknesses or undermining the rationality of their existence. Other critics criticize the whole character of the security policy, putting stress on the democratic problems of such a policy. The criticism itself, therefore, is diversified not only by its source, but also by its character.

## The Critics

Policies and fields of cooperation included in the Area of Freedom, Security and Justice of the EU, the actions undertaken by EU's specialized institutions (i.e. EU agencies) and internal security policies of the Member States are being criticised by many various public figures in the European Union and the Member States. Some of these critics are political parties, some have the status of Non-Governmental Organizations (NGOs), others are highly professional political scientists who highlight the institutional weakness of the AFSJ. The criticisms differ, occasionally due to a difference in character of these critics. For example the character of criticism presented by some of the academics, such as Ian Loader<sup>5</sup>, cannot be perceived as even remotely similar to the views of political parties such as FPÖ (Austria), NPD (Germany), or Front National (France). Furthermore, Social Democrats' and Socialists' criticism of the ASFJ is based on different arguments to those of national or liberal parties. It is, therefore, important to introduce.

## The Left – Socialists, Social Democrats

The political orientation of the governments of the Member States is crucial to the AFSJ, because of its traditionally intergovernmental character. Despite the fact, that the Lisbon Treaty increased (in theory) the role of parliaments, both European and national, in the process of developing the AFSJ and provided new instruments for the Commission in this field, it is the Council that remains the main decision making authority in the AFSJ<sup>6</sup>. The role of the European Parliament is not very noticeable within the PJCCM, which makes the governments of the Member States even more influential. On the other hand the European Parliament has a more substantial role in

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<sup>5</sup> I. Loader, *Policing Securitization and Democratization in Europe*, Challenge Paper, 2005. Retrieved on 23.10.2011 from : <http://www.libertysecurity.org/article209.html>. This article was first published In T. Newburn (Ed), R Sprarks (Ed), *Criminal Justice and Political Cultures: National and International Dimensions of Crime Control*, Cullompton, Willan, 2004,pp. 49-79.

<sup>6</sup> H. G. Nilson, Julian Siegl, *The Council in the Area of Freedom, Security and Justice*, in: Joerg Monar (ed.), *The Institutional Dimension of the European Union's Area of Freedom, Security and Justice*, P.I.E. Peter Lang, Brussels, 2010, p. 79.

the migration and asylum policy of the European Union. Still, in the European Parliament we also have a division between the parties on the Left and on the Right.

In these ways the moderate criticism of the security policies of the European Union is influenced by the political character of the parties on the Left. Yet it should be remembered that among many political groups criticizing the process of securitization of the European Union, the Socialists and Social Democrats are the less eurosceptic, their attitude to the EU is generally quite positive and enthusiastic.

The parties on the left criticize the efforts of governments to increase security, as, in their opinion, it is a way for the government to increase its control over society and above all over the opposition. The left side of the political scene also tends to criticise the amount of money spent by governments on the security and securitization. The increasing importance of the security policies in the policies of the EU causes the increase of the budget costs of such policies, not only on the national level (in the Member States), but also in the amount of money that the European Union spends on activities connected with providing security for the Member States (through the AFSJ activities).

Another reason for the criticism of the security policy of the European Union is due to the migration policy of the EU. Traditionally, Socialists and Social Democrats put stress on more open borders of the European Union, which in their opinion would make Europe more culturally eclectic and diverse. That is why the independence<sup>7</sup> of such agencies as Frontex (called by the critics the “expulsion agency”<sup>8</sup>), is being criticized, as it may lead to the external borders of the European Union becoming less accessible for people, such as asylum seekers. The concept of “Festung Europa”<sup>9</sup> is not popular among politicians on the left, neither on the national nor on the European level.

In this spirit, the human rights organisations are criticising some aspects of the AFSJ. The example is a criticism of the immigration policy – claiming that western

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<sup>7</sup> J. Helene, *Construction of a European ...* pp 9-12.

<sup>8</sup> *Ibidem*, p. 20.

<sup>9</sup> See: D. Bigo, *Frontier Control in the European Union: Who is in Control?*, in: D. Bigo, E. Guild, *Controlling Frontiers, Free movement Into and Within Europe*, Ashgate Publishing Group, Aldershot 2005, s. 52-55.

countries are denying the right to wealth and better quality of life to the non-EU citizens. The development of the police cooperation is being criticised by some NGO's and civil rights organizations, because of the threat of turning the EU into a "police state". Furthermore, the lack of democratic control and institutions in the AFSJ (described in the further part of my paper) is being criticised by national and international organizations which aim to promote democracy. This shows that the idea and the shape of the AFSJ is being criticized not only by the political groups (Socialists and Social Democrats), but also by some non-governmental organizations and groups, which, despite the fact of calling themselves "unaffiliated", belong rather well to the Left.

### **The Liberals**

The radical Liberals – or rather the euro-sceptic Liberals and Libertarians, also criticise the AFSJ and other security-related policies of the EU, however on other grounds than those of the parties on the Left. The main point of the Liberal critics of the securitization on both European and national level, is that it is limiting the personal freedom of the citizens. The governments of the Member States, as well as the European technocrats governing AFSJ (see below), according to radical Liberal/Libertarian movements, are using the fear of security threats to extend their power and control over citizens, through increasing the level of security. What is more important, such an increase of the security is not necessary, in the opinion of various liberal political groups, they are just used by the governments and the EU technocrats as an excuse to gain control over the people<sup>10</sup>.

In the opinion of liberal groups the progressing securitization of the European Union (see above) is not a response to a threat of violence of the others. Such a securitization is replacing the violence of the individuals and the groups that may threaten the societies, by the violence of the State and the European Institutions

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<sup>10</sup> A. Plahr, *Fear is a bad counselor*, New Libertas, Issue no. 6, 2008, p. 6.

such as Europol, which “omits to protect individual freedom”<sup>11</sup>. This is done by gathering the excessive amount of data about the citizens, including the citizens that are not suspected of having committed any sort of unlawful act. On the European level this data is exchanged between the Member States, using such frameworks as EuroJust and Europol. The other way of limiting the freedom of the citizens, according to the eurosceptic Liberals, is the technical aspects of securitization such as fingerprinting technology (EuroDac, see below) and CCTV in the European cities<sup>12</sup>.

To conclude, the core of the Liberal and Libertarian criticism of the AFSJ (apart from some general liberal euro-skepticism) is the violation of the personal freedom of the citizens, using the pretext of threats, such as organized crime or terrorism. In this field, the European Union is being criticized for enhancing cooperation between security agencies by building databanks for the information gathered by those agencies, as well as encouraging the Member States to develop their “excessive” (in the opinion of liberals) security policies, by conducting the training and providing material means for cooperation of national bodies responsible for security.

### **The Right – Nationalists**

The nationalists criticise not only the AFSJ and the securitization of the EU, but also the concept of the European Union itself. The basic concern of these groups is the issue of losing the sovereignty by the national states ..

For the right wing parties, the police (and other security agencies) represent the authority of the state in the field of law and order. This exclusive right of law enforcement institutions to force citizens and other subjects to obey the law, as well as the right to investigate cases of breaking the law, is one of the attributes of a modern national state, it is a part of the sovereignty of the state. That is why transferring part of such an important competence and attribute of the state to the organization like the European Union is controversial. The right wing parties criticize this process, because they claim that when the Member States lose the total control

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<sup>11</sup> I. Caldeira, *Security or Freedom, is it really the question?*, New Libertas, Issue no. 6, 2008, p. 7.

<sup>12</sup> V. Gujić, *Who is your favorite Big Brother character*, New Libertas, Issue no. 6, 2008, pp. 10-11.

over the “state violence”, they lose the sovereignty and the European Union becomes able to maintain control and forces directly the citizens (even without the consent of the national governments) to obey the law of the European Union.

The other aspect of the criticism of the AFSJ is that the control over the data gathered by the law enforcement bodies, can be used by the other Member States. Nationalists put stress on the fact that preserving and protecting classified data is an important part of keeping the independence from the European Union.

The institutions, such as EuroJust and European Arrest Warrant are criticized by nationalists as well. In this case the main issue is the jurisdiction of another country over the citizen of a Member State. This as well, according to the far right-wing parties, is an indicator of losing independence from the EU.

To conclude, the criticism of the AFSJ brought up by the far Right or nationalist parties concentrate on losing the sovereignty of the Member States and giving too much unjustified competences to the inter- or supranational organisation, such as the European Union.

## **The general criticism of the security policy of the EU**

### **Lack of parliamentary and judiciary control**

The whole AFSJ deals with the lack of control by the democratic institution. Before the Lisbon Treaty, the Judicial and Police Cooperation in Criminal Matters (similarly to the Common Foreign and Security Policy) used to have predominantly intergovernmental character. Therefore, most of the decisions used to be made by the intergovernmental bodies, without being directly influenced parliaments. Both national and European parliaments used to be excluded from the decision making process in the 3<sup>rd</sup> pillar as well having a narrow function of control.

The Treaty of Lisbon has extended the parliamentary control over the PJCCM by involving the European Parliament in the decision-making process. However, legal acts concerning the operational cooperation of national law enforcement bodies remained to be accepted by unanimous decision in the Council (after consultation

with the European Parliament). This shows, that despite some the extension of parliamentary control, the AFSJ's crucial legal acts are still adopted on the basis of intergovernmental consensus rather than more democratic majority vote with the European Parliament involved. It is also worth mentioning, that despite some progress in this field, some aspects of the AFSJ are not subjected to the control by the Court of Justice of the European Union (principally the matters of maintaining the internal security and public order by the Member States, as well as some aspects of the PJCCM)

Naturally the Council is the main legislative body of the AFSJ, yet its legislative function is based on opinion of the technocratic bodies and committees to such an extent, that some critics claim, that Council's role is limited to accepting or refusing the projects prepared by the technocrats managing the former third pillar (see below)<sup>13</sup>. The control of the European Parliament, initially extremely moderate, has been increased in the Treaties of Amsterdam, Nice and Lisbon. However, due to the technocratic nature of the AFSJ and the five years of transition period in the former 3<sup>rd</sup> pillar policies, it is yet too soon to determine, whether the new provisions of the Lisbon Treaty will provide a much needed reduction of the democratic deficit in the AFSJ.

The other aspect of the aforementioned lack of control over the process of developing the AFSJ is the threat of increasing independence of the specialized institutions (agencies) of the AFSJ. If not controlled by primary (obviously more legitimized) bodies of the European Union, such as the Council, the Commission, or the EP, agencies like Frontex or Europol may be not only ineffective, but also may pursue goals of their own, instead of their constitutional goals, which is a feature of all security oriented institution left without a proper democratic control.

The lack of parliamentary control is not the only issue of the AFSJ. Moreover, the European Court of Justice has only limited competence in the PJCCM and the legal control of all the official acts and the actual actions undertaken within the

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<sup>13</sup>H. G. Nilson, Julian Siegl, *The Council in the Area of Freedom...*, pp. 62-64.

PJCCM is therefore moderate. In the opinion of critics this undermines the rule of law in the European Union, as well as, once again, decreasing the level of legitimization of some aspects of the AFSJ.

It is hard not to agree with those critics who point out the lack of democratic control of the AFSJ of the EU. This problem gets even more important regarding the fact that the security matters become more and more important to the EU (process of securitization). In fact, in the opinion of some critics, security issues come to the forefront of the policies of the European Union<sup>14</sup>. In this context, the lack of democratic instruments and parliamentary control must be worrying. On the other hand, the security policy is very important for the Member States and that is why they are not so eager to change the character of this cooperation to a more supranational one, which would provide more democratic, judicial and parliamentary control.

The Treaty of Lisbon did, on one hand, provide some basis for increasing the parliamentary, democratic and judiciary control over the AFSJ except for the matters of operational cooperation between the law enforcement agencies of the member States. On the other hand, the Treaty extended the competences of EU's specialized agencies (such as Europol and Frontex), especially in supporting and organizing the aforementioned operational cooperation. This posts a question of whether the Lisbon Treaty really decreased the democratic deficit in the AFSJ.

### **Technocratic character of the AFSJ**

The other feature of whole AFSJ that is being criticized is the technocratic character of management of its policies. Technocracy is a characteristic of whole the European Union, but it is most visible in the AFSJ<sup>15</sup>.

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<sup>14</sup> I. Loader, *Policing, Securitization...*

<sup>15</sup> *Ibidem*.

TECHNOCRACY

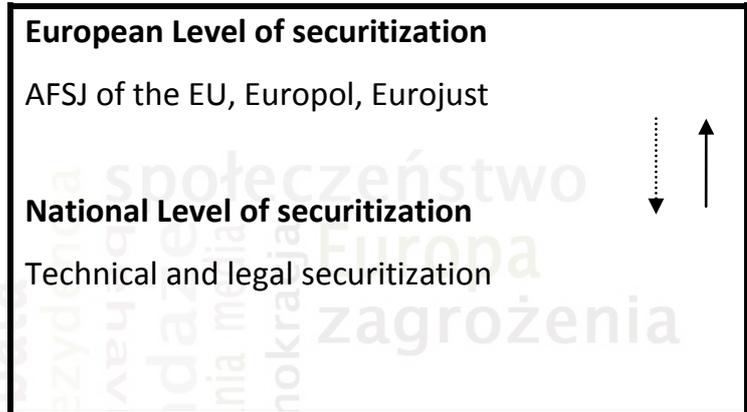


Figure 2: Technocracy in the process of securitization of the EU

Indeed the AFSJ has always been dominated by “middle-range officials of the Community and Member-states in a combination of variety of private and semi-public bodies”<sup>16</sup> - various types of experts: judges, prosecutors, senior police officers, lawyers. The speciality of some tasks of the AFSJ requires that people managing those policies are specially trained to do it and that they have a previous experience (on the national level). Therefore the possible human resources for those jobs are rather limited and the rotation of the personnel is rather moderate, comparing to the other fields of cooperation within the EU. This is being criticized because those experts are supposedly isolating the governance of AFSJ from the democratic institutions, and thereby from democratic control (see above). The institutional examples of this process will be described in the next part of this paper.

The criticism of the AFSJ technocratic character does seem reasonable, but considering this problem, one must ask oneself a question, whether or not it is possible for the PJCCM (and generally the whole AFSJ) to be less technocratic. The nature of security management is that it has to be conducted by experts, quite homogenous group of people (higher rank police officers, law enforcement establishment). This is the model which applies to the most of the national states and which most probable to be applied in the institutional structure of the EU.

<sup>16</sup> J. Weiler, *The Constitution for Europe: “Do the New Clothes Have an Emperor” and other essays on European Integration*, Cambridge University Press, Cambridge, 1999, p. 98.

## The matter of effectiveness and subsidiarity

The last general problem of the AFSJ of the EU mentioned in this paper is the issue of subsidiarity and effectiveness of the JPCCM. The subsidiarity rule indicates, that the European Union “intervenes”, only if the Member States can’t cope with certain issues on their own. In other words, the EU can take the responsibility and involve in certain affairs only if Member States can’t achieve certain goals that they want to achieve, without the EU’s help. On the other hand, the EU regulations with regard to the AFSJ seem to be placed above the national regulation, since in the matters of the AFSJ the EU has shared competence with the Member States, which *shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence*<sup>17</sup> (art 2.2 TFEU).

The need for such cooperation seems obvious to any reasonable observer, yet some critics state that this cooperation goes too far or takes the wrong form. For example, critics claim, that some forms of cooperation, initially needed, developed too much and at the moment are violating the subsidiary rule (example: Europol’s data exchange cooperation – see below). Some claim that this is related to the technocratic character of the management of the AFSJ because technocrats tend to spread their competences, beyond the subsidiary and necessity, trying to legitimize their power and are trying to use a public fear caused by new threats (such as terrorism), to legitimize (not without successes) their mode of governance of the AFSJ of the EU.

Such criticism of the cooperation provided by the development seems exaggerated. The challenges for the security evolved as the European Union expanded (enlargements in 2004 and 2007). That is why the AFSJ has to evolve as well. Because of the changing and increasing threats cooperation between the Member States must also be increased and institutionalized. Because those challenges have inter- and transnational characters, the Member States can cope

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<sup>17</sup> Notable exception is the matter of providing the internal security and maintaining law and order in the Member States, which is an exclusive competence of the Member States (art 72 TFEU).

with them only by cooperating with each other more intensively, using the frameworks provided by the AFSJ.

### **The criticism of the institutions and policies – FRONTEX and EUROPOL as examples**

European Police Office (Europol) is the main institution responsible for police cooperation in the EU. The character of its criticism are various, from fundamental problems of legitimization (see above), through management issues, to the question of the Member States' sovereignty.

Naturally in the case of Europol, one can find all the problems of AFSJ mentioned in the previous part of this paper. Lack of parliamentary control and legitimization problems are the main issues among them. This is caused by the character of the Europol – it is a European agency, therefore control over its action is limited, especially the control of the European Parliament. As mentioned above, the parliamentary control over Europol's activities was extended by the Treaty of Lisbon, except for the matters of operational cooperation between the law enforcement agencies of the member States. On the other hand, the Treaty extended the Europol's competences in supporting and organizing the aforementioned operational cooperation (excluded from the parliamentary control). It is, therefore, hard to determine, whether the new provisions of the Treaty of Lisbon really increased the democratic and parliamentary control over Europol's activity.

The management issues are somehow connected with a technocratic character of the AFSJ in general and PJCCM in particular, yet in the case of Europol, the problem becomes even more complicated. Europol is a specific agency – a network to improve cooperation between national law enforcement agencies, therefore its structure is based on police officers from the Member States. Most of the network of Europol are liaisons in the Member States (on various levels and ranks). In 2010 Europol itself employed 698 people out of whom 45,6% were law enforcement officers from the Member States and third parties<sup>18</sup>. The amount of law

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<sup>18</sup> <https://www.europol.europa.eu/content/page/staff-statistics-159>. 19.11.2011.

enforcement officers, i.e. strict technocrats, employed by Europol provides the technocratic character of management, which is being criticized.

No matter how unpleasant the connotation of the word “technocratic”, one must not forget that Europol is an institution created to support local and national law enforcement agencies in their struggle against threats, such as organized crime, terrorism, drug trafficking, or international fraud. Such tasks require Europol hiring certain experts and require that there be no rotation of the staff (like in other, “more democratic” institutions of the EU). The later is caused by the fact that Europol’s tasks require long term operations, which of course require significant experience in law enforcement matters and long speciality within Europol. Therefore there is little rotation and changes among the officials of Europol. This would be quite disturbing in the case of other European institutions, but in the case of Europol it must be accepted as a necessity in order to provide the best possible effectiveness.

Some of the critics put stress that giving up some of the law enforcement competences is one of the symptoms of the fall of the national state. Policing is an instrument of enforcing law and order in the society and therefore an undisputable element of state’s sovereignty and therefore, in the opinion of various critics, should be the competence granted exclusively to the Member States.

Such criticism is easy to repulse, because Europol is right now only a framework for training and cooperation of national police agencies, with only minor operational power, mainly to support Joint Investigation Teams created by the Member States to conduct a particular investigation. However after ratification of the Lisbon Treaty, new opportunities opened before Europol. It is expected that some years from now, Europol may become as operative as Frontex is today (see below). This is making the critics of the European level of securitization anxious, because it is the first step to what sceptics call “European FBI”. It is hard to analyze criticism of something that may or may not happen in the future, yet it must be said, that present level of European integration does not allow for the creation of an independent

European law enforcement agency, which would undermine the Member States' sovereignty and exclusive right to provide internal security.

The last aspect of criticism is the issue of protection of personal data. Providing the exchange of data between law enforcement agencies in the EU is one of Europol's most important tasks. Critics raise the argument, that police institutions in the Member States gather data that are irrelevant to their work (for example about sexual orientation or political preferences of certain citizens<sup>20</sup>). This data is transferred and exchanged with national police agencies of other Member States. The problem of the right to privacy is mentioned by critics of Europol; this criticism, even though it may be viewed as a reasonable point of view, should not be addressed to Europol. As a network Europol only provides an exchange of databases gathered by national agencies, Europol is not gathering information or data itself, therefore criticizing it for the fact that national police agencies are gathering and exchanging unnecessary data is unjustified and to some extent pointless.

To conclude, many aspects of Europol (and more generally: police cooperation) criticism is caused by a lack of actual knowledge about the Europol itself, or by false imagination of Europol as "European Police" or "European FBI"<sup>21</sup>. Other aspects seem to be derived from these false assumptions. At the same time, the criticism caused by the technocratic construction of Europol and other related issues (lack of parliamentary control etc.) should be addressed to the whole institutional structure to the EU rather than to Europol itself.

### **Border management, asylum and immigration policy – Frontex**

Another aspect of the AFSJ is border management, as well as immigration and asylum policy. This part of the AFSJ is being particularly strongly criticised. Just as Europol is an institutional example of police cooperation, Frontex is an example in the field of border control.

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<sup>20</sup> I. Caldeira, *Security or Freedom...* p. 7.

<sup>21</sup> See: P. Rakowski, *Europol – europejska organizacja policyjna do zapobiegania i zwalczania przestępczości zorganizowanej*, „Przegląd Prawa Europejskiego” 1998, nr 2, s. 59-74.

The European Union, after accepting the *Schengen Agreement* into its own *aquis* became an area with “no borders” between the Member States, because of the freedom of movement and lack of control on the land borders of the Member States. At the same time, it became obvious that it was necessary to strengthen the external border of the EU<sup>22</sup>. More or less at the same time, the international situation developed so that more and more people from Eastern Europe, Africa and Balkans (engaged in almost 10 years of conflicts) decided to emigrate to the EU. Both of these factors determined the development the immigration and asylum policy, as well as the management of the external borders of the EU.

The immigration policy is in an obvious way connected to the border control management and therefore is important to AFSJ. This policy is being criticised by many figures of public life: the left, the right, human rights organizations and others.

Some, like the left side, or the human rights organizations, argue that the immigration policy of the EU is morally wrong, because it is making it more difficult for the non-EU citizens to migrate to the European Union. This criticism goes further by claiming that the EU is too restrictive on the asylum policy and that it denies help to people who need it. For some of the most radical critics of this policy the concept of “Festung Europa” has already been implemented, because of irresponsible actions of the EU. The core of this criticism is a demand for a more open immigration policy<sup>23</sup>.

The right (conservatives, nationalists, eurosceptics), on the other hand, criticise the immigration policy of the EU for being too open<sup>24</sup>. The far right politicians claim that too many non-Europeans have already emigrated from their homelands to the EU Member States, and that this process is escalating. In their opinion this is a threat to the cultural identity of Europeans. They propose establishing strict regulations on immigration and asylum – “Festung Europa” is not a threat in the opinion of far right, it is a solution to an important issue.

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<sup>22</sup> H. Jorry, *Construction of a European...*, p. 2.

<sup>23</sup> <http://www.amnestyinternational.be/doc/article14499.html>, 21.11.2011.

<sup>24</sup> *BNP call for end to immigration from Muslim nations*, BBC News (23. 04 2010), [http://news.bbc.co.uk/2/hi/uk\\_news/politics/election\\_2010/8639097.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/election_2010/8639097.stm), 20.11.2011.

Regardless of political views, it seems obvious that the immigration policy of the EU became a serious issue and a subjected to an enhanced debate, therefore the leaders of the EU tried to solve this problem by imposing new balanced regulations (Immigration Pact and Common European Asylum System). The EU aims to reorganize this policy in such a way, that problem of increasing immigration is solved, without the controversies over human rights and European (hermetic) isolation.

The considerations about immigration policy as whole have rather an ideological and political character. The criticisms of external EU border management, however, are more focused on the actual actions of Frontex – the institution responsible for this task, as well as for preventing, fighting and reversing the process of illegal immigration to the EU. The necessity of creating such an institution was noticed by the Member States after the May 2004 enlargement of the EU. External borders have been moved eastwards to countries like Poland, Slovakia and Lithuania. The challenge for these countries was exceptional, and therefore the institutional cooperation was needed, not least to help and support the “new” Member States

Frontex is an EU agency responsible for managing the operational cooperation at the external borders of the EU, and has been established by the Council Regulation (EC) 2007/2004. FRONTEX started its activity on May 2005 and became operational on October 3. 2005. Its main goal is to provide cooperation between the Member States, organizing training for the Border Guard officers and providing technical support for joint operations. The other goal of Frontex is to handle the problem of illegal immigrants, who managed to get in the EU.

Frontex is criticized in a similar way to Europol. The first aspect of this criticism is the critical evaluation of Frontex’ actions – expelling immigrants, managing the camps for asylum seekers and, most importantly, the joint actions of the Member States under Frontex’ supervision. The other aspect of the criticism focuses on the technocratic management of this agency and is similar to the criticism of Europol.

Frontex' actions are criticized mainly in the field of expelling illegal immigrants, therefore by those critics Frontex is also called an "expulsion agency"<sup>25</sup> on the basis that it indeed has the power to organize the joint return operations. For some of the human rights organizations it is unacceptable, because, in their opinion, even illegal immigrants moved to Europe seeking a better life, running away from war, or poverty and the Europeans have no right to deny them a right to live in peace and wealth. Furthermore the conditions of camps for the illegal immigrants are criticized, as well as the condition of expulsion itself. The "return directive"<sup>26</sup> enables swifter organization of those types of action more, by organizing more camps for illegal immigrant in which they will be held before being expelled. The human rights organizations (Amnesty International), on the other hand, claim that detention should only be imposed when necessary and that such laws *will allow EU countries to detain people who have not committed any crime, including minors, for up to one year and a half*<sup>27</sup>.

Naturally the expulsion and detention of illegal immigrants is certainly a rough step, yet one cannot forget that illegal immigration is actually an act of law violation and as such must be fought; people committing it must be separated from the ones who do not break law (including legal immigrants). Furthermore those conditions, which are being so much criticized by Amnesty International and similar NGO's are much better than the conditions in prisons, where other people who committed a crime are being held.

The Frontex's operations aiming in securing the external border of the EU are criticized because they take almost military form. Frontex has to its disposition airplanes, helicopters and vessels and the operations, especially in Mediterranean area, are conducted in an "aggressive" way; they aim to stop the roots of man-

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<sup>25</sup> H. Jorry, *Construction of a European...* p. 20.

<sup>26</sup> Directive 2008/115/EC of the European Parliament and of The Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98 pp. 98-107.

<sup>27</sup> Q&A: *EU immigration policy*, BBC News 14.10.2008. <http://news.bbc.co.uk/2/hi/europe/7667169.stm>. 21.11.2011.

trafficking to Europe by seizing the vessels and aeroplanes smuggling immigrants illegally to the EU. In the opinion of critics, this indicates militarization of the EU, and most importantly, is dangerous to people whose only guilt is to seek a better place to live. This aspect of the criticism of Frontex' activities seems particularly important regarding the new provisions of the Treaty of Lisbon, which may lead to even more institutionalized form of managing the external borders of the EU (art. 77 TFEU) . If the European Corps of Border is to be created, it would most certainly be met with a strong criticism by human rights organizations.

The character of the management of Frontex is similar to the one of Europol. Its technocratic character is also being criticized, as well as Frontex' autonomy as an agency. The only form of control over Frontex is a budgetary control (and control through granting funds) and an annual report. However, as in case of Europol, those problems are the necessity, if an agency such as Frontex is to work effectively

### **Technical aspects of the European level of securitization**

The technical aspect of securitization is also very important for the criticism of the European level of securitization. The technical aspect on the national level are obvious; CCTV, for example, or the ability to triangulate every single mobile phone conversation. In the European Union the technical securitization is creating similar instruments on the European level, such as transfer of technology and technological cooperation in the field of security (for example by standardization of the equipment)<sup>28</sup>. Some examples of these procedures are: Schengen Information System, EuroDac, and Europol's DNA database<sup>29</sup>. Since Europol's database system has been mentioned above, the stress should be put, in this part of the paper, on EuroDac as an example of technology in service of securitization.

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<sup>28</sup> E. Brouwer, *Data surveillance and border control in the EU: Balancing efficiency and protection of third country nationals*, in: T. Balzaq (ed.), S. Carrera (ed.), *Security versus Freedom. A Challenge for Europe's Future*, Ashgate, Aldershot 2006, pp 137-154. Text published also as Challenge Paper, in 2005.

<http://www.libertysecurity.org/article289.html>. 17.01.2011.

<sup>29</sup> For further reading see: J. P. Aus, *Supranational Governance in an "Area of Freedom, Security and Justice": EuroDac and the Politics of Biometric Control*, Sussex European Institute Working Paper No 72, Brighton, 2003.

EuroDac is a database of fingerprints of asylum seekers and irregular border-crossers. All asylum seekers and irregular border-crossers must leave their fingerprints, which are transmitted to a database, where they are cross-referenced with other databases (Europol's, Interpol's, SIS). The dactyloscopy helps the authorities to identify the asylum seekers and make sure that they do not seek the asylum in two Member States at the same time, as well helping them to monitor if they have previously committed any crime (especially if they have ever tried to illegally cross the border of the EU before)<sup>30</sup>.

EuroDac is being criticized mainly because of the necessity of asylum seeker's or irregular border crosser's consent for being fingerprinted. Furthermore the fingerprints are taken, even if the asylum seekers not committed any crime or misdemeanor, they are also processed by the European institutions (so the data is accessible for 30 countries – the EU members + Norway, Iceland and Switzerland) without the consent of those asylum seekers, from whom the fingerprints are taken.

One aspect is that it seems like a violation of the human and civil rights of immigrants, but it also is recognized by some critics as a threat to a civil society, because of the technical ability to spread such a system to every citizen of the EU, in the future<sup>31</sup>.

EuroDac is just an example, yet it shows the core of the criticism of the technological aspect of the securitization. This aspect is being criticized, because it gives the authorities the hypothetical power to control society by omitting democratic principles. Technology enables the provision of security, yet this process needs to be controlled so as not to violate the basic principles of modern liberal democracy.

## Conclusion

The analysis of the criticism of the AFSJ of the EU, brings us to a conclusion that these policies included in the AFSJ are criticised by various critics and for various reasons. The spectrum of the critics, goes from the Left (socialist, social-

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<sup>30</sup> E. Brouwer, *Data surveillance and border control...*

<sup>31</sup> Jonathan P. Aus *Supranational...* p. 41.

democrats), through liberals to the Right (nationalists, eurosceptics, far right); from the big parties on the European and national level, to the NGO's campaigning for human and civil rights, inside and outside of Europe. The reasons are also various: some criticize too much integration in some fields, some raise the issues of sovereignty of the Member States, some want more open immigration policy and some want more strict regulation for non-EU citizens.

	<b>Police Cooperation</b>	<b>Immigration issues</b>	<b>Technical aspects</b>
<b>The Left</b>	Moderate criticism – need for legitimization, fear of a “police state”	Criticism of FRONTEX, criticism of too strict regulation for immigrants	Question of legality and freedom of the citizens
<b>The Liberals</b>	Criticism of securitization		The question of freedom and privacy
<b>The right</b>	Problem of sovereignty	Criticism of too open immigration policy of the EU	Sovereignty aspects (of creating supranational security system independent from national level)
<b>Human Rights Organizations</b>		Criticism of FRONTEX, criticism of too strict regulation for immigrants	Question of violating civil rights (a right to privacy)

**Table 1. : A summary of the analysis of the criticism of the Area of Freedom Security and Justice of the EU.**

The AFSJ may have a technocratic and intergovernmental character, but is very important for the EU. One must not forget that this part of the European Integration

is not well known to the citizens, because of its character (just like the security policy in a modern state is not well known to the citizens of this state), yet it aims in securing the achievements of the long-term process of integration (single market, Schengen community, community of values) from the threats to the internal security of the Member States. Even though some aspects of the AFSJ may raise some controversies concerning democratic legitimization and omitting the values the policies of the AFSJ were supposed to protect, the AFSJ (with all its components) is necessary to secure the stable development of the EU. If the European Union can be compared to a modern democratic state, the AFSJ of the EU should be compared to internal security policy in a national state as well. With such a comparison one must come to a conclusion that even though institutions such as border control, immigration office, police, or the army (on the European level: FRONTEX, Europol) do not have a democratic structure and have much more independence than strictly political bodies (on the European level: the Commission, the Parliament etc.), they are necessary components of democratic system and must outlast criticism and perform their tasks as effectively as they can.

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### **Abstract**

The following paper concentrates on the analysis of the criticism of the Area of Freedom, Security and Justice of the European Union. The Author focuses on the nature of this criticism, its subject – the process of securitization of the EU and also on the sources of such criticism. This paper addresses fundamental questions related to the issues of both general criticism of the AFSJ (its technocratic character and lack of parliamentary and judiciary control) and the criticism of particular activities of the EU agencies, such as Europol and Frontex.

## **ANALIZA KRYTYKI PRZESTRZENI WOLNOŚCI BEZPIECZEŃSTWA I SPRAWIEDLIWOŚCI UNII EUROPEJSKIEJ**

### **Abstrakt**

Niniejsza praca skupia się na analizie krytyki Przestrzeni Wolności, Bezpieczeństwa i Sprawiedliwości Unii Europejskiej. Autor skupia się na naturze tej krytyki, jej przedmiocie – procesie sekurytyzacji Unii Europejskiej, a także na źródłach tej krytyki. Praca porusza fundamentalne kwestie związane zarówno z ogólną krytyką Przestrzeni Wolności, Bezpieczeństwa i Sprawiedliwości, jak i z krytyką poszczególnych działań podejmowanych przez unijne agencje, takie jak Europol i Frontex.