

Crimmigration checks in the internal border areas of the EU: Finding the discretion that matters

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Abstract

Internal borders are a major but understudied site of crimmigration as most scholarship has focused on external borders (Van der Woude and Van Berlo, 2015). Internal borders were supposed to disappear under the principle of free movement within the European Union. But today we see EU member states policing the borders inside Schengen, checking identification, verifying passage, and regulating mobility in so-called ‘gray zones’. This article investigates this type of policing within the EU, focusing on the case of the Netherlands. It argues that the policing of internal borders is highly dependent upon discretionary power, a significant factor in the crimmigration process that we do not know enough about. Following Hawkins (1992, 2003), Schneider (1992), and Bushway and Forst (2013) on discretion and discretionary decision-making, we examine the interaction between decisions by law-makers and policy-makers that create discretionary space for law enforcement officials on the ground, and the way in which these street-level bureaucrats perceive the discretionary space attributed to them. By zeroing in on the interaction between these two actors, we aim to find the discretionary decision that matters the most in terms of explaining the crimmigration practices, offering a more holistic and interdisciplinary approach to border control. We discuss the implications of this power and the consequences for the European Project as such.

Keywords

Crimmigration, decision-making, discretion, European Union, immigration control, internal borders

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Introduction

Times are turbulent for the European Union (EU). Large numbers of immigrants are trying to find their ways into Fortress Europe irrespective of the dangers of such an undertaking and the insecure future ahead of them, often fleeing desperate situations in their home countries. Against the background of an ongoing securitization of migration in Europe (Bourbeau, 2011; Guild, 2009; Huysmans, 2006), the influx of immigrants entering the European mainland has led to heated debates among politicians and policy-makers, on both the member state level and the EU level, on how to best deal with the matter. Solutions are sought in the militarization of the external borders, border fences, and extensive yet also dispersed border surveillance (Aas, 2011). Much of the scholarship on EU border matters seems to focus on the external border of the EU, whereas developments affecting the formally non-existing internal borders between EU member states remain relatively understudied. Obviously, the tragedies happening at the EU's external borders justify attention. Yet, given what the EU stands for – being an area without internal borders in order to stimulate the free flow of services, goods, and people – monitoring what is happening in internal border areas is as crucial. In response to the recent immigration influx, several member states have asked for internal border checks to be temporarily reinstalled, which would be a fundamental breach of the Schengen *acquis*. Other states have started to explore the possibility offered by the Schengen Borders Code to conduct highly discretionary random police checks – for reasons of both immigration control and/or crime control – in 20 kilometer internal border *areas* between two member states (Van der Woude, 2015).

These police checks taking place in internal border areas are highly relevant in the light of the process of crimmigration (Van der Woude and Van Berlo, 2015) – the increased merger of crime control and immigration control (Aliverti, 2014; Chacón, 2009, 2014; Sitkin, 2014; Spena, 2014; Stumpf, 2006, 2011, 2013). Both virtually and physically, borders are primary sites for authorities to distinguish between so-called 'bona fide travelers' and 'crimmigrant others', being a bridge for the former and a barrier to the latter (Aas, 2011, 2013; Barker, 2013; Stumpf, 2006; Van der Woude and Van Berlo, 2015). The growing body of scholarship studying practices of crimmigration seems to paint a rather grim picture: to a greater or a lesser extent, crimmigration seems to be present in many national contexts, with no exception for countries in the EU (Barker, 2012; Bosworth, 2014; Bosworth and Guild, 2008; Mitsilegas, 2015; Staring, 2013; Van der Woude et al., 2014).

Despite the different macro-level explanations that can account for the process of crimmigration, many scholars directly or indirectly refer to the central role of *discretionary decision-making*. Discretion allows law enforcement officials to make largely autonomous decisions – to exercise choice – on how to deal with an individual case. In cases in which immigrants are involved this may also include the decision on whether to treat or approach it as a criminal case or an immigration case, with far-reaching consequences attached. When examining the literature on discretion and crimmigration, much of it seems to focus on explaining why and how the actions of one specific actor contribute to the practice of crimmigration: police and/or immigration officers (Motomura, 2011; Weber, 2003), prosecutors (Eagly, 2011; Hernandez, 2013; Wadhia, 2015), judges (Reyes,

2012), etc. Although some scholars discuss the actions of several actors in their commentaries (Miller, 2005; Stumpf, 2015), little attention is being paid to the ways in which discretionary decisions made by different actors might relate to, interact with, or depend upon each other. Thereby the image might arise that the practice of crimmigration is to be seen as an outcome of discretionary decisions made by one sole actor and that it is mostly driven by decisions made on the enforcement level.

Central focus and scope

This article will argue that a multi-actor assessment of discretionary decision-making, including also discretionary decisions made on the legislative and policy level (Schneider, 1992) can contribute to a better understanding of the implementation of crimmigration. Such an understanding – both in terms of *why* it is happening, but also in terms of *how* this implementation takes shape – is important in the light of exploring ways in which the process and its often unjust outcomes could be subverted. This article will mostly focus on the *how* by looking at actual practices of crimmigration and how discretion is used to sort and regulate mobility through the criminalization frame. In doing so, the article will focus upon the police checks carried out in the EU's internal border areas. The ways in which member states give substance to these often highly discretionary police checks as allowed under the Schengen Borders Code (SBC) can differ greatly both in terms of the legal and policy framework as well as in terms of practical enforcement, with differences in the implementation of crimmigration as a result.

This article will use the Netherlands – both an EU and a Schengen member – as a case study. This is a crucial case because the Dutch government has already formalized the Schengen-proof police checks by introducing the Mobile Security Monitor (MSM), comprising time-limited immigration controls carried out by the Royal Netherlands Marechaussee (RNM, in Dutch: *Koninklijke Marechaussee*). In border areas, Dutch RNM officers are allowed to stop any vehicle or person to check their ID and legal status under the Aliens Act, the central body of immigration law in the Netherlands, together with the Aliens Decree and the 2012 Police Act. A reasonable suspicion of any criminal activity or unauthorized entry or stay is not necessarily needed, which implies a lower threshold for these controls compared with regular police checks. By following the discretionary decisions that govern the MSM, this article aims to shed further light on the question of what the core and contingent discretionary decision(s) is/are behind the process of crimmigration in the context of immigration control in the internal border areas of the Netherlands.

This question falls within the scope of a larger research project 'Crimmigration & Discretionary Decision-making in EU Internal Border Areas'.¹ We will draw from the legal and empirical data collected as part of this project. Whereas previous publications derived from this project have focused more on the higher-level policy and administrative decision-making with regard to the Dutch immigration controls in border areas (Dekkers et al., in press; Van der Woude and Van Berlo, 2015), this article will also include data from focus group interviews and informal interviews and chats that were carried out during ride-alongs reflecting the perceptions of RNM officials with regard to the scope of their discretionary space. Although we also collected observational data

during the ride-alongs that provide insight into the practices on the ground, the actual application of their discretionary space, this article explicitly aims to address the *perception* of discretion in the context of the MSM. By analyzing the discretion created on the legislative and policy level and comparing it with the perceived discretion on the enforcement level, we aim to shed light on whose decisions seem to matter most in fueling criminal migration practices.

Conceptualizing discretion

As a result of fundamental changes in the nature of modern society, the state is called upon to intervene in many areas of social life and the issues that have to be grappled with are inherently complex (Beck, 1992; Giddens, 1999; Prosser, 1982; Unger, 1976). Both the diversity and the complexity of problems that states have to deal with in modern society require a flexible approach. In order to meet the demands that are being made on the modern state, discretion, rather than fine-grained rules, appears to be a more adequate mechanism for exercising power. Street-level bureaucrats, defined here as personnel of criminal justice agencies who have regular direct contact with members of the public (such as police officers or probation officers), are the final implementers of public policy. Their jobs are inherently discretionary and influence people's lives (Lipsky, 2010; Maynard-Moody and Musheno, 2003; Maynard-Moody and Portillo, 2010; Prottas, 1979). As Weber notes (2003: 250), '[w]hile high levels of discretion are often associated with failure to meet the most basic requirements of justice (that is, that decisions should be fair and not arbitrary) it is recognized that a certain amount of discretion can bring positive benefits'. In other words, by enabling decision-makers to mitigate the unintended outcomes of the application of rules in individual cases, discretion can contribute to justice (Schneider, 1992). Obviously, it is precisely this flexibility with regard to applying the rules that makes discretion susceptible to misuse and abuse, potentially contributing to *injustice*, for instance by favoring certain social groups over others. This brings us to the core concept in discretion: choice. For discretion to exist, an official must be given power, within a broad framework, either to choose the end that is to be pursued, or, if the end has already been determined, to choose the most appropriate means or standard to achieve the end. How much discretion officials have will depend on the nature of their professional power and the recognition that other officials give to their ability to choose (Mensah, 1998; Van der Leun, 2006). Having said this, it is important to realize the important role the legislature and policy-makers play in allocating discretion. The very heart of the discretionary process lies within legislative and policy decisions since it involves decisions about the objectives and meaning of the law, and about how these are to be shaped into strategies to permit their interpretation (Galligan, 1986). According to Schneider (1992), discretion is deliberately built in to decision-making systems by law-makers for a variety of reasons.

The dominant focus in social science studies on discretion is on street-level decisions, but this does not do justice to the reality that they should always be seen as part of a sequence of decisions and occurring as part of a network of relationships in the legal system (Emerson, 1983; Emerson and Paley, 1992). Seemingly simple discretionary decisions quite often involve a rather more complex series of decisions. The 'output' for

one actor within a system often provides the ‘input’ for another (Hawkins, 1992, 2003; Hupe, 2013; Jewell and Glaser, 2006; Meyers and Nielsen, 2012). In trying to answer the question of whose discretionary decisions matter most in fueling the practice of crimmigration in the case of the Dutch MSM checks, the remainder of this article will adopt a more systemic approach towards discretion by focusing on both the discretion built in to the legal and policy framework of the MSM and the ‘enforcement discretion’ as perceived by RNM officials.

Such a systemic approach towards discretion gives room for the possibility – and often reality – that effective powers to decide are frequently assumed by actors other than the person allocated formal authority to exercise discretion and diffused among a variety of actors who all play a part in the handling of an individual case. In doing so we will use the simple yet functional conceptualization of discretion as put forward by Bushway and Forst (2013). They distinguish between what they refer to as ‘Type A’ and ‘Type B’ discretion. Type A discretion refers to the discretion that individual actors have to make decisions with variation given a set of rules and Type B refers to the discretion that legislators and criminal justice policy-makers have to establish a set of rules. The choice by legislators to impose sentencing guidelines is an act of Type B discretion; the legally allowable choice by judges of sentences within the sentencing guideline ranges is an act of Type A discretion. Type B discretion, the ability to create rules and policies, can be used to limit and shape Type A discretion and there is often a tension between the rules set by higher-level, administrative actors (Type B) and the discretion within those rules that is available to lower(street)-level actors, responsible for the actual enforcement of the rules. Most discussion in the literature deals with Type A discretion, yet, according to Bushway and Forst (2013), both Type B discretion and the interaction between A and B deserve more direct study in criminal justice. The same could be said for scholarship on crimmigration.

Crimmigration and discretion

Crimmigration is often explained by referring to underlying trends such as over-criminalization – the frequently deplored tendency of criminal law to expand into areas for which its heavy-handed machinery seems ill suited (Sklansky, 2012), the emergence of an overall cultural obsession with security and potential dangerous ‘others’ (Garland, 2001; Simon, 2007), and the development of an enemy penology (Fekete and Webber, 2010). Despite acknowledging the clear complexity and multitude of forces driving the process of crimmigration, Motomura (2011) claims that the discretion to stop persons is the strongest driver behind the process of crimmigration, since it enables racial profiling and makes street-level officers responsible for funneling immigrants into systems dealing with immigration crime or criminal violations. His assessment of the pivotal importance of street-level decision-making in the process of crimmigration is widely shared among scholars, who often link it to selectivity based on racial stereotypes (Hernandez, 2013; Koulis, 2010; Miller, 2005; Pratt, 2010; Pratt and Thompson, 2008; Stumpf, 2006).

Although the process of racial profiling by law enforcement officials is unmistakably connected with the process of crimmigration, it is unclear whether it can explain the process or whether it is an outcome of it, or both. The answer to this question depends on

whether one approaches immigration control from a bottom up or a top down modus (Lind, 2015). In line with Motomura's assessment, the bottom up modus attributes power to the (Type A) decisions made on the street level. Yet, in their assessment of the criminalization of migration, Provine and Doty (2011) observe that policy responses to unauthorized immigration reinforce racialized anxieties by creating new discretionary spaces of enforcement within which racial anxieties flourish and become institutionalized. In other words, although they do acknowledge the impact of racial anxiety on the enforcement level, potentially leading to racial profiling, they rather see this as the outcome of top down (Type B) policy-level decisions.

According to Sklansky (2012), practices of crimmigration cannot be seen apart from the more general tendency towards ad hoc instrumentalism that is visible within both criminal and administrative law. He defines ad hoc instrumentalism as 'a manner of thinking about law and legal institutions that downplays concerns about consistency and places little stock in formal legal categories, but instead sees legal rules and legal procedures simply as a set of interchangeable tools. In any given situation, faced with any given problem, officials are encouraged to use whichever tools are most effective against the person or persons causing the problem' (Sklansky, 2012: 161). The underlying rationale behind practices of crimmigration seems to fit in with this tendency. In order to identify dangerous individuals – immigrants and criminals both fitting this category – a hybrid web of social control is spun in such a way that street-level law enforcement officials can choose between their criminal and administrative (immigration law) powers. Whichever route they take – crime control or migration control – doesn't really matter, as long as their actions are effective (Chacón, 2012; Miller, 2005; Stumpf, 2006; Van der Woude et al., 2014). Although Sklansky also attributes an important role to street-level decisions in driving practices of crimmigration, in line with Provine and Doty (2011), he explicitly places street-level actions in the dynamics of broader changes in the governance of crime and migration and therewith of (Type B) decisions made in higher legislative and policy echelons.

It seems safe to say that, although there is consensus in the literature that crimmigration and discretion are somehow related, there are different views as to whether it is more a top down or a bottom up connection, or possibly both. We take these differing views on what is driving crimmigration practices as a theoretical angle to study discretion in internal border control in Dutch border areas empirically at different levels.

Methodology

The present study uses a mixed methods research design, combining a policy discourse analysis, informal interviews (held during ride-alongs with the border police), and semi-structured focus group interviews. A key feature of mixed methods research is its methodological pluralism, which offers the advantage of incorporating the strengths of different methodological strategies. Data were collected between October 2013 and March 2015.

First a discourse analysis was conducted on the basis of the Dutch parliamentary debate as laid down in policy documents accessed through all relevant digital databases. Using key words, a total of 451 documents were found in the databases, of

which 259 documents contained relevant information and were used in the analysis. With regard to the upper echelons of the assumed chain of discretionary decision-making in matters of immigration checks in border areas – the level of the EU, the national legislature, and policy-makers – we will draw from the results of this analysis, which were supplemented with the outcomes of a legal analysis of (supra)national legislation and jurisprudence (Dekkers et al., in press; Van der Woude and Van Berlo, 2015; Van der Woude et al., 2015).

Secondly, in order to study street-level perceptions of discretionary decision-making, primary data were collected through informal conversations with border police officers carried out during ride-alongs (Geertz, 1973; Reiss, 1971). During a period of 16 months, three researchers went on 57 ride-alongs with border patrol officers who were exercising their discretionary powers in the context of the Mobile Security Monitor, during which they were able to observe and talk about the MSM checks, the use and scope of discretionary powers, and the work of the border patrol in general. These ride-alongs were carried out at the seven RNM brigades that are responsible for carrying out the MSM in the border area with Belgium and Germany. All brigades were visited at least six times for ride-along sessions, with extra ride-alongs carried out at the larger brigades. Although some RNM officials did show some slight distrust when the researchers went on their first ride-along with them, a thorough explanation of the scope of the research, with an emphasis on the fact that the researchers were independent and not hired by the RNM to check on the street-level RNM officials, would often result in a relaxed atmosphere in which the RNM officials were more than willing to share their views. This feeling of trust was only further enhanced by the fact that the researchers returned to a brigade multiple times. This, combined with the informal nature of the conversations and the familiar setting, decreased the chance of politically correct answers (Finch et al., 2013; Krueger, 1994; Krueger and Casey, 2009). In the present article we do not use the observation data, but we do draw from the informal interviews.

Thirdly, focus group interviews were conducted to gather more in-depth information on specific subjects related to discretion and street-level decision-making in the context of the MSM. Focus group interviews are useful for exploring and examining what people think, how they think, and why they think the way they do about the issues of importance to them without pressuring them into making decisions or reaching a consensus. Focus groups permit researchers to search for the reasons why particular views are held by individuals and groups. The method also provides insight into the similarities and differences of understandings held by people (Krueger, 1994; Krueger and Casey, 2009; Finch et al., 2013). A total of 13 focus groups with 6–10 participants were organized divided over all seven brigades, resulting in 25 hours of conversation. All focus groups consisted of a mixture of experienced and less experienced border patrol officers who were all carrying out MSM checks as part of their duties. During most focus groups, all RNM officials who were present participated in the discussion, some more actively than others, which is one of the most important limitations of focus group interviews (Krueger and Casey, 2009). Yet, knowing this pitfall, the moderator directly intervened in such instances. Being a military organization, it was mostly the younger and often less experienced or less highly ranked officials who kept somewhat of a low profile. Again, when noticed by the moderator, these officials would be explicitly asked to respond.

The discourse analysis resulted in 259 documents selected to be analyzed. Valuable information from the ride-alongs and the informal conversations were recorded in the researcher's field notes. After the shifts, these field notes were written down in a detailed and structured manner in order to be coded. The focus group interviews were audiotaped, transcribed verbatim, and also coded. All data were analyzed with software for qualitative analysis Atlas-Ti. As mentioned above, the observations will be reported on elsewhere. Access for this unique long-term and intensive research project was obtained after a series of meetings taking place over the course of two years during which the project coordinator reached an agreement with the RNM and the Ministry of Security and Justice. The agreement was formalized by a written covenant in which the independent position of the researchers and privacy issues were dealt with. As part of the covenant, an external advisory board of academic experts and officials working for the Ministry of Security and Justice and the Ministry of Defence was established.

Discretionary decisions and the implementation of crimmigration

Based on secondary research of the legal and policy context of immigration and border control as well as on primary empirical research with regard to the way in which Dutch border patrol officers perceive their task and their discretionary space, this section aims to shed further light on the way in which the various levels of discretionary decision-making relate to each other at both the national and the European (the supranational) level. At both levels, Type B discretionary decisions can be made. By leaving room for member states to decide how to interpret or how to implement certain EU rules or directives, discretionary space is created on the supranational level. Yet member states also make Type B discretionary decisions by translating political and policy goals into the rules and regulations that in turn govern street-level officials. The first two subsections are based on the outcomes of the analysis of legal and policy documents, and subsection 3 draws from the data collected through the focus group interviews.

Creating discretionary space on the European level

When researching immigration controls carried out in the border areas between EU member states, the point of departure for exploring discretionary decisions that might have contributed to the process of crimmigration is obviously the 1985 Schengen Agreement. This agreement proposed the gradual abolition of border checks at the signatories' common borders. In addition, the agreement included sections dealing with the harmonization of visa and asylum policies, the common fight against drug-related crime, and increased controls at the EU's external borders. The rules that govern the movement of persons across the Schengen borders can be found in the Schengen Borders Code (SBC) as adopted in 2006. The SBC sets out the standards and procedures to be followed in controlling the movement of persons across internal and external Schengen borders and should thus offer clear guidelines for border patrol agents on how to perform their duties.

According to Article 22 SBC, '[i]nternal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out'. According to the *travaux préparatoires*, this provision means that any control, whether systematic or by spot-checks, carried out solely for the reason of crossing an internal border, is incompatible with the idea of a single area without borders, and is therefore prohibited.² Nevertheless, Article 23(a) SBC makes clear that lifting border controls does not mean giving up *all* forms of control in border areas: 'The abolition of border control at internal borders shall not affect the exercise of police powers by the competent authorities of the Member States under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks.' Border checks, according to Article 2(10) SBC, are 'checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorized to enter the territory of the Member States or authorized to leave it'. Following this definition, police checks are not allowed *at* the actual internal border between two member states but they can be carried out in the area around the border. As Article 23(a iii) SBC further states, the aim of the police checks will 'in particular' be to combat cross-border crime. Looking at the SBC, it seems safe to say that it creates discretionary space for member states to autonomously decide how they want to carry out police checks, where, for how long, and with what aim. This might be considered as problematic, or at least remarkable, given the 'freedom of movement' and the lifting of formal border control as one of the key features of the European Project. These ambiguities in the SBC demonstrate that much of the actual implementation of these police checks has been left to the discretion of member states.

The problematic nature of the vagueness of Article 23 SBC was affirmed by two important cases that were brought before the Court of Justice for the EU (CJEU). In the cases *Melki & Abdeli*³ (CJEU: 22 June 2010, CJEU C188/10 and C189/10) and *Adil*⁴ (CJEU: 19 July 2012, C278/12 PPU) the legitimacy of the national legal framework governing police checks carried out in France (*Melki & Abdeli*) and in the Netherlands (*Adil*) was contested in the light of the right to free movement as represented by Articles 22 and 23 SBC. In both cases the Court ruled that, in order to comply with Articles 22 and 23(a) of the SBC, national legislation granting a power to police authorities to carry out identity checks must provide the necessary framework for the power granted to those authorities in order, *inter alia*, to guide the discretion that those authorities enjoy in the practical application of that power. In order to guarantee that the practical exercise of that power, consisting in carrying out identity controls, would not have an effect equivalent to border checks, the national framework should contain detailed rules and limitations in order to define the intensity, frequency, and selectivity of the checks. A further explanation or guideline as to how detailed the national legal framework should be on these three matters, or how these three rather general concepts should be interpreted in the light of open borders, was not given by the CJEU or by the European Commission in response to the two rulings.

In sum, guidance with regard to the way in which member states legally formalize let alone practically shape the Schengen-proof police checks is limited. This can be seen as an example of what Schneider (1992) refers to as rule-compromise discretion: discretion intentionally built in to the decision-making systems of member states as a result of

general EU norms. This allows member states to shape their national legislation in such a way that it can do justice to the specific demographic, institutional, legal, etc. characteristics. The responsibility to meet the requirements of the SBC is intentionally passed to the national legislator since it would be impossible for the supranational rule-makers to come up with an all-encompassing legal framework that would fit all member states.

Creating discretionary space on the national level

The Dutch government was one of the first to sign and implement the Schengen Agreement, yet it was also one of the first to introduce a form of police control in the border areas. The easing of internal borders under the Schengen Agreement had the parliament worried, leading to the implementation of the Mobile *Aliens* Monitor (MAM).⁵ The original goal of the Monitor, as stated in a 1994 letter by the State Secretary, was ‘to prevent illegal entry and irregular stay of aliens’.⁶ The Monitor was seen as an important tool to stop unwanted immigrants at the border and to discourage prospective immigrants from coming to the Netherlands without legal authorization. The chosen aim is interesting in the light of the parameters set by the SBC. As mentioned in the previous section, the SBC (Article 23[a iii]) explicitly states that police checks in border areas are particularly meant to combat cross-border crime. Controlling immigration or immigration-related crime is not mentioned at all.

Over the course of the years it became clear that RNM officers also ran into certain forms of cross-border crimes while performing the MAM, human smuggling and identity fraud being the two most important. These crimes did not formally fall under the scope of Monitor because it was – and still is – predominantly meant as an instrument of immigration control, legally founded in the Dutch Aliens Act and the Aliens Decree. When encountering a case of human smuggling or identity fraud – phenomena falling under the scope of the criminal law – RNM officers immediately had to delegate these cases to the national police since they themselves were unauthorized to deal further with the case. Since this course of events was seen as inefficient and frustrating, the Dutch legislature in 2006 decided to formally expand the powers of the border patrol while exercising the MAM by amending the Dutch Police Act. From that year on, RNM officials were legally allowed not only to use their discretionary powers for the purposes of immigration control, but also to check for the allegedly immigration-related crimes of human smuggling and identity fraud.⁷

The expansion in the scope of the MAM seemed to bring it more in line with the language of Article 23 SBC, which clearly speaks of police checks carried out to combat cross-border crime. From a crimmigration perspective, the expansion can be seen as problematic because it attributes powers of both crime control and immigration control to one actor: the RNM official having to enforce the MSM. Although the legislature seems to have put a clear limitation on the discretionary powers of the RNM officials by limiting their crime control powers strictly to cases of human smuggling and identity fraud, no accountability structure was put in place to ensure that RNM officials in the field would also interpret and apply their newly acquired tasks this restrictively.

This missing accountability structure seems particularly concerning in the light of a shift in the political discourse on border security in the Netherlands. Starting in 2010,

official policy documents all of sudden spoke of the Mobile *Security* Monitor instead of the Mobile Aliens Monitor without there being any changes in the formal discretionary powers of RNM officials, as seemed to be suggested by this new name.⁸ The reason for the name change was addressed in a letter from the Minister for Immigration, Integration and Asylum.⁹ The minister explained that, during the MSM checks, criminal offenses were often encountered that made these checks an important tool not just for immigration purposes but also for combating crime. The fact that the latter was still legally limited to crimes of human smuggling and identity fraud was conveniently left out. Although the name change was presented as merely cosmetic, in the light of finding decisions that might have influenced the practice of crimmigration enforcement and the perceptions of RNM officials in the field, it seems very significant.

Contrary to the formal expansion suggested by the name change, the use of the MSM was legally *restricted* in 2011, this time by a formal change of the Dutch Aliens Decree (Article 4.17a) in response to the ruling of the CJEU in the previously mentioned *Melki & Abdeli* case.¹⁰ Whereas, prior to the ruling, the MSM was not restricted in terms of time and location, the restrictions limited the MSM checks on the road to a maximum of 6 hours a day and 90 hours a month. Whereas the obligation to define the intensity and frequency of the MSM checks in the national legislative framework has been rather explicitly met by the Dutch legislature by setting clear numerical limits, this cannot be said for the third aspect mentioned in the *Melki & Abdeli* ruling: the decision to select a person or a vehicle for a check. Although the CJEU asked for ‘detailed rules and limitations defining the selectivity of the checks’, Article 4.17a of the Dutch Aliens Decree merely states that ‘only a part of the passing vehicles will be stopped’. By not addressing specific criteria for selection, the decision to select a vehicle for an MSM check is completely left to the discretion of the RNM official in the field, making this decision of the Dutch legislature a good example of rule-binding discretion deliberately built in to the decision-making system (Schneider, 1992). This type of discretion recognizes the value of practical experience and knowledge of street-level decision-makers in deciding, within the framework of the law, how to respond in a certain situation. In our case this means that a high level of trust is attributed to the professional intuition and experience of RNM officials in selecting cars for an MSM check.

In line with the observations on the supranational legal framework, can the national legal framework regulating the MSM also be characterized as highly discretionary, especially with regard to the key question of how the selection for the MSM checks is made by individual RNM officials? This question is important not just because of heated public and academic discussions on ethnic – or racial – profiling by law enforcement officials in general, but also because of the seemingly ambiguous scope of the Monitor as a result of the name change, combined with the partial expansion towards also becoming an instrument of crime control. To what extent did these changes affect the way RNM officials perceive the MSM and their discretionary power?

Street-level perceptions of discretionary decision-making in border areas

The previous two subsections have dealt with decisions taken on the legislative and policy level that create discretion for street-level RNM officials. By drawing from the

data collected during the focus group interviews, this subsection will address the perceptions of RNM officials of their discretionary powers under the MSM. Two of the core questions of the focus group interviews – ‘What is the aim of the MSM?’ and ‘What do you see as your most important task?’ – often resulted in very lively discussions and important insights into the way in which RNM officers perceived their discretionary power.

Although the majority of the respondents mentioned that the MSM was meant as an instrument of immigration control, and therefore combating unauthorized stay (commonly referred to as illegal stay) was the main reason to perform these checks, a large part of these respondents also added that, ‘besides combating illegal stay, the MSM is also meant to combat cross-border crime’. When asked to specify cross-border crime, it was interesting to hear that a fair number of the respondents also included crimes such as drug trafficking, money laundering, and gun offenses.

‘The police is responsible for the security in the streets, the RNM is responsible for the safety and security of the state. That also includes catching folks who are dangerous due to carrying weapons or drugs across the border.’

As mentioned previously, RNM officials have the authority to actively look for cross-border crimes during the MSM. Nevertheless, this authority is limited only to human smuggling and identity fraud as ‘migration-related’ forms of cross-border crime. When this legal limitation was mentioned by the moderator, respondents would often start questioning whether this limitation was legitimate and effective in their eyes. These discussions would in the end always come back to the 2010 name change from Mobile Aliens Monitor to Mobile Security Monitor.

‘In the early 90s it was clear that we could only use the powers attributed to us by the Aliens Act, but the goal at the time was to combat illegal immigration. Over time, society has changed, crime has changed and they changed the name into Mobile Security Monitor and much more priority was given to catching criminal illegal immigrants.’

During every focus group, respondents mentioned that the name change resulted in some confusion at the street level. Although the majority of the respondents were very aware of the fact that the name change had not formally resulted in an expansion of their discretionary powers, a small portion of the respondents was not. They were under the impression that the MSM could be used as a fully fledged instrument of crime control after the name change and that it was no longer restricted to human smuggling and identity fraud.

‘In the 20 kilometer zone around the border you’re no longer specifically focusing on illegal immigration, you’re also focusing on safety and security ... which means that you also pay attention to money laundering and stuff like that.’

Interestingly enough, all the respondents thought it necessary to indeed expand the legal framework of the MSM to all forms of cross-border crime, since that would be more in line with their daily practices and with the image of the MSM as presented to the

general public. Many respondents expressed feelings of frustration with regard to the current state of their powers. These frustrations were often motivated by addressing the fact that, ‘in the end, we’re the frontline of defense for the Netherlands’ or by the fact that, ‘whereas the national police is for defending the streets, we’re here to defend the nation-state, that’s quite different’. Two respondents aptly capture the broadly shared feelings of frustration and incomprehension:

‘When you are checking a car and immigration-wise everything is fine, they have the right papers etc., that obviously doesn’t mean that they cannot have someone or something illegal lying in the trunk. Officially, your hands are tied because their IDs and paperwork were fine. Under these circumstances, the Aliens Act forces you to let them go. But the thing is, you are standing there to secure the safety of the Netherlands. With that in mind, it is strange that you are legally restricted from fully checking a car.’

‘We’re located in these border areas and the name is Mobile *Security* Monitor. We’re the first ones to guarantee the security of the Netherlands, that’s the focus of our organization. And if that’s your target, to monitor the security in the Netherlands while also saying that I cannot use my powers to combat crime because that’s not why I am here... Well, hello, I need to know who is entering my country? I need to create a secure situation, which is my task isn’t it?’

The frustration about the ambiguous aim of the MSM also contributed to the noteworthy situation of RNM officials actively exploring the boundaries of the legal framework. As many respondents stated, although the name change had not resulted in an expansion of the legal framework, it seemed to imply that this was something to which the RNM as an organization aspired. Therefore, many respondents admitted that this provoked ‘being creative’ with their powers. ‘Being creative’ referred to situations in which RNM officials intentionally overstepped the discretionary powers attributed to them under the Aliens Act by using them – or abusing them – for reasons of crime control. Several RNM officials – also including some higher ranked officers – expressed the necessity of seeking out the limits of the law in order to create case law that could eventually lead to more clarity about the implications of the name change for street-level decision-making. This situation, where there seems to be a push from the street level to the policy level to make legal potentially illegal practices that are part of the system (Davis, 1971), is characteristic of rule-binding discretion. And, as we established in the previous subsection, the discretionary space created by the Dutch legislature allowing RNM officials to rather autonomously decide which cars to stop and check can be characterized as such.

From a crimmigration perspective it is important to note the ease with which immigration and crime were being lumped together in the focus group interviews, even by those respondents who were well aware of the fact that the MSM was formally predominantly meant to combat unauthorized stay in the Netherlands. These discussions were often related to the alleged ‘proven’ links between illegal border crossings and cross-border crime (‘if you have nothing to hide, there’s no need for false paperwork’) or alleged connections between migration and terrorism. According to the large majority of the respondents, the presence of the RNM in the border areas was of great importance in current times of mass migration and terrorism. With some exceptions, the dominant discourse around the MSM was clearly a discourse of safety and security in which

immigration was seen as a factor potentially threatening security. As Van der Woude et al. (2014) note, besides actual laws and policies, an important marker of the process of crimmigration is the way in which issues relating to crime and immigration are perceived and framed on the social and the policy level, but in terms of explaining crimmigration practices.

Crimmigration checks in the EU's internal border areas?

This article has sought to shed light on the influence of discretionary decisions on the process of crimmigration, by distinguishing between discretionary decisions taken on various levels and by different actors. The often heard claim or assumption that street-level officials are the most important drivers in the crimmigration process has not been empirically verified in the case of the Netherlands. Our study suggests that the culprits in the merger of crime control and migration control are to be found in the upper echelons of criminal justice decision-making. Based on the outcomes of this study, Type B decisions made at both the European and the national level seem to play a more important role in the process of crimmigration than Type A – street-level – decisions by RNM officials. By leaving much room for interpretation of the legal framework – both for member states on how to translate the Schengen Borders Code into their national legislation and for RNM officials on how to interpret the national legal framework of the MSM – favorable conditions are created for crimmigration practices. This is especially the case since Dutch RNM officials are by law equipped with both immigration control and specific crime control powers while enforcing the MSM.

Although the use of their crime control powers is formally limited to specific situations, the joint political and organizational – Type B – decision to change the name of the Monitor has suggested a broader application. As the empirical research has shown, this leads to confusion and sometimes frustration at the street level. RNM officials increasingly seem to focus on crime control while they are performing the MSM and they feel legitimized to do so by the name change, which also seems to have fueled existing perceptions of the links between crime and migration. They also perceive a large amount of discretionary space while enforcing the RNM in a crime- and immigration-oriented manner.

At the same time, it should be realized that there can be a gap between what people say – during interviews – and what people do in practice. In order to truly grasp the way in which RNM officials enforce their discretionary powers and how this might contribute to the practice of crimmigration, it is necessary to observe their decision-making processes over a long period of time, which is another part of our study that is not reported on here. Nevertheless, our findings indicate that the implicit or explicit claim that street-level officials are the most important drivers in crimmigration needs to be nuanced. Owing to the formulation of open norms on the supranational and national levels, discretionary space is consciously introduced into the decision-making scheme governing the MSM. Time limitations do not fundamentally limit this space. Although the discretionary decisions most visibly reflecting crimmigration practices might be taken on the street level, the foundation for these decisions was laid on higher legislative and policy levels.

In order to more thoroughly unravel the process of crimmigration, an interdisciplinary holistic multi-level approach is thus necessary. Focusing on one actor and ignoring the social and political context within which crimmigration decisions are made will by definition lead to an incomplete analysis of the process of crimmigration and its drivers. Nevertheless, there are always additional questions to explore. As mentioned in previously, the national legislature has created discretionary space for RNM officials to select which cars to stop for an MSM check. In the context of further disentangling the process of crimmigration, it is precisely this decision that needs further scrutiny. It would be relevant to investigate to what extent border police officers see parallels between the people they would stop from an immigration point of view and those they would stop from a criminal law point of view. In other words, to what extent are some immigrant groups in practice also associated with certain forms of cross-border crime? Another open question concerns the effectiveness of these strategies when it comes to crime control. What is the added value of border area policing in combating migration crimes? The latter question requires a quantitative and potentially semi-experimental research design, which was not feasible in the context of the existing study.

The outcomes of the present study have implications for the European Project. One could argue that the mere possibility of performing immigration checks in border areas is already questionable from the perspective of free movement, which can be seen as the core characteristic of the EU. Surely, the frequency and intensity of these checks have been limited as a result of the rulings of the CJEU, but member states still enjoy a great amount of discretion on how to translate the Schengen Borders Code into their national legislation. And since the SBC is rather vague on the exact nature of these checks, member states can deal with them creatively. Although the European Commission announced stricter checks on the implementation and enforcement of EU legislation on the member state level in the 2013 Schengen Governance Package, it remains to be seen what this actually means in practice. In the light of the present influx of immigrants through the southern and eastern external borders of the EU and the difficult political process with respect to more fundamental harmonization and burden-sharing with respect to asylum seekers, it is to be expected that member states – especially those in Western Europe – will seek out all options to somehow manage or at least monitor who is entering through the border areas of their nation states (Van der Woude and Van Berlo, 2015). Terrorist threats and attacks, including the recent ones in France, add to the urgency that is felt in this respect. Although the original promise of creating a borderless Europe within which crossing a land border should be as easy as crossing a municipal border sounded good, it has proven to be too good to be true. Countries are increasingly looking for ways to use the gray areas of supranational and national legislation in such a way that the promise of a borderless Europe applies only to a privileged group of bona fide travelers and not to those who are seen as the crimmigrant ‘other’ (Aas, 2011). Security concerns are crucial, but the implications of the increasing merger of crime and migration control across Europe deserve attention that goes further than solely looking at street-level decisions.

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Notes

1. The empirical fieldwork was jointly conducted by Jelmer Brouwer, Tim Dekkers and Maartje van der Woude. The project was initiated and is coordinated by Maartje van der Woude, and the dissertations resulting from the project are co-supervised with Joanne van der Leun. All members of the research team are affiliated with the Institute of Criminal Law and Criminology at Leiden Law School, the Netherlands.
2. Report from the Commission to the European Parliament and the Council on the application of Title III of Regulation (EC) No. 562/2006 (Schengen Borders Code), COM (2010) 554 final, p. 3.
3. Mr Melki and Mr Abdeli, two Algerian nationals who were unlawfully present in France, were subject to a French police control near the Belgian border and placed in administrative detention. Mr Melki and Mr Abdeli challenged the lawfulness of their detention before the *juge des libertés et de la détention* (judge deciding on provisional detention). *Inter alia* they pleaded that the provisions of the French Code of Criminal Procedure in the context of which such controls took place was unconstitutional.
4. Mr Adil, an Afghan national, was stopped on 28 March 2012 by the RNM in the course of an MSM check when traveling on a bus coming from Germany, in the area extending up to 20 kilometers from the land border of the Netherlands with Germany. By a decision of 28 March 2012, Mr Adil was placed in administrative detention. Mr Adil contested the lawfulness of his detention on the ground that the MTV check, to which he was subject, amounted to a border check and was, therefore, contrary to Regulation (EC) No. 562/2006 ('the Schengen Borders Code'), concerning the crossing of the territory of the State parties to the Convention implementing the Schengen Agreement ('Schengen Convention').
5. Kamerstukken II, 1994/95, 19 637, 115; Kamerstukken II, 1994/95, 23 900, 2.
6. Kamerstukken II, 1994/95, 19 637, 115; Kamerstukken II, 1994/95, 23 900, 2.
7. Kamerstukken II, 2001/02, 27 925, 34; Kamerstukken II, 2001/02, 27 204, 17; Kamerstukken II, 2002/03, 27 925, 96.
8. In Dutch the name changed from *Mobiël Toezicht Vreemdelingen* (Mobile Aliens Monitor) to *Mobiël Toezicht Veiligheid* (Mobile Security Monitor), both abbreviated MTV.
9. Kamerstukken II, 2011/12, 19 637, 1526.
10. The Council of State is the country's general administrative court. It hears appeals lodged by members of the public or companies against administrative decisions or orders given by municipal, provincial, or central governments. Being part of administrative law as well, decisions or orders based on the Aliens Act or the Aliens Decree also fall within the jurisdiction of the Council of State.

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