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Mobility, control and technology in border areas : discretion and decision-making in the information age

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Citation

Dekkers, T. J. M. (2019, March 20). *Mobility, control and technology in border areas : discretion and decision-making in the information age*. Retrieved from <https://hdl.handle.net/1887/70038>

Version: Not Applicable (or Unknown)

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Issue Date: 2019-03-20



3. The Mobile Security Monitor

As discussed in Chapter 1, the EU is increasingly relying on information in the context of migration control accompanied by a plethora of newly implemented technologies. While the aim of this study is to see how information shapes and limits decision-making in controlling mobilities, it would be difficult if not impossible to include all relevant organizations in a single research project. Since each organization comes with its own set of actors, goals, political setting and information technologies, it would result in a huge number of unique challenges and complex questions. To avoid such over-complexity and possibly unanswerable research questions, this dissertation therefore concentrates on a single case study in migration control: the Mobile Security Monitor, as carried out by the Royal Netherlands Marechaussee. By limiting the scope of the research to a single setting, it becomes possible to delve deeper into the matter, resulting in a better and more in-depth understanding of how information and information technologies are applied in migration control. This chapter describes what the Mobile Security Monitor actually is and does, to give further context to the research.

3.1 Border policing in the Schengen area

In 1985, the Netherlands, Belgium, Luxemburg, France and Germany signed the Schengen Agreement. The goal of the agreement was to take a first step towards gradually abolishing border control at the internal borders of the countries involved. Abolishing the borders would result in the free traffic of persons, goods and services between the member states, creating opportunities for further economic integration. The next step was taken in 1990 in the form of the Schengen Convention, which pushed the dismantling of systematic border checks between the member states even further. This process was completed in 1995, resulting in an area in which individuals could freely travel without being stopped at the borders between the member states. With the Amsterdam Treaty signed two years later, the Schengen Agreement was absorbed into EU law, significantly expanding the Schengen Area. At the time of writing, all EU member states except the UK and the Republic of Ireland have become part of the Schengen Area, as have the non-EU states of Norway, Switzerland and Iceland.

3.1.1. The Schengen Border Code

While the Schengen Agreement was created with economic integration in mind, it also raised questions regarding security. Not just commerce and tourism would

benefit from the freedom of movement, but so would irregular immigrants and individuals with criminal intentions. The Schengen Agreement therefore offered both opportunities and threats. The creators of the Schengen Agreement were aware of this from the start and decided to include the possibility of border policing. While Article 22 of the Schengen Border Code states that ‘internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out’, Article 23 allows for police activity in border areas, be it with restrictions. After all, the freedom of movement in the Schengen Area would not mean much if member states continued to implement full border control. Article 23 provides several criteria for border policing to prevent member states from resorting to systematic border control. Sub A of the article in question states that:

‘...the exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when the police measures:

(i) do not have border control as an objective;

(ii) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime;

(iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders;

(iv) are carried out on the basis of spot-checks’

Two comments should be made regarding Article 23 of the SBC. First, the police checks central to Article 23 are very different from the temporary reinstatement of border control as described in Article 29. Article 29 can be enacted when a Member State believes its public policy or internal security is at risk ‘as a result of persistent serious deficiencies relating to external border control as referred to in Article 21.’ This implies temporarily reinstating border control as it was before the Schengen Agreement, and is very different from policing the border areas regularly.

Second, while the Schengen Border Code sets certain criteria for border policing, these criteria are far from concrete or specific. They leave room for interpretation, which can result in different approaches to border policing among each of the member states, and the number of rulings of the Court of Justice of the European Union shows that the different interpretations are not always in line with the

Schengen Border Code. In reviewing the rulings of the CJEU², the Policy Department of Citizens’ Rights and Constitutional Affairs of the European Parliament (2018) makes several observations regarding the regulation of policing in border areas that are relevant to the current research. Starting with several benchmarks that the CJEU sets for border policing: police checks must be clearly defined to allow them to be tested, requiring national law to determine the boundaries of the police activities; national legislation must ‘guide the discretion’ (pp. 22) of those that carry out the police checks in the border area; the more extensive the police checks are, the more extensive the legislation regulating the checks needs to be; and finally, the goals of the police checks cannot be equivalent to border control. It is therefore up to the individual Member States to create a national framework for border policing and, as the CJEU states, for the national courts of the individual Member States to determine whether the police checks in question are indeed compliant with these benchmarks. While the CJEU intends to clarify the role of border policing, the Policy Department of Citizens’ Rights and Constitutional Affairs (2018) comments that the CJEU also makes several statements that run counter to these goals. In these statements, links are made between migration and national security and how police checks can be more efficient than border control, blurring ‘the line between what is and what is not equivalent to a border control, or what constitutes a disproportionate policing within the common Schengen area’ (pp. 23). A final observation is that the CJEU stimulates the use of ‘modern technologies to monitor traffic flows, notably on motorways and other important roads determined by the Member States, [as they] can be instrumental in addressing threats to public policy or internal security’ (European Commission, 2017). Using such technologies allows Member States to monitor cross-border traffic without having to stop or check each individual vehicle, balancing free traffic and border surveillance at the intra-Schengen borders.

3.1.2 Migration control in Dutch border areas

As the Schengen Border Code and EU legislation do not offer firm guidelines on how to create a ‘Schengen-proof’ framework for border policing, it is up to the individual Member States to create legislation at the national level. In the Netherlands, the interpretation of Article 23 of the Schengen Border Code has taken the form of the Mobile Security Monitor. Since 1994 the Royal Netherlands Marechaussee has been conducting migration checks at the internal borders. Although these checks are carried out on the highways and trains that cross the border and for intra-Schengen flights at airports, the current case study only looks at the MSM checks on the highways. As both national and international law have a major impact on how

² CJEU 21 June 2017, nr. C-9/16 (A)

these migration controls are performed, the legal framework forms a good starting point to explain the MSM. This framework can be quite complex and could result in a substantive legal analysis going far beyond the scope of this dissertation. Therefore, the description will be limited to what is directly relevant to the research.

According to Article 50 of the Dutch Aliens Act and Article 4 sub 1g of the Police Act, RNLN officers can act to combat irregular migration, identity fraud and human smuggling during MSM checks, meaning RNLN officers can check individuals' identity, nationality and residential status. Although MSM checks are primarily a tool for migration control, it has some elements of crime control as well. Should an officer encounter a non-migration related offence during these migrations checks, such as drugs or weapons related offences, the officer is allowed to take action. Officers are not allowed to stop vehicles based solely on suspicion of criminal offences, however, as the MSM is aimed at migration control. Although there are no requirements of reasonable suspicion in deciding who to check, MSM checks are bound to other legal limitations. An important legal development in this regard concerns the 2010 ruling of the CJEU in the cases of Melki and Abdeli.³ While the cases in question took place in France, the rulings were relevant to the Dutch context as well. In response to the CJEU ruling, the Dutch Council of State ruled that the MSM as it was being carried out until then did not conform to the requirements stated in the Melki and Abdeli cases. This led to the creation of Article 4.17 of the Dutch Aliens Decree, which gave the MSM a solid foundation in national law as an instrument for migration control, but at the same time imposed several limitations on the MSM checks as well. The legal framework for the MSM as it was then and during the research period meant that (1) not every vehicle that crossed the border on a highway could be stopped, as this would mean systematic border control; (2) MSM checks could only be carried out in a 20 kilometer zone from the border; (3) MSM on the highways could not exceed six hours a day for each highway, with a limit of ninety hours a month.

In 2014, during the fieldwork for the current study, the Dutch Aliens Decree saw an addition to Article 4.17 in the form of 4.17b. This sub-article states that in case of a significant increase in irregular migration or if such an increase is expected based on concrete information, the RNLN may deviate from the limitations set in what is now 4.17a. For MSM checks on highways this means that the RNLN can check twelve hours a day with a maximum of 180 hours a month for each location, effectively doubling the allowed time for MSM checks.

³ CJEU 22 June 2010, nr. C-188/10 (Melki) and nr. C 189/10 (Abdeli).

3.1.3 Intelligence-led migration control and Amigo-boras

In addition to these requirements, Article 4.17a of the Dutch Aliens Decree contains a criterion that is especially relevant to the current study. Sub 2 of the article states that the MSM should be carried out based on information or experiences regarding irregular migration and that the MSM itself can be used as an instrument to gather information on irregular migration. A similar provision is found in the previously discussed Article 23 sub a of the Schengen Border Code. Information plays a vital role in the execution of the MSM. These developments have played an important part in the RNLN's decision to initiate an intelligence-led policing program. Similar to the developments visible in the regular policing context, the RNLN has been transforming into an organization where information is collected and analyzed in order to make decisions regarding its operations. MSM checks are therefore often referred to as intelligence-led in policy documentation (see Chapter 6 for more on this).

An important aspect of the shift towards intelligence-led policing for the RNLN was the introduction of the Amigo-boras camera system in August of 2012. Amigo-boras is a smart camera system specifically developed and implemented by the RNLN to assist MSM checks on the highways and is often referred to when mentioning intelligence-led policing in policy documentation. The system has been installed at fifteen fixed locations in the border area near Belgium and Germany, corresponding with the main highways crossing into the Netherlands. In addition to the static version, the RNLN has also developed a mobile version of the system. SUVs have been equipped with cameras and additional hardware in order to use Amigo-boras at any location at any time.

The system has three functions which can assist in the planning and execution of MSM checks. The first function is general traffic data collection and analysis. The cameras monitor cross-border traffic twenty-four hours a day and store relevant information. The information is stored anonymously and cannot be traced back to a specific vehicle. Although license plate information is stored, this is done indirectly by giving each license plate a unique identifier instead of the license plate number itself. As explained by the Minister of Immigration, Integration and Asylum in 2012, because the data only contains general information there are no restrictions on how long the data can be stored.⁴ By analyzing the traffic information, the RNLN aims to determine when and where MSM checks will be the most effective and efficient (see Chapter 4, 6 and 7 for a more in-depth discussion of the aims of Amigo-boras). For

⁴ Parliamentary Papers II, 2011–12, 19 637, no. 1492

example, if the traffic data indicates that every Wednesday around 7 o'clock in the morning an unusual number of Italian vehicles cross the border, the RNLM could set up a MSM check in order to investigate why those vehicles cross the border at that time. By looking for such irregularities, MSM checks can be used more effectively as they can be set up where necessary and more efficiently, without wasting resources on fruitless checks.

The second function of Amigo-boras is to show, not where and when but who to check. During MSM checks, Amigo-boras can use automated risk profiles to indicate which vehicles are a high risk regarding migration related offences and should be checked by RNLM officers (see Chapter 6 and 7 for a more in-depth discussion of the profiles used by Amigo-boras). The system takes a picture of each vehicle that passes by and analyzes the picture to compare it to a risk profile. The Amigo-boras system will then compare the characteristics of the vehicle with those of a risk profile. In case of a match, Amigo-boras will transmit what is called a hit. This hit is sent to an officer assigned to monitoring the system. The officer then first performs a check based on the picture of the vehicle to make sure no obvious mistakes were made in the assessment by Amigo-boras. If not, the officer will send the relevant information to a border patrol officer in the field who can then decide to stop the vehicle in question (see Chapter 6 and 7 for more on the decision to stop a vehicle using Amigo-boras).

The third function is less relevant to the current research, as it entails an alerting system for specific vehicles called Amber Alert. In case of an emergency involving a vehicle, Amigo-boras can be used to detect the license plate of that vehicle in cross-border traffic. For instance, when a vehicle is used for the abduction of a child, the RNLM will be alerted when that vehicle crosses the border. This function does not have a direct relation to migration control and will not be part of this research project

3.2 MSM checks in practice

Now that the legal framework and goals of MSM checks are clear, we will take a further look at how MSM checks are carried out in practice (see also: Van der Woude, Brouwer & Dekkers, 2016). As this study aims to understand the use of information and information technology in migration control practices, it is important to know how MSM checks are actually conducted. The underlying description describes MSM checks as they were performed during the fieldwork between October 2013 and March 2015. See section 2.2.1 for the methods used to collect this data.

Each MSM check started with a briefing consisting of several standard elements. First, relevant developments in the last twenty-four hours were discussed. Border patrol officers were updated on what their colleagues had encountered and what they were still working on. After that the Brigade Intelligence Desk⁵ presented new information that could be useful for the officers. Examples could be eye-catching cases found by other brigades, new (inter)national developments relevant to the MSM such as wars, or specific types of vehicles the border patrol officers should be looking for during the MSM check. This was usually followed by information on wanted criminals. The briefings often ended with a task division for the officers present on that shift. After the briefing the officers would gather equipment and head out to the border area for the MSM check.

Not all MSM checks were the same and a distinction could be made between what were called dynamic and static checks. The differences between the two, as the names would imply, is that during dynamic checks officer would drive around in the border areas and check vehicles along the way, while during a static check a temporary checkpoint was set up where all the vehicles would be checked. During the fieldwork the decision for either a dynamic or static check often depended on the number of officers available on that shift. Dynamic checks could be done with just two officers while static checks required at least four officers, although that was the bare minimum and officers preferred to be with a larger group.

During dynamic checks, two officers would get in a vehicle and drive in the border area near the German or Belgian border. While driving in the twenty kilometer zone officers would observe traffic. When they spotted a potentially interesting vehicle (see Chapter 5 for more on selection practices), they would pass that vehicle to see who was in it. Depending on the occupants of the identified vehicles, the decision to stop or not was made. If so, officers would give the driver a signal to follow and lead the vehicle to a safe area away from traffic to conduct the actual MSM check. After having stopped the vehicle, officers would ask the occupants for their documentation, such as passports, id-cards or driver's license. They would run the information via radio by a dispatcher to see if there were any open warrants, unpaid fines or other relevant information on the occupants. This process could take one to ten minutes, depending on the number of occupants, how busy the dispatchers were and what information was retrieved. If everything was in order, the occupants could continue their journey and the officers would start the selection process over again. If something was found during the check, for example an undocumented person, irregular immigrants,

5 In Dutch: BIK, Brigade Informatie Knooppunt

contraband or an open warrant, officers would have to take action. Simpler cases such as unpaid fines could be taken care of on the spot. For more complex cases, such as finding an undocumented person, officers would take the occupants to the brigade to work on the case and the necessary paperwork.

Static checks differed significantly from dynamic checks and made up the majority of the observations. Fifty out of the fifty-seven observations involved a static check (see section 2.2.1 for more on the observations). For static checks, officers would set up a temporary checkpoint somewhere in the border area. Each brigade had one or more fixed locations for these checkpoints, usually a designated piece of asphalt next to the highway or a parking lot. The size of the checkpoint would vary depending on the number of officers available for the MSM check. If four to six officers were available, a small checkpoint consisting of one or two vans would be set up. The vans could be used for questioning individuals, paperwork or to transport individuals back to the brigade if necessary. If the team was larger, then the checkpoint would also have a so-called Mobile Administration Centre (MAC). This was a truck equipped with several computers to run information on individuals, equipment to check for false documents and a separate questioning room. The static MSM checks varied in size: some days four officers were present, other days thirty officers. Despite the differences in the size of the operation, all officers were approachable for the researchers.

During static checks each officer had a clear task. These tasks could be roughly separated into two categories: selection of vehicles and checking vehicles. The selection of vehicles was in the vast majority of cases done by an officer on a motorcycle, although in cases of bad weather or when no motorcycles were available cars were used. Depending on the size of the MSM check, up to four officers would be tasked with selecting vehicles who would be positioned near the territorial border to observe the passing traffic. When an officer spotted an interesting vehicle, he or she would set off in pursuit. This decision to follow or not would have to be made in a split second. As traffic was passing by at a high speed (70 to 130 kilometers per hour), officers had just seconds to make their decision. If Amigo-boras was used during the MSM check, the officers would also receive information on hits by the system. Irrespective of whether it was an Amigo-boras hit or a decision based on their own judgement, if the officer decided to set off in pursuit, he or she would take a second look at the vehicle after catching up. Now there was more time to take a look at the vehicle and its occupants. If the officer still thought this vehicle was worth checking, the driver would be signaled to follow and be led to the designated checkpoint.

At the checkpoint, the officers making the selection would signal to the driver to stop. In the majority of cases officers waiting at the checkpoint would continue the MSM check while the officer on the motorcycle would return to the selection point and start the process over again. Only if no other officers were available, the officer making the selection would carry out the MSM check directly. The checking part of the process was identical to that of a dynamic check. Officers would ask the occupants of the vehicle for identification in order to establish identity, nationality and residential status and would run this information as well as the license plate of the vehicle via radio by dispatch. If everything was in order, the occupants were free to continue their journey. If not, officers would have to take appropriate action.

3.3 The MSM in numbers

In addition to the description of how MSM checks were conducted in practice, basic statistics provide insight into the overall size of the operation. Quantitative data made available by the RNLN (see section 2.2.5 for more information on the available data) show that in the period of January 2011 – August 2015, a total of 30,190 MSM checks were carried out on the highways in Dutch border areas. The number of checks per year seems to have declined steadily since 2012.

Table 3.1: number of MSM checks on highways each year.

Year	Number of MSM checks	Percentage
2011	6757	22.4
2012	7813	25.9
2013	7217	23.9
2014	5646	18.7
2015*	2757	9.1
Total	30,190	100.0

Source: Royal Netherlands Marechaussee *Data up to September 2015

The MSM checks can vary in size, however. The RNLN makes a distinction between small, medium and large checks. Small checks consist of two to four officers, medium check five to nine and large checks ten or more. The data shows that a large majority (78.7%) of MSM checks are of the small variety and a limited number (4.5%) are large.

Table 3.2: number of checks per size

Size MSM check	Number	Percentage
Small	23,767	78.7
Medium	5054	16.7
Large	1369	4.5
Total	30,190	100

Source: Royal Netherlands Marechaussee

A similar image is presented by the duration of MSM checks. On average an MSM check takes just over one hundred minutes (101.58 minutes). While MSM checks can take up to a maximum of six hours a day for each location, categorizing the checks shows that most of them do not use the available time to the full extent. More than half (51.6%) of MSM checks take less than an hour. This can possibly be explained by the fact that when officers encounters something that requires further action during a check – e.g. irregular immigrants or false documents – they are no longer available to check other vehicles. Considering how most checks are performed by just a few officers, encountering such a case means that not enough officers are available to keep the MSM check going and officers need to head back to base. Besides the large number of short MSM checks, the data show that a small percentage (0.9%) of checks exceeded the legal limit of six hours. This can be explained as registration errors and, according to the RNLM, a transition period in 2011 during which the legal limitations were not yet strictly enforced. The number of checks that exceeded the limit after the transition period is virtually zero.

Table 3.3: duration of MSM checks in categories.

Duration of MSM check	Number	Percentage
0-15 minutes	5275	17.5
16-30 minutes	3767	12.5
30-60 minutes	6498	21.6
1-2 hours	6656	22.1
2-3 hours	2921	9.7
3-4 hours	1699	5.6
4-5 hours	1774	5.9
5-6 hours	1274	4.2
More than 6 hours	259	0.9
Total	30,123	100.0

Source: Royal Netherlands Marechaussee

The data also gives insight in the number of vehicles stopped and checked during the migration controls. In the period January 2011 – August 2015, a total of 202,228 vehicles were stopped for an MSM check. As with the number of MSM checks, the number of vehicles stopped has declined steadily since 2012. To put these numbers into perspective: according to the National Data Warehouse for Traffic information, in 2014 a total of 63,686,051 vehicles crossed the border. The number vehicles stopped and checked for an MSM check that year was 46,696, meaning only a very small percentage (0.073%) of the cross-border traffic was stopped and checked by RNLM officers.

Table 3.4: tot number of vehicles checked for an MSM check per year.

Year	Number of vehicles checked
2011	35,938
2012	52,021
2013	48,772
2014	46,696
2015*	18,861
Total	202,228

Source: Royal Netherlands Marechaussee *Data up to September 2015

While legislation has imposed restrictions on the MSM, the statistics above indicate that the limit of these restrictions were not reached in practice. The size of MSM checks shows a limited amount of available personnel and MSM checks in the vast majority of cases did not use the full six allotted hours.

3.4 Concluding remarks

It will have become clear that the MSM involves a complex decision-making process for the RNLM, both on a legal, policy and street-level: intelligence-led migration checks with elements of crime control lacking requirements of reasonable suspicion but at the same being restricted in the number of individuals that can be stopped, where they can be stopped and in what timeframe they can be stopped. Combined with the observed issues regarding EU legislation and jurisprudence, this case study raises many questions regarding the performance of MSM checks and the role played by information and information technology. The research methods discussed in Chapter 2 are therefore needed to fully understand the decision-making process in such a complex setting.

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