Mobility, control and technology in border areas : discretion and decision-making in the information age
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4. Exercising Discretion in Border Areas: On the Changing Social Surround and Decision Field of Internal Border Control in the Netherlands[6]

As discussed in Chapter 1, the societal perspective on migration has seen quite some change. A recurring theme in the literature on migration, especially in the context of the EU, has been how migration is increasingly presented as a security issue. In this chapter we will investigate to what extent this development can also be observed in the Netherlands by looking at the policy and political discourse related to the MSM from 1992 to 2013.

4.1 Decision-making in border areas

At the border, a distinction is made between 'bona fide' global citizens and 'crimmigrant others' (Aas 2011; Carling 2011). Bosworth and Guild (2008, pp. 703-704) explain this process as 'a defining aspect of modernity.' As borders have become increasingly permeable 'due to global capitalism, mass tourism, the communications evolution and evolving forms of regional governance such as the European Union', states seek to restrict access to non-citizens who are seen as the primary risks emanating from elsewhere.' Border control officers are of vital importance in the decision making process of who belongs, and subsequently can cross the border, and who does not, thereby continuously differentiating 'insiders' from 'outsiders' (Motomura, 2011). Outsiders can only enter under certain conditions. In the Netherlands this vital task of selection and risk assessment is fulfilled by the Royal Netherlands Marechaussee (RNLM); a special force with both military and civil police duties. Their border patrol officers have a great deal of discretion in performing their duties in line with the faith

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6   An earlier version of this chapter was published as: Dekkers, T.J.M., Van der Woude, M.A.H., Van der Leun, J.P. (2016). Exercising discretion in border areas: on the changing social surround and decision field of internal border control in the Netherlands, in *Int. J. Migration and Border Studies,* Vol. 2, No. 4.

that is being placed in the amalgam of actuarial policies based on risk assessments and discretionary powers in the current new penological era (Feeley & Simon, 1992, 1994; Simon & Feeley, 1995). Under the Aliens Act together with the Aliens Decree and the 2012 Police Act[7], border patrol officers are allowed to stop any vehicle in a zone of 20 kilometers (km) behind the Dutch border to check the driver and potential passengers for valid ID and legal status. A reasonable suspicion of any criminal activity or illegal entry or stay is not needed as long as the controls are non-structural. The controls are conducted under the heading of the Mobile Security Monitor (MSM). These are time-limited immigration controls on highways and in trains that cross the border with Belgium and Germany and intra-Schengen flights at airports.

The decisions made by border patrol officers have so far remained understudied and so is the changing social context in which officers make their decisions (Pratt, 2005). Discretion in this respect can be seen as 'the freedom, power, authority or leeway of an official, organization or individual to decide, discern or determine to make a judgement, choice or decision about alternative courses of action or inaction' (Gelsthorpe & Padfield, 2003: 3). Research on discretionary decision-making in criminal justice matters tends to focus on outcomes and individual decisions, which seems to sell short the influences of other – more macro-level – factors, or in the context of this dissertation, the border policy level.

Although street-level bureaucrats play a significant role in how policy is actually applied (Lipsky 2010, orig. 1980), their discretion finds its origin in and is shaped by decisions made by politics and high-level administrators (Bushway & Forst, 2013). This higher level process partially scripts the work of the officer in order to achieve the policy goals. However, this does not take place in a vacuum. Hawkins (2003) emphasizes how criminal justice decisions are made in a rich and complex environment, which acts as the setting for the play of shifting currents of broad political values and forces. He refers to this complex environment as the social surround, the broad and largely uncontrollable setting in which both individual decision-making and activities of the criminal justice bureaucracies in which such decision-making occurs takes place. The social surround is influenced by much broader societal developments. In the case of border control, the asylum seekers crisis at the Mediterranean borders or the increased fear of terrorism after incidents can be thought of as such developments. Within the social surrounds sits the decision field, another important and often overlooked area according to Hawkins. Other than the social surround, the decision field is defined by and acted on by criminal justice bureaucracies. Whereas the law

determines the contours and reach of the decision field, the decision field contains sets of policy and organizational ideas about how the ends of the law and formal policies are to be pursued. The decision field is therefore constructed by politicians and policy makers that create and shape these ideas and goals. This runs from official aim of laws and policy goals towards informal work instructions. The social surround and the decision field continuously interact and together influence the ways in which street-level officers will frame and decide upon an individual case. In order to fully comprehend the nature of street-level discretionary decision-making it is therefore important to take into account the social and organizational context as well as at the legal and political field in which the decision making is set and viewed. According to Galligan (1986), the very heart of the discretionary process lies within legislative and policy decisions. Whereas legislative decisions shape the formal legal framework of discretion, it is subsequently shaped and transferred down throughout an organizational hierarchy by means of policy. Policy, like legal rules, acts therefore as one of the constraints in the context or field within which individual decisions have to be made.

Whereas the larger research project underlying this dissertation does investigate the interpretive and classificatory processes of individual Dutch border patrol officers, this chapter will focus on the social surround and the decision field. The focal point will be political and policy processes surrounding immigration control in border areas in the Netherlands rather than individual decision-making by border patrol officers. In doing so we aim to contribute to a deeper understanding of the complex political and socio-legal context within which individual border patrol officers in their performance of the MSM have to come to individual decisions on which vehicle to stop or not. This has led to the following research question:

To what extent and in what way have the social surround and decision field underlying Dutch internal border control decision-making changed over the past two decades and how might these changes affect street-level decision-making by individual migration control officers?

In order to answer this question, based on the rich scholarly literature on the securitization of migration in relation to EU border control, we will first lay out the changed social surround within which individual border patrol officers have to perform their duties in paragraph two. Next, in paragraph three we will study the decision field of border control agents by making use of the results of a qualitative discourse analysis from over 250 documents on Dutch border control, the MSM and the role and task of the RNLM to identify important changes. By drawing from

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7   Article 4 lid 1 sub f Police Act 2012 jo art. 50 Aliens Act jo art. 4.17a Aliens Decree.

policy documents, transcripts of political debates and parliamentary documentation, the rationales and goals behind the policies and how they change over time will be uncovered. These findings will generate insight into developments at the policy making level which will also be used as a starting point in paragraph four to hypothesize about the implications of these developments at the street-level. We plan to empirically test these latter hypotheses by drawing from over 800 man-hours of observations as well as dozens of formal and informal interviews with street-level border patrol agents in future publications.

4.2 A changing social surround: The criminalization of migration in borderless Europe

As mentioned in the introduction, in order to fully comprehend choices and decisions made by law enforcement officials on the street-level, it is necessary to have a clear grasp of the wider social context in which Dutch patrol officers perform their duties. In this paragraph we aim to give an overview of the most striking changes in the social surround as identified in the literature on the broader context of internal border control in Europe and the ways in which perspectives on migration flows and security have evolved in recent times. According to Burgess, while being confronted with security threats that surpass the boundaries of nation states and that are interconnected through the process of globalization, the challenge of maintaining security is no longer limited to the traditional foreign policy and military tools of the nation state since the mid-1990s (Burgess, 2011). Migration flows and cross-border movements have increasingly become an object for monitoring and security analysis (Torpey, 2000; Rudolph, 2003).

There is a wide consensus amongst scholars that the 'criminalization of migration' in (Western) Europe has intensified during the past three decades, therewith echoing the situation in the United States (Bigo 2004; Huysmans, 2006; Merlino 2009; De Giorgi, 2010; Vollmer 2011; Mitsilegas 2015). The literature shows that the emergence of a complex system of migration control in Western Europe, functioning on the one hand as a regulatory tool for legal entry and residence and on the other as a repressive tool against illegal entry and residence, can paradoxically be traced back to the establishment of the Schengen Agreement in 1985. By doing away all internal border checks between Member States, Schengen encouraged the free movement of goods, information, money and people. From an economical and trade perspective, most member states saw the advantages of joining the agreement, or at least the disadvantages of opting out. Ironically enough, the establishment of an area with no borders has effectively stimulated border control, since the notion that European integration and economic welfare *via* the opening of internal borders would also

lead to an increase in cross border crime became the shared belief underpinning Schengen (Atger, 2008; Bigo 1999). In particular, third country nationals and irregular immigrants are increasingly seen as potential security risks (Cholewinski 2007; Engbersen et al. 2007; De Giorgi 2010).[8] According to the Schengen process the abolition of controls at the internal frontiers should be matched by a standardized strengthening of controls at the external frontiers of 'Schengenland' (Anderson et al. 2000). As this never worked out as planned, member states were still concerned about internal cross-border movements. Whereas these concerns were present from the very first moment the Schengen agreement was called into force, several factors in particular fueled these concerns in later stages (Mitsilegas 2007; 2015).

The first factor is the 'war on terror' that immediately rocketed to the top of the political agenda in both the US and the EU after the terrorist events of 9/11 (Van der Woude & Van Berlo, 2015). A major characteristic of the resulting counterterrorist strategies has been the focus on maximum surveillance, especially in relation to the movement of people. As a result, immigration and crime – and especially serious crimes such as terrorism – are turned into a single problematic issue. These developments have been exacerbated by more recent events in several European countries such as train bombings in Spain and the recent attacks in Paris. The second factor is the enlargements of the EU in 2004 and 2007, leading to the shifting of the EU external border to the East of Europe (Van der Woude & Van Berlo, 2015). In the late 1990s, EU membership of the eight then candidate countries from Central and Eastern Europe caused a number of concerns centered in particular on the perceived difficulties that these countries would face in guarding the EU external border (Sitkin, 2014). Although most of these concerns seemed to focus on third country nationals including irregular migrants, the securitization of migration also started to affect the rights of immigrants within the EU as states started to resist further harmonization. The third factor – partially tying in with the second factor – is the Arab Spring in 2011 and the resulting influx of third country nationals due to inadequate or sometimes even absent external border control and immigration management in Italy. The Italian government decided to grant all Tunisian nationals temporary residence permits for humanitarian reasons under Article 20 of Italy's Consolidated Immigration Law allowing them to travel – and therewith further spread – throughout Europe, specifically to France. In response to the Arab Spring, many European countries have expressed the wish to temporarily close their internal borders in order to ward off an immigration influx (Van der Woude & Van Berlo, 2015).

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8   Irregular migrants constitute the prime target of the broader punitive turn in the regulation of migration that has emerged in the European context since the mid-1970s.

The debate on border control is evidently not confined to the southern region of Europe but affects the EU as whole (Munkøe, 2012). Across Europe, law and policy makers are actively involved in a dialogue about the existing Schengen regime on internal border controls and the potential need to apply changes. In response to the EU-wide discussion sparked by the Arab Spring, the rules governing the possibility for member states to temporarily reinstate permanent internal border checks have been clarified and intensified, making it less easy for member states to do so. The Commission's intent might have been to prevent abuse of this exception to the right to free movement in the light of the growing concerns on immigration (Van der Woude & Van Berlo, 2015).

All in all, the criminalization of migration and the growing immigration and security concerns about internal border movement are important changes in the social surround at a supranational level that have to be taken into consideration when analyzing street-level decision-making by border patrol officers on a national level. In the following paragraphs we will see how this second pillar of what Hawkins (2003: 200) refers to as the 'background of decision-making activity' in the context of border security develops over time by means of a more specific discourse analysis of the decision field.

4.3 Method
The legal and policy framework of the MSM – and therewith the formal decision field of border patrol officers carrying out the Monitor - have changed over time. By means of a qualitative discourse analysis we not only aim to shed light on the most important areas of change, but also on the political rationale underlying these changes and what is hoped to be achieved by this. A qualitative discourse analysis is a suitable method for analyzing social and policy developments in an in-depth way (Koemans, 2011). It enables a vigorous assessment of how language is used to describe and explain (Institute for the Public Understanding of the Past & the Institute for Historical Research, 2007). Through the process of connecting language to the broader social and political context, it is a valuable tool for researching processes of social and cultural change (Pinto, 2011). The present analysis will focus specifically on the drafting of policy and legislation by politicians and public institutions and the debates surrounding these processes, thereby depicting the decision field.

The Dutch parliamentary debate as laid down in policy documents has been the main source of information for the present analysis. These documents will show policy makers' deliberations with respect to immigration control in border areas, what the goals should be and how these goals should be attained. This debate is accessible

through digital databases: OpMaat, Tweedekamer.nl and Staten Generaal Digitaal.[9] All three databases contain various types of official documents, such as transcripts of political debate, policy reports, policy evaluation and legislation which are all publically available. Specific keywords relating to the Mobile Security Monitor have been used to search these databases (translated from Dutch): *mobile security monitor, mobile alien monitor, border surveillance, border control, border security, Amigo-boras, immigration control, military border police, irregular immigration.*[10] These keywords were also used in a variety of search strings.

In order to make a diachronic comparison (cf. Jäger & Maier, 2009), three crucial time periods have been selected within the twenty-year frame of existence of the MSM on the basis of prominent events. The first period is 1992 - 1994. Although the MSM officially started in May 1994, an important motion in parliament in February 1992 is considered to be the start of the process of developing the MSM (De Weger, 2006). In this timeframe, the development of the initial priorities and goals of the MSM can be analyzed. The second timeframe is the three-year period between 2001 and 2003. The terrorist attacks of September 11th 2001 are considered to be a turning point in border security worldwide (Ackleson, 2005a, 2005b, 2012; Donaldson, 2005; Miller, 2005; Brunet-Jailly, 2006; Aradau & Van Munster, 2007; Ewing, 2007; Wilson, 2007; Ceyhan, 2008; Vaughan-Williams, 2008; Wilson & Weber, 2008) and in this time frame we expect to see how these events have influenced the Dutch debate on internal border control and the monitoring of border crossing. The third period is the start of 2011 until the end of 2013. In June 2011, the Minister of Immigration and Asylum had to change the legal framework of the MSM in order to limit its duration and frequency in response to a ruling of the Council of State that the MSM was a disguised form of border control and therefore a breach of the Schengen Border Code[11]. To observe how this has affected the political discourse of the MSM, this period is also part of the analysis.

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9   Staten-Generaal Digitaal (http://www.statengeneraaldigitaal.nl/) is a database complied by the House of Representatives and the Royal Library, consisting of transcripts of debates and meetings of the House of Representatives and the Senate of the Netherlands. The database goes back to 1815 and is available up to 1995. OpMaat (http://opmaat.sdu.nl) is a database published by SDU Publishers. It contains a large variety of official publications such as policy reports, jurisprudence, law, regulations and publications of the Dutch Parliament from 1985 until present day. Tweedekamer.nl (http://www.tweedekamer.nl) is the official website of the Dutch House of Representatives. Besides news and a parliamentary agenda, it also serves as an archive for documents, propositions, motions and transcripts related to the House of Representatives.
10   In Dutch: *mobiel toezicht veiligheid, mobiel toezicht vreemdelingen, grenstoezicht, grenscontrole, grensbewaking, @migo-boras, vreemdelingentoezicht, Marechaussee, illegale immigratie.*
11   See Article 22 and 23 of the Schengen Border Code.

Within each time period, documents were selected based on the title or index of the document, and subsequently analyzed with the help of the software program for qualitative analysis Atlas-Ti. For each time period a separate hermeneutic unit (HU)[12] was created, in which the documents were searched and labeled. Relevant fragments of text were sorted by subject and compared with the method of constant comparison between the different time periods.

A total of 451 documents were found in the databases, of which 259 documents contained relevant information and were used in the analysis. Table 4.1 shows the distribution of these documents over time.

Table 4.1: Number and types of documents found in the databases (N=451)

Type of document	1992 - 1994	2001 - 2003	2011 - 2013	Total
Brief to parliament	7	59	70	136
Reports of parliamentary meetings	51	40	52	143
Transcripts of debates	1	15	13	29
Policy report	1	7	40	48
Parliamentary questions	0	11	32	43
Other	13	11	28	52
Total number of documents found	73	143	235	451
Total number of documents that contained relevant information	44	63	152	259

Source: Original data based on analysis of policy debates as laid down in formal texts.

The variety in numbers between each period can be accounted for on the basis of the development of digitalization, and the different ranges of the databases. The database Staten Generaal Digitaal stores documents from 1814 until 1995 and Tweedekamer.nl includes documents from 2007 until present day. Although OpMaat stores documents starting as from 1985, until 1995 the documents comprised only legislation and not yet political deliberations and jurisprudence.

It must be kept in mind that our methodological strategy is limited to written policy and strategy documents, which obviously has its limitations as it constitute only one particular element of policy. Changes in practice may occur in the absence of official changes in policy and written policies or policy debates do not necessarily translate into changing practices on the ground (Van der Leun, 2006). As explained

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12   In AtlasTi, the HU contains all documents, quotations, codes, memos, and associated files that make up a project.

in the introduction, however, we will later supplement our policy level analysis with observational work on border practices on the ground.

4.4 Unraveling the decision field

Our summary of findings of the policy discourse analysis below will be grouped into broad themes for analysis: (a) goals of the MSM, (b) expansion of discretionary powers, (c) intelligence and risk assessment, (d) technology and (e) profiling. The results for each of these themes will be presented in a chronological order.

Goals of the MSM: from controlling immigrants to crimmigrants
The analysis shows that although the MSM was not yet conceptualized at the beginning of 1992, the political debate did show a demand for such an instrument at the time. The opening of the internal borders due to the Schengen agreement clearly had the parliament worried[13], not only because of immigration issues, but also because of the potential increase of cross-border crime. The fear of increased cross-border crime was a reason for some politicians to call upon the supporting role of the RNLM in police matters to fight crime at the border and keep potential criminals out. Despite these security-related motivations the MSM, as presented to parliament in the debate of March 24th 1994, had a more univocal immigration-oriented goal. Official documentation states the following: '*The goal is to prevent illegal entry and irregular stay of aliens.*'[14]

Even in 2001, when the MSM had been a task of the RNLM for seven years, the official goal of the MSM was still clear and fixed. In most documents, a single definition, barring some variations, of this task can be found: '*The goal of the MSM is to prevent irregular stay of aliens as a result of irregular immigration in the earliest possible stage.*'[15] The MSM was seen as an important tool to stop unwanted immigrants at the border and to discourage prospective immigrants from coming to the Netherlands illegally. In the documents analyzed, the MSM was presented as functioning in both a repressive and a preventive way.[16] The specific goal of deterring asylum seekers who are in the asylum process of other countries and might want to enter the Netherlands was mentioned only once.[17]

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13   Handelingen II, 1992/93, 17; Handelingen II, 1992/93, 78.
14   Parliamentary Papers II, 1994-95, 19 637, 115; Parliamentary Papers II, 1994-95, 23 900 , 2.
15   Parliamentary Papers II, 2002/03, 26 269, 6; Witte, R., Wijkhuis, V. (2001). *Effectief Mobiel Toezicht Vreemdelingen.*
16   Parliamentary Papers I, 2002/03, 23 490; Witte, R., Wijkhuis, V. (2001). *Effectief Mobiel Toezicht Vreemdelingen.*
17   Parliamentary Papers II, 2001/02, 19 637, 1.

In the second period of analysis, the goal started to shift, as the relation between MSM and terrorism had entered the debate.[18] From 2001 on, the MSM was also explicitly presented as a tool to fight crime and terrorism.[19] Whereas for long time immigration control prevailed, crime control gained importance to such an extent that it even led to a name change of the instrument. Where it used to be Mobile Foreigners Monitor, in 2010 this changed to Mobile Security Monitor.[20] This name change clearly implied the wider security-oriented scope. The reason for this change in name was addressed in a letter from the Minister of Immigration, Integration and Asylum.[21] The minister explained that during MSM checks, criminal offences were often encountered which made these checks not just an important tool for immigration purposes, but also for combating crime. As a result, the goal seemed to change simultaneously: *'The goal of the MSM is to combat irregular immigration and certain forms of cross-border crime.'*[22] There are variations and different interpretations in this mission statement, including the occasional addition of terrorism, drug related crime or all forms of crime, but the above-mentioned goal is most commonly stated in documents published by the RNLM.

Looking at the development of the goal of the MSM, several observations can be made. First, an increased association between immigration and crime over time can be seen in the goal of the MSM. Irregular immigration was a priority for politicians during all three selected periods, but the focus shifted. In the first period, irregular immigration was mentioned mostly in general terms. In the second and third period, the emphasis shifted to *criminal* irregular immigrants who became a clear priority.[23] This prioritization went hand in hand with an increased association between irregular migration and crime. In the first period, the link between the two was occasionally brought up, but never emphasized. In fact, in a debate on irregular immigrants it was explicitly stated that the association between irregular immigration and social issues had to be prevented.[24] The discourse in the second and third period showed

more evidence of the association between irregular immigration and crime.[25] Drug related crimes, human trafficking and terrorism were all associated with immigrants and border security. Especially in the period 2001 – 2003 the association with human smuggling and terrorism attracted attention.[26] As (irregular) immigrants became to be associated more and more with crime, the goals of the MSM co-evolved in the same direction.

Although the name change and the shifting goal of the MSM took place in the political debate in this first period, the legal framework of the MSM stayed the same. Whereas these changes seemed to imply a broadening of the legal foundation of the MSM also formally allowing border patrol officers to focus on alleged criminal behavior in the border areas they patrolled, this was not the case. Remarkably, the legislative foundation of the MSM – and thus the formal authority of the RNLM – was still based solely on the Aliens Act (Van der Woude, Dekkers & Brouwer, 2016).

Expanding discretionary powers
Although permanent internal border controls had been abandoned with the implementation of the Schengen Border Code, article 23 of the SBC clarifies that lifting permanent internal border controls does not mean giving up all forms of territorial control. National police forces still have the possibility of carrying out controls in border areas, subject to the conditions as described in the SBC and as long as these controls are not conducted in a systematic or static way and do not have an effect equivalent to permanent border checks. In 1994, the Dutch interpretation of article 23 SBC led to the introduction of the MSM. Based on the Aliens Act and the Aliens Decree, the Dutch RNLM have the authority to carry out immigration checks in a 20 kilometer zone around the Dutch – German and Dutch – Belgian border. In this 20 kilometer zone, individuals entering Dutch territory (either by train or by car or by any other mean of transport) can be asked for their identity document as well as their residential status. Officers can stop any person or car in this zone without the requirement of reasonable suspicion of illegal stay. In other words: RNLM officers enjoy a high degree of discretion in selecting persons and vehicles.

This discretion has been a continuous matter of debate. The political discourse shows that the potential selectivity and stereotyping as a result of this discretionary space

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18 Parliamentary Papers II, 2002/03, 26 269, 7; Parliamentary Papers II, 2002/03, 27 204, 2.
19 Parliamentary Papers II, 2001-02, 27 925, 34; Parliamentary Papers II, 2001-02, 27 204, 17; Parliamentary Papers II, 2002-03, 27 925, 96.
20 In Dutch the name changed from Mobiel Toezicht Vreemdelingen (Mobiel Aliens Monitor) to Mobiel Toezicht Veiligheid (Mobile Security Monitor), for both the acronym MTV is used.
21 Parliamentary Papers II, 2011/12. 19 637, 1526.
22 Parliamentary Papers II, 2011/12. 19 637, 1393; Parliamentary Papers II, 2011/12. 19 637, 1485; Parliamentary Papers II, 2010/11. 32 317, 68.
23 Handelingen II, 2000/01, 83; Parliamentary Papers II, 2001/02, 19 637 en 26 338, 641; Parliamentary Papers II, 2001/02, 19 637, 608; Parliamentary Papers II, 2002/03, 28 749, 4; Handelingen II, 2001/02, 48; Aanhangsel Handelingen, 2011/12, 2007; Parliamentary Papers II, 2010/11, 19 637, 1393; Aanhangsel Handelingen, 2011/12, 2565; Parliamentary Papers II, 2011/12, 19 637, 1459.
24 Parliamentary Papers II, 1992/93, 22 981, 3

25 Handelingen II, 2000/01, 83; Parliamentary Papers II, 2001/02, 19 637 en 26 338, 641; Parliamentary Papers II, 2010/11, 19 637, 1393; Aanhangsel Handelingen, 2011/12, 2565.
26 Parliamentary Papers II, 2001/02, 27 925, 10; Parliamentary Papers II,2001/02, 33 031, 6; Parliamentary Papers, 2001/02, 27 204, 15: Parliamentary Papers II, 2012/13, 33 512, 3; Parliamentary Papers II, 2012/13, 32 317, 178.

was a matter of concern. Some politicians voiced concerns that it could result in disproportionate checks of non-Western immigrants.[27] They stressed that regulations in the Immigration Circular were not specific enough in describing who could be checked and on what bases, to prevent discrimination of non-Western immigrants.[28] The discussion of potential discrimination was continued under the heading of profiling, discussed later in this chapter.

Seven years later other aspects relating to the authority and discretion of the RNLM can be discerned. A heated debate as to the ability for the RNLM to take (irregular) migrants into custody or having to transfer them to the Aliens police had risen.[29] [30] The authority for the RNLM to take immigrants into custody was removed with the introduction of the Aliens Act 2000, but this was soon seen as inefficient. Limited capacity of the aliens police resulted in having to let irregular migrants go without any consequences. The ability for the RNLM to autonomously arrest and take irregular immigrants into custody by itself would soon be reinstated. Another aspect of authority that was debated was the ability to search a car during MSM checks, which was legally granted in 1998. A report[31] on the MSM states that although the RNLM claimed this would make the MSM checks more effective, statistics showed no improvement in effectiveness to be seen at this time.[32] The legal power nonetheless remained.

In the third and last period, the focus of the MSM was most fundamentally questioned by politicians. Some politicians emphasized that the RNLM should stick with its core business: immigration control.[33] Matters such as drug enforcement in border areas were considered a task of the police, rather than the RNLM. Other politicians saw the MSM not only as a means for fighting irregular immigration, but also for fighting various forms of crime.[34] They were of the opinion that the RNLM should be granted more powers to combat crime more effectively. What the exact scope of these powers had to be remained unclear.

Whereas the demand for a closer monitoring of the internal borders and border mobility in this last time frame is strongly fueled by the fear of cross-border drugs crime and terrorism, the use of the MSM was legally restricted in 2011 by formal change of the Aliens Decree. The extent of the instrument was limited by the Minister of Immigration and Asylum after a ruling of the Council of State.[35] The ruling of the Council of State was inspired by the ruling of the Court of Justice for the EU in the cases Melki/Abdeli vs. France.[36] In these cases the Court was of the opinion that the preventative searches carried out by the French Gendarmerie in the border area were to be seen as forbidden border checks due to their almost permanent nature.[37] The restrictions that followed limited the MSM to a maximum of six hours a day on the highways and two trains per day. The discourse shows that this ruling was not well received in the Dutch debate. Politicians stated their concerns about a potential increase in crime and irregular immigration as a result of these limitations.[38] The limitations were described as ridiculous, unsatisfactory and a sign of losing control of the borders.[39] Questions were asked and motions were put forth to stretch the boundaries of the limitations.[40] Some politicians even proposed reinstating permanent internal border control, even if this would mean breaking the Schengen Agreement.[41]

Intelligence and risk assessment
The notion of risk assessment – in the sense that potentially risky immigrants needed to be identified as early as possible - was not very prominent in the political discourse on immigration and border control during the first period of analysis. In the documents included in the analysis, risk assessment was only mentioned in the

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27   Handelingen II, 1992/93, 17, 17 769; Handelingen II, 1992/93, 78, 76-5658.
28   Handelingen II, 1993/94, 78, 78-5671.
29   Witte, R., Wijkhuis, V. (2001). *Effectief Mobiel Toezicht Vreemdelingen;* Parliamentary Papers II, 2001/02, 19 637 and 26 338, 641.
30   Where the RNLM is responsible for immigration control in border areas, the aliens police is responsible for immigration control within the country.
31   Witte, R., Wijkhuis, V. (2001). *Effectief Mobiel Toezicht Vreemdelingen.*
32   Witte, R., Wijkhuis, V. (2001). *Effectief Mobiel Toezicht Vreemdelingen.*
33   Parliamentary Papers II, 2012/13, 2109.
34   Parliamentary Papers II, 2012/13, 1767; Parliamentary Papers II, 2012/13, 1189.

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35   The Council of State is the country's the 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 government. 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.
36   Being the highest court in the European Union in matters of European Union law the ECJ is tasked with interpreting EU law and ensuring its equal application across all EU member states. Therefore, rulings of the ECJ have direct effect in all member states as to how certain aspects of EU law should and can be interpreted and enforced. For more on the role of the ECJ in the process of European Integration see: Waele, H. de (2010) The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment, *Hanse Law Review,* 6(1), 3-26.
37   CJEU 22 June 2010, nr. C-188/10 (Melki) and nr. C 189/10 (Abdeli).
38   Commissie Integraal Toezicht Terugkeer, Jaarverslag 2011; Parliamentary Papers II, 2012/13, 32 317, 184; Parliamentary Papers II, 2011/12, 33 192, 5.
39   Parliamentary Papers II, 2010/11, 19 637, 1396; Parliamentary Papers, 2010/11, 19 637, 1443; Parliamentary Papers II, 2012/13, 32 317, 184; Parliamentary Papers II, 2012/13, 32 317, 171.
40   Handelingen II, 2012/13, 29; Parliamentary Papers II, 2012/13, 32 317, 184; Parliamentary Papers II, 2012/13, 19 637, 1673; Parliamentary Papers II, 2013/14, 32 317, 195.
41   Parliamentary Papers II, 2011/12, 22 112, 1283; Parliamentary Papers II, 2011/12, 32 317, 128; Parliamentary Papers II, 2011/12, 32 317, 76; Parliamentary Papers II, 2010/11, 32 317, 67.

context of air traffic.[42] According to politicians, additional security measures, such as pre-flight checks, should be applied to flights from locations that were considered risky in terms of irregular immigration. Risk-oriented data collection was not common practice either. The only instance of data collection found in the discourse was the Schengen Information System (SIS), which was a subject early on in the debate on Schengen and open borders.[43] The brief discussion around this system indicated that it raised questions about potential problems with such a shared system. Concerns about privacy and the possibility of information getting in the wrong hands were expressed, albeit not thoroughly debated.

In the second period, risk assessment is still not often referred to in the political debates and policy documents with respect to immigration. Only a further development of pre-flight and visa checks in high risk countries can be seen.[44] Yet, in debates and documents surrounding terrorism, risk assessment was much more prominent.[45] Task forces and project groups were assembled to analyze potential risks to society[46] and threat analyses were deemed necessary to prevent future terrorist attacks. The MSM was seen as a crucial tool to put these analyses to practice and went hand in hand with a more prominent call for large-scale data collection in border security. In the political debates and policy documents, analyzing and sharing information was seen as key factor in securing the border.[47] On a national level, information on travel routes and information from travel agencies was gathered and analyzed, and criminal and immigration databases were linked. On an international level, cooperation and information sharing was seen as the key to improving immigration policy. For example, a European visa database was being developed and liaison officers were appointed to facilitate shared risk analysis.[48] This wealth of information was used for immigration policy in general, but also for the MSM in specific. The wish to strengthen the intelligence branch of the MSM was expressed in several documents that also referred to crime and terrorism. For example:

'The research and analytical task of the MSM will be prioritized. This will result in more insight into human smuggling which will enable better [MSM] checks.'[49]

'The measures for the MSM and border security described in the Plan of Action against Terrorism will increase the demand for validating and sharing information between sister organizations.'[50]

This last quote also points to new function of the MSM. It is no longer primarily seen as merely consuming information, it is now also seen as a crucial means to gather information. The latter is emphasized in several documents.

In the last selected period, the use of risk analysis had permeated the discourse on both border security as a whole as well as the MSM in specific. In the political debate and policy documents the need to act based on risk and threat analysis had become highly explicit. A quote that emphasizes the importance of risk assessment can be found in the National Counterterrorism Strategy: *'Absolute safety cannot be guaranteed. Protection is therefore controlling threats and risk.'[51]* Words that often accompany risk assessment in the policy debate are *effectiveness* and *efficiency*. Risk analysis is considered a method that can provide effective and efficient border security, which is especially convenient in the light of the limitations imposed by the Schengen Border Code. Also, much like effectiveness and efficiency, the phrase *intelligence-led* plays a part in most documents relating to border control.[52] This also becomes apparent in the discourse as data collection has increased vastly since 2003. The Schengen Information System, Schengen Information System II, Visa Information System, EURODAC and Entry and Exit System are some of the digital databases that store information on immigrants. The overlap in immigration control and crime control which can be seen in the goals of the MSM is also reflected in how some politicians wanted these systems and databases to be used. Despite the fact that there were some concerns about the implied association between immigrants and crime, it has become possible, albeit with restrictions, to compare fingerprints found on crime scenes with those stored in immigration databases.[53]

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42   Parliamentary Papers I, 1992/93, 215483F; Parliamentary Papers I, 1992/93, 215646F; Parliamentary Papers I, 1992/93, 216O97F

43   Handelingen I, 1993/94, 17, 17-747.

44   Parliamentary Papers II, 2001/02, 27 925, 34.

45   Parliamentary Papers II, 2001/02, 27 925, 66; Parliamentary Papers II, 2001/02, 27 925, 94; Parliamentary Papers II, 2001/02, 27 925, 96.

46   Parliamentary Papers II, 2001/02, 23 490, 224; Handelingen II, 2001/02, 86; Parliamentary Papers II, 2001/02, 23 490, 237.

47   Handelingen II, 2001/02, 86; Parliamentary Papers II, 2003/04, 29016, 5; Parliamentary Papers II, 2001/02, 23 490, 224; Parliamentary Papers II, 2001/02, 19 637, 608; Handelingen II, 2000/01, 53; Mensensmokkel in Beeld, 2001 – 2003; Parliamentary Papers I, 2001/02, 23 490, 13n & 237; Parliamentary Papers II, 2001/02, 21 501-02, 21 501-20 & nr. 438; Witte, R., Wijkhuis, V. (2001). *Effectief Mobiel Toezicht Vreemdelingen.*

48   Parliamentary Papers II, 2001/02, 21 501, 02; Parliamentary Papers II, 2001/02, 23 490, 224.

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49   Witte, R., Wijkhuis, V. (2001). *Effectief Mobiel Toezicht Vreemdelingen.*

50   Parliamentary Papers II, 2001-02, 27 925, 34.

51   Nationale Contraterrorismestrategie 2011-2015.

52   Rapportage Vreemdelingenketen periode juli – december 2011; Parliamentary Papers II, 2013/14. 19 637, 1760; Parliamentary Papers II, 2012/13. 32 317, 156; Parliamentary Papers II, 2012/13. 19 637, 1647.

53   Parliamentary Papers II, 2011/12, 32 317, 128.

Technology

Technology does not seem to play a big role yet in the process of border security in the first period. In the discourse of 2001-2003, though, technology is presented as a crucial aspect in the process of data collection. Digital databases are referred to in many instances, especially with respect to a database to store and share visa information. The prospect of linking different databases is also a common theme in this second period of analysis as well as that of biometrics, which is presented as a crucial tool for border security.[54]

The most far reaching technological advancement for the MSM, is seen in the last period in the form of the advanced camera system dubbed Amigo-boras. The name is an acronym of what can be translated as '*more intelligence-led action – border observation, registration and analysis system.*' The system, first officially used in August 2012, was installed at 15 highways in the Dutch border area. It has several functions that support the RNLM during the MSM. First, it can gather traffic data. Patterns and trends derived from this data can be used to decide where and when to set up the checks. Second, the system can assist the selection during the MSM based on profiles. For example, the system can recognize the origin of license plates and vehicle types, which can be linked to a certain risk profile. When a vehicle fitting a profile crosses the border during the MSM, the RNLM will receive a notification, after which border patrol officers can decide whether or not to stop the vehicle. Although Amigo-boras was originally developed for immigration control purposes, in several documents it was suggested that the system should also be used for crime control purposes.[55] The third function - license plate recognition – is an example of the latter. The system can read the license plates of passing vehicles and compare those to a database of license plates that are searched for of previously linked to criminal activities. This way, license plates could not only be scanned for immigration profiling, but also to see if there are any unpaid fines or other sanctions connected to the owner of the vehicle. Although this last function is currently not in use, pilots have been run and the wish to use this function in the future was explicitly expressed in several documents.[56]

The aim of the system is to increase the use of intelligence-led policing, but politicians also express the hope that it will improve the objectivity and efficiency of selection by using risk profiles based on data. Two quotes from a debate on the system and border security clearly illustrate this wish:

> '*I cannot imagine that in these days of automation and innovation it would cost less to rely on men and women. I believe in progress [...].*'[57]

> '*An RNLM officer should not think 'I don't like this' based on a gut feeling. He should be able to base his decision on computerized and visual information.*'[58]

And, as with risk assessment, the words *effectiveness* and *efficiency* are found in most descriptions of Amigo-boras.[59] Analyzing traffic data – which cars from which countries are crossing the border where and when - will show the RNLM where and when to act allowing them to make efficient use of the available resources. The profile-based selection is seen as rendering the selection process more efficient and effective as it will single out high-risk travelers.

Profiling

To some extent, profiling was already part of the discourse in the first period. As systematic border checks could no longer be conducted under the Schengen agreement, immigration checks in border areas had to be based on a selection process.[60] Concerns were immediately raised as selection might be based on physical appearance which could lead to discrimination.[61] It should be noted that profiling in this period was considered to be based on the experience of the immigration officer rather than data analysis. Although the Minister of Justice and the State Secretary claimed that the physical appearance of a person crossing the border would not be part of the selection process[62], this was doubted by several members of parliament. There was a demand for a list of specific indicators that could be used during the selection to prevent discrimination. The Immigration Circular was considered too vague in this respect.

54   Parliamentary Papers II, 2002/03. 26 269, 51; Parliamentary Papers II, 2002/03. 25 764, 18; Parliamentary Papers II, 2001/02, 23 490, 224; Parliamentary Papers II, 2001/02, 23 490, 303.
55   Parliamentary Papers II, 2011/12, 19 637, 1485; Parliamentary Papers II, 2012/13, 31 051, 11; Parliamentary Papers, 2011/12, 19 637, 1485; Parliamentary Papers II, 2012/13, 19 637, 1647.
56   Parliamentary Papers II, 2012/13. 24 077, 312; Parliamentary Papers II, 2012/13. 33 542, 5.

57   Parliamentary Papers II, 2011/12, 32 317, nr. 128.
58   Parliamentary Papers II, 2011/12, 32 317, nr. 128
59   Parliamentary Papers II, 2012/13. 33 542, 5; Parliamentary Papers II, 2012/13. 19 637, 1647; Parliamentary Papers II, 2011/12. 19 637, 1492.
60   Handelingen II, 1992/93, 76.
61   Handelingen II, 1992/93, 17, 769; Handelingen II, 1992/93, 78, 5658 – 5662; Handelingen II, 1993/94, 66, 4874.
62   Handelingen II, 1992/93, 79, 5658 – 5716; Handelingen II, 1993/94, 66, 4867.

Seven years later, profiling in the context of border checks was still debated. A report on the effectiveness of the MSM[63] noted that the MSM was more aimed at quality than at quantity. Where in the beginning of the MSM the goal was to check as many people as possible, the focus had become to target specific demographic categories, based on the characteristics of irregular immigrants. This observation clearly refers to profiling in practice. Profiling was also noted in the discourse surrounding terrorism, in which it was presented as a helpful method to select potential terrorists out of larger groups of people. A report of the Advisory Committee on Immigration Affairs recommended the use of profiling in border security.[64] This suggestion was well received by the Minister of Alien Affairs and Immigration, but she also emphasizes that negative effects of profiling, such as tunnel vision and discrimination, should not be ignored.

In the last selected period, profiling had become highly prominent in the political and policy discourse. Documents on the Amigo-boras system described the function of risk profiles in the context of the system[65], which still raised concerns. Questions as to using physical appearance as an indicator again surfaced when debating MSM in trains.[66] Once again the official answer was that physical appearance was not part of the selection process. The storing of data to be used for profiling also led to critical questions. A report by the Dutch Data Protection Authority[67] emphasized that data could be stored for the purpose of profiling, but that privacy of citizens should be guaranteed. On many occasions in this period, profiling and its negative by effects were heavily debated, but never led to concrete proposed solutions. The professionalism of law enforcement officers was seen as the most appropriate answer.

The results of the qualitative discourse analysis document the significant changes that the MSM – and internal border control in the Netherlands - has undergone within the span of twenty years. It evolved from an experience-led immigration-oriented control tool towards an intelligence-led, high tech supported tool to prevent both unwanted migration and crime. In the following section, we will draw conclusions how these changes relate to the changes in the social surround and what they appear to imply for the decision field.

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63   Witte, R., Wijkhuis, V. (2001). *Effectief Mobiel Toezicht Vreemdelingen.*
64   Parliamentary Papers II, 2003/04, 27 925, 103.
65   Parliamentary Papers II, 2011/12. 19 637, 1492; Parliamentary Papers II, 2012/13. 19 637, 1673; Commissie Integraal Toezicht Terugkeer, Jaarverslag 2011.
66   Parliamentary Papers II, 2010/11, 19 637, 1443.
67   Parliamentary Papers II, 2012/13, 30 897, F.

4.5 Conclusion and discussion

While the discretionary powers and discretionary decision-making processes of police officials have been widely studied, this is much less the case for the discretionary powers of officials involved in immigration control, especially within the European Union (barring exceptions such as Pratt 2010; Pratt & Thompson 2008; Motomura 2011; Aas & Grundhus 2014; Sitkin 2014; Wadhia 2015). According to Pratt (2005: 53) to a certain extent this bias might be explained by a preoccupation with rights of citizens rather than those of non-citizens. Following the theoretical notions of Hawkins (1992) this chapter focused on the changing social surround and decision field in which Dutch border patrol officers have to make their decisions on who to check and who not. Whereas the social surround focuses more on wider societal and political changes, the decision field deals with the changing legislative and policy context.

Our literature study revealed that the social surround of Dutch internal border control has changed significantly over the last two decades. Central to this change are the Schengen Agreement and the expansion of the European Union. Open internal borders allow for freedom of movement, with both social and economic benefits as intended result. Yet, at the same time open internal borders create a soft spot in the security of Member States when the external borders of the 'area of freedom, security and justice' are not adequately monitored. Terrorism, cross-border crime and illegal immigration have made their way into the social surround, creating an image of immigrants as dangerous outsiders, resulting in a demand for more control in the areas around the internal border between Member States. Third country nationals are not just seen as individuals wanting to live a better life in the EU, but also as potential security threats. Schengen, which once was a crucial step in the development towards open internal borders, seems to have slowly turned into a reason for stricter security checks in the border areas between Member States.

Subsequently, we have studied the decision field being the legal and policy framework of internal border control which was influenced by changes in the social surround. This is perhaps most clearly indicated by the changed goal of the MSM. Where it once was a tool for immigration control, over time it seems to have transformed – at least on the level of political and policy discourse - into a combined tool of crime and migration control as cross-border crime and terrorism have gradually become part of the mission statement. This seemed to have happened gradually and more or less spontaneously as a result of changing circumstances and perceptions. A more deliberate step was the name change of the MSM. Whereas before it unequivocally made clear the controls were aimed at immigration, it now directly refers to security.

These remarkable changes can be seen as a manifestation of the increasing merger of crime control and migration control, which has been dubbed elsewhere as 'crimmigration'(Stumpf 2006, 2011; Van der Woude, Van der Leun & Nijland 2014). It must be noted that although this development was observed in the political debate, no changes were made to the legal basis of these controls. Legally, the MSM is still solely an instrument of immigration control. This ambiguity and the conflicting aims do not leave a clear set of practical rules for the individual RNLM officer.

The discourse also documented a persisting and increasing demand for the monitoring of internal border mobility between different countries despite the fact that under the Schengen Agreement, systematic border control is not a viable option. Therefore, instead of relying on physical border checks, a strong call for border technologies was voiced in the debates. Politicians and policy-makers seemed to put a lot of trust in the application of technology and risk assessment strategies in order to secure the borders by gathering information on who crosses the border and who poses a potential threat. The discourse also showed the underlying rationales of this trust: information technology is almost without a doubt assumed to be efficient, effective and objective. It will not only secure the border, but will be able to do this more efficiently and effectively than the traditional walls and migration officers. This trust sometimes raised questions with respect to potentially subjective (racial) prejudices which might lead to unwanted outcomes, but these were relatively easily pushed aside with reference to professional standards. These lines of thought are not per se characteristic for Dutch policy makers and politicians, as they can be seen in other nations as well (Nesbary, 2001; Graham & Wood, 2003; Muller, 2004; Wilson, 2007; Wilson & Weber, 2008; Hayes and Vermeulen, 2012; Broeders & Hampshire, 2013).

Due to the increased and ongoing criminalization of migration there is an increasing pressure on states and the responsible agencies to monitor and secure the internal borders. This pressure to increase border security, or at least to border surveillance, is fueled by concerns about irregular migration cause this pressure, but also by concerns about cross-border crime and terrorism (Bosworth & Guild, 2008; Barker, 2012; Van der Woude, Van der Leun & Nijland 2014). There is an increased pressure on the RNLM to keep the border areas free of irregular immigration and crime when looking at the social surround, yet while looking at the decision field there seems to be a discrepancy. The legal means that are given to the RNLM to achieve this rather informal dual goal of migration and crime control do not seem to have changed accordingly. Although the discretionary powers of the RNLM increased somewhat over the years, this development does not necessarily seem to match the – informal - expansion of the goals of the MSM nor the legal powers that come with it. On the

contrary, while MSM checks are seen as an important means to monitor cross-border mobility, in 2011 the practical application of these checks was limited to a maximum of hours per day and month.

It is safe to say that the MSM is a complex instrument in terms of its exact scope, aim and powers. Based on the alleged discrepancies and ambiguities as laid bare by the underlying research, it is difficult to envision how this would not affect the decisions made by individual border patrol officers. If the policy or law that needs to be enforced is unclear, this will undoubtedly affect the outcomes of the policy. The ambiguity with regard to the central aim of the MSM as either an instrument for immigration control, crime control, or both makes it interesting to monitor the actual decisions made by individual border patrol officers in relation to their perspective on the central aim of their job. The same holds for the way in which border patrol officers perceive and implement the increased use of technology and intelligence in their daily decision-making. Border patrol officers are, as the discourse has shown, also increasingly stimulated to work 'evidence-based' in order to be more efficient but also in order to limit subjective judgment and racial prejudice. Politicians question the role of professional experience as playing an important role in MSM related decision-making, mostly with regard to the selection of persons or vehicles to be checked, as they associate professional experience with stereotyping and prejudice in relation to physical appearance. Politicians and policy-makers increasingly stress that decisions should be based on objective data such as risk assessments and profiles. In line with the previously mentioned 'political' shift from immigration control to crime control, it will be interesting to see to what extent the political ideas and expectations of a more intelligence-led MSM can be met in practice. With migration and crime control both being highly politicized topics, political solutions on how to better 'combat' both matters are too often formulated and drafted based on their alleged electoral impact instead of their practical application or enforcement ability.

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