The mobility control apparatus: getting to the core of crimmigration in the Schengen area

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THE MOBILITY CONTROL APPARATUS

Getting to the Core of Crimmigration in the Schengen Area

Maartje van der Woude

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"*The Mobility Control Apparatus* is a critical read for all scholars and students of crimmigration and mobility. The book navigates the complexities of politics, bureaucracy, law, and discretion to craft a clear picture of the mobility control regime of the Schengen borderlands. Deftly tying together path-breaking field research on Dutch crimmigration practices with insights from the literature on multi-level governance and legal pluralism, the book provides a new window into the multiscalar nature of mobility control and crimmigration, uncovering its consequences for racialisation and the flow of power. Finally, it points persuasively towards unexpected sources of change and resistance."

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THE MOBILITY CONTROL APPARATUS

This book critically explores the complexities of intra-Schengen border control and migration dynamics within Europe. It provides a comprehensive analysis of how various actors, including border officials and state apparatuses, interact in managing mobility and enforcing controls. The theoretical foundation draws on Foucault's concept of the dispositif, examining how borders are enforced through a combination of legal frameworks, discourses, and on-the-ground practices.

The book emphasises the importance of discretion in border control, arguing that it plays a pivotal role in shaping decisions at both the organisational and street levels. It delves into the experiences of Dutch border control officers and the wider European context, offering a comparative analysis of Europe's intra-Schengen borderlands. By drawing on real-world case studies, it showcases the tensions between security and mobility and how migration is managed through both visible and covert policing practices. The work is grounded in rich qualitative data, collected over years of fieldwork, and addresses key debates in migration and criminology studies, particularly the evolving concept of 'crimmigration' and its implications for human rights and security policies.

This book will be of interest to criminologists, sociologists, legal scholars, and political scientists alike, as well as all those engaged in studies on migration, mobility, and the European Union.

Maartje van der Woude is a Professor of Law & Society at Leiden University. Her research focuses on crimmigration, securitisation, (counter) terrorism and border control, with previous publications addressing issues like European border security and the politics of fear in immigration enforcement.

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The Mobility Control Apparatus
Getting to the Core of Crimmigration in the Schengen Area
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THE MOBILITY CONTROL APPARATUS

Getting to the Core of Crimmigration in the Schengen Area

Maartje van der Woude

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Writing this book was not easy. Not only was the road to its completion fraught with personal loss, a pandemic, and the onset of great geo-political tensions and ongoing societal polarisation, the larger theme of this book – migration and borders – also increasingly became a 'hot topic'. Both in political debates as well as in academic debates. As a result, it often felt as if I was trying to capture something in text that at the moment of finding the right words to do so, already had changed or was already captured by someone else. That meant that the search for words, for the right angle, had to start all over again. I would feel like Lily in 'To the Lighthouse' (Woolf, 2006: 4) who, in an attempt to make sense of a conversation tries to parce together individual words and symbols: 'If only she could put them together, she felt, write them out in some sentence, then she would have got at the truth of things.' I needed to find a way to put these continuously moving parts together, to get at the truth of things.

Thanks to the support and encouragement of a small tribe of close and inspiring colleagues/friends I kept going. Having a solid and supportive 'home base' at the Van Vollenhoven Institute at Leiden Law School was, and still is, crucial. I feel grateful to be surrounded by a wonderfully eclectic and interdisciplinary group of colleagues and students who are all joined together through their drive for social justice and equality. Adriaan and Janine, thanks for at times allowing me to get lost in my work by getting lost in the woods. Jelmer, Tim, Patrick, Maryla, Neske, Roxane, Hannah, Bilal, and Reeda, this book is partially inspired by your PhD projects and the many conversations we've had. Your fieldwork and the insights from it helped me contextualise both national and European policy and legal developments and also led me to explore new theoretical avenues. Vivian and Florbella, thank you both for assisting me in the research process by finding and organizing case-law, policy documents and (more and more) literature.

My second supportive home base, a home away from home, has been Berkeley, California, where I was lucky to find wonderful mentors in Professors Cecilia O'Leary, Tony Platt, and Jonathan Simon. Apart from being pivotal forces in the shaping of my ideas and the critical lens through which I've grown to look at the (growing intersection of the) worlds of crime control and migration control, you've opened my eyes to the different ways in which the world of academia can be combined with the worlds of activism and art.

Crucial in the development of my thinking on some of the central matters discussed in this book is the work that is done by the ever growing group of scholars affiliated with the crimmigration scholars network CINETS, the Border Criminologies Network, and the Citizenship & Migration collaborative research network of the Law & Society Association. Being active in these networks over the past decade has allowed me to engage with many scholars whose work has been foundational in my thoughts about bordering practices and border control. To those with whom I've crossed paths as part of these networks – you know who you are. Know that our conversations and interactions have helped me. For that I am deeply grateful, as I am for the close friendships growing out of many of these interactions.

To my dear friends Amalia, Irene, Karine and Vanessa: Thank you for listening to my ideas, thoughts, frustrations throughout the years but also for making me laugh, for creating together and for being sources of inspiration, both intellectually and on a human level.

As Chapter 1 further explains, this book would not have been written if the Royal Netherlands Marechaussee had not taken the 'risk' to allow me to start my research in 2013. It is commendable that they did and that – up to this day – they continue to grant me access. The many respondents within the RNM that I spoke with over the years have helped me further understand the complexity of border control and made me reflect on some of my own biases and conceptions of 'the' State. I deeply appreciate all my gatekeepers and respondents for taking the time to engage with me, to explain me things and, in so doing, show me vulnerability. I hope to continue shining light on the 'humans of/in the apparatus' and to continue to engage in difficult conversations where and when necessary.

Lastly, I want to thank the most important sources of support and encouragement throughout the period during which I was doing (parts of) the research for this book: my parents. Dad, I know you are proud, even though you are no longer here to tell me. Mom, without your strength and resilience these past years, I would not have been able to continue to pursue my dreams and goals. I am eternally grateful for that.

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SERIES EDITOR INTRODUCTION

The Schengen regime is arguably one of the most innovative and intriguing border regimes created in the last decades, not least because it has effectively turned the majority of fences and checkpoints separating European countries into bridges. Against the backdrop of border criminology and crimmigration literature that frequently focuses on the so-called EU external borders – especially on Mediterranean external borders – bordering practices enforced at the internal borders of Schengenland have been largely overlooked in academic conversations. Thankfully, the leading crimmigration scholar Maartje van der Woude has gradually consolidated an inspiring body of knowledge on these intra-EU bordering arrangements, which have proved to be both increasingly contentious and critical to grasp European border regimes.

The Mobility Control Apparatus can be seen as a major milestone in this academic endeavour. It showcases the compelling results of years of fieldwork research at border areas within the European Union. In so doing, the monograph contributes significantly to explorations on border policing, a topic that has gained traction across Europe and elsewhere, acknowledging the various challenges faced by scholars in examining this specific sphere of immigration enforcement. In this respect, the book scrutinises the diverse dimensions of discretion characterising street-level bureaucrats' activities in policing EU internal borders. Crucially relying on Michel Foucault's notion of *dispositif*/apparatus and his stimulating conception of the dialectics of power and resistance, the book explores to what extent discretion may actually operate as a leverage to counter – if not subvert – the most violent manifestations of border regimes. Thus, *The Mobility Control Apparatus* closes on a much-welcomed positive note, emphasising the role to be played by public border criminology scholars in enabling resistance from within the border policing apparatus.

José A. Brandariz

FIGURE 1.1 A visualisation of the Mobility Control Apparatus by artist and designer Tim Juffermans, based at Studio071 in Leiden, the Netherlands (see: https://www.studio071.nl/)

1

THE BEGINNING OF A BORDERLAND ADVENTURE

'Omnia mutantur, nihil interit'

Ovid, Metamorphoses, book XV, line 165

As the opening quote of this chapter states: "Everything changes, nothing perishes" – a sentence that repeatedly came to mind while thinking about and working on this book. Whereas working on migration and border control oftentimes felt like trying to pin down an ever-moving, ever-changing 'target', over time, it became clear to me that despite these changes, there were certain structures and dynamics that always were present to, albeit slightly adapted, enable, and support the practices that I studied. While stable structures and repeating dynamics can offer a sense of calmness and a sense of security, in the context of migration and border control within the European Schengen Area – the area in which the abolishment of border controls between countries allows for free and unrestricted movement of people across member states as if they were a single country – these structures and dynamics seem to have created a structurally unequal and exclusionary regime of mobility control. A regime that operates on securitised and racialised notions of whose mobility is seen as risky and whose mobility is to be embraced and supported. This book is an attempt to understand what allows things to 'stay the same' amidst an ever-changing and ever-moving geopolitical context. Of course, the answer to this question is manifold and should be – and has been – approached from many disciplinary angles. The angle with which this book approaches the question is predominantly socio-legal, which means that it traces the role and the workings of the law and the actors involved in the creation and implementation of these laws in allowing for what I call the intra-Schengen mobility regime to operate the way it does. In so doing, I strive to be as concrete as possible to allow a broader, more diverse, audience than exclusively (socio-legal) scholars to see how law and politics cannot be separated,

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how there is no such thing as 'the' law and how the law is anything but (value) neutral or objective.

1.1 The call to adventure

My interest in Europe's internal borderlands has been triggered by an initial interest in a law enforcement agency that I, as a scholar of criminology and sociology of (criminal) law, had very little knowledge of until 14 years ago. When one of my master's students whose thesis I was supervising sometime in Spring 2011 said that he was interested in doing an internship with the Royal Netherlands Marechaussee (RNM), I caught myself thinking, 'Royal Netherlands Marechaussee, what is their role in the criminal justice system? What is it exactly that they do?' While familiarising myself with the organisation and the larger bureaucracy, I quickly learnt that there was a whole world for me to explore. This fascinating gendarmery-like military-police organisation was not only a key player in the realm of national security and the protection of the Dutch royal family – which is where I had mapped it in my mind – but it also played crucial roles in matters of criminal justice and immigration control. The more I learnt, the more intrigued I was by, amongst other things, the many legal frameworks within which the RNM could operate, by the fact that the organisation falls under the responsibility of – or, better said, is controlled by – three different ministries (the Ministry of Defence, the Ministry of Justice & Security, and the Ministry of Internal Affairs) and by the fact that the RNM is in charge of policing the country borders. Despite their wide range of tasks and crucial roles in the national security infrastructure of the Netherlands and Europe, I couldn't find any empirical research on the organisation, which only further piqued my curiosity.

After my student had locked in an internship, I decided to take the plunge and reached out to the RNM to ask for a meeting to talk about the possibilities to do research with them myself. My request was met with what I would now, reading back the initial email correspondence, qualify as a mixture of curiosity and hesitation. Despite the connections on the operational level that I had established as a result of my student's internship, there seemed to be more hesitation and, at times, suspicion amongst those working on the higher policy level. Nevertheless, I was invited to the headquarters of the RNM in The Hague to introduce myself and to, from both sides, test the waters. It was a year of testing waters, exchanging ideas with people within the organisation and a year of learning a lot (and at times getting very frustrated) about the dynamics of a bureaucracy operating in the field of national security.

There were many hoops that I had to jump through – hoops that I did not even realise were there until after I had jumped them, sometimes successfully, sometimes unsuccessfully. The metaphor of 'navigating difficult terrain' (Schwell, 2019) best illustrates the gradual and challenging process of getting research access to the RNM. It surely was a process of 'exploration and orientation of familiarization in an expedition into the unknown' (Schwell, 2019, p. 84) in which I constantly had to manoeuvre cultural patterns, power dynamics, and structures that, I see now, were quite specific to a (semi) military organisation, but very new to me.

After a year, I was asked to pitch the study that I – while having closely listened to the issues that the RNM was struggling with – had designed. I still vividly remember that meeting. It was a warm day in September, and I made my way, once again, to the headquarters of the RNM. I wore a brightly coloured dress with a floral print with a big red flower pinned on it. I had prepared a research idea, and while waiting to pass the front desk, I felt the thrill of starting a new adventure. I was asked to proceed to the meeting room, and while walking in, immediately, the four male officers who were fully dressed in their official uniforms 'jumped' out of their seats to formally greet me. That moment was a moment in which two very different realities met: my colourful, slightly naive, curious and academic reality with a reality that I would now, with the benefit of hindsight, characterise as suspicious, formalistic, obviously militaristic, and hierarchical as well as dedicated, chivalrous, and proud. Despite the stark differences between these two worlds, or maybe because of these differences, in that meeting, the foundation was laid for the research that underpins this book. It was also the beginning of a journey into the intra-Schengen borderlands that, up until this day, continues to fascinate me.

1.2 In focus: Intra-Schengen borderlands and crimmigration

The research I pitched on that sunny September morning focused on the so-called 'border police' task (*grenspolitietaak* in Dutch) of the RNM. In the weeks and months leading up to the meeting, I had come to realise that this 'border police' task entailed both the control and policing of the *external* and of the *internal* borders. The distinction external-internal refers to the different borders that came into existence after the ratification and implementation of the Schengen Agreement: external borders are the borders between Schengen countries and non-Schengen countries, and internal borders are the borders between Schengen countries. As will be explained in Chapter 3, eventually the distinction external/

internal borders also largely overlaps with the distinction between EU and non-EU countries.

The policing of the external border of the Netherlands in practice means that RNM officers perform border checks at the maritime border (ports and the shoreline) and at the airports on non-intra-Schengen flights. It also entails the deployment of RNM officers to Europe's external borders located outside of the Netherlands and partaking in Frontex operations as part of Europe's integrated border management approach and the development of a European Border and Coast Guard standing corps (Hilpert, 2023). Over the years, scholars from various disciplines have provided invaluable and shocking insights into the situation at Europe's external borders (Cuttitta & Last, 2020; Ferrer-Gallardo & van Houtum, 2014; Karamandidou & Kasparek, 2022; Léonard & Kaunert, 2022; Mitsilegas, 2022; Squire, 2020). Insights that illustrate very clearly that one of the key criteria for a proper functioning of the idea of free movement inside the European continent, a solid and impenetrable external border, is not working. It also remains the question if this ideal will ever be fully realised, as it also has become painfully clear over the past decade that another essential prerequisite for a proper functioning of the area of freedom, security, and justice is lacking: trust and solidarity between the European and the Schengen member states (Dziedzic, 2022; Karageorgiou & Noll, 2022; Habermas, 2012). This lack of trust between member states is particularly clear when looking at the way in which countries in northern and southern Europe interact around the issue of 'secondary movements', which are the movements that occur when refugees or asylum-seekers move from the country in which they first arrived to seek protection or for permanent resettlement. While countries at the external border of Europe (e.g. Italy and Greece) complain about having to shoulder the 'burden' of dealing with asylum-seekers without feeling adequate solidarity from other member states or from 'Europe', politicians further north often decry the alleged incapacity of their Southern peers in running functioning asylum systems and in preventing onwards movements 'up north' (Thym, 2023).

The connection, and also tension, between the external and the internal borders of Europe was an important topic during my various meetings with the RNM. It was clear that my discussion partners felt a deep responsibility to, as they would say it, 'keep the nation safe' as they saw themselves as the 'first line of defence' and as the 'Police force of the State'. Ideas and perceptions that do not necessarily sit well with the notion of free movement as they immediately linked migration to the notion of (national) security. Therefore, the RNM was eager to use the possibilities the *Schengen Borders Code (SBC)* – the European

regulatory framework governing the movement of persons across borders – offered them to, despite the freedom of movement, manage migration and mobility in the areas between two Schengen countries. It was precisely the RNM's role in the policing of these *internal* borderlands that struck me as particularly interesting in the light of questions I had been exploring in previous research projects: questions about choices made by (European and national) legislature(s), questions about the interaction between different legal systems and questions about street-level decision-making and racial profiling.

Following the strong securitised discourse around the policing of the internal borderlands of Schengen, another tension was also very clear from the beginning of my discussions with RNM officials. This was the tension between crime control and migration control. Within the organisation – and I was talking to people working on the (national) management/policy level at the time – there seemed to be some ambiguity regarding the aim of the RNM's activities in the internal borderlands. Whereas some of my discussion partners stated clearly that the checks that were conducted in these internal borderlands between two Schengen countries served the purpose of combating irregular migration into the country, others were focusing predominantly on the importance of these checks in the light of combating (cross-border) crime. While carefully probing where these differences in the perception of their mission statement regarding the RNM's presence in the internal borderlands might come from, I quickly learnt that although RNM officers were performing their duties in the internal borderlands under the scope of administrative – migration – law, they were at the same time also able to operate under the criminal law. Following the crimmigration literature (Stumpf 2006; Van der Woude et al., 2014; Jiang & Erez 2018), and in particular the image of the 'toolbox' as introduced by Sklansky (2012), this made me wonder how RNM officers in practice would choose, or perhaps shift, between these different 'tools'. The image arose of the RNM officer as a central actor in the internal borderlands, operating on the verge of European and national law as well as on the verge of criminal and migration law and, as a result, (un)consciously steering course through European, national and organisational politics. The proposal that I presented on that sunny morning in September aimed to shine light on the management of mobility in the internal borderlands of Schengen with a strong emphasis on exploring if the tensions I identified based on my preliminary conversations and (legal) research were indeed experienced as such and how they would play out *in action*. The fact that I am able to write this book indicates that my proposal was well-received.

However, this successful meeting did not mean that the hard work on my part in assuring that I actually could do the research the way I wanted to do it was done and that I, despite constant rotations in gatekeepers, would keep having access over the years. Quite the contrary, I experienced first-hand how 'getting field access in bureaucratic settings - especially those related to national security (…) doesn't happen once and for all, but [that] it includes continuously working one's way' (Schwell, 2019, p. 81). By starting this introduction so explicitly with my 'arrival story' (Austin, 2019) of getting access to study the practices of the RNM, I respond to the call by Bosma et al. (2019, p. 7) for scholars studying bureaucracies operating in the field of national security to be more explicit about '(…) the hard work of gaining access, developing fieldwork strategies, navigating secrecy and adapting research design in light of classification'. It is thus not just to be seen as an 'irrelevant or amusing prelude to the real research' (Bosma et al., 2019, p. 8) but as an important and crucial part of the research and the choices that were made as part of it. It feels refreshing and liberating to start with this story, as these often very messy journeys after the initial call to a new research adventure tend to not make it into peer-reviewed articles or other publications. As a result, the arrival into a certain field or onto a certain topic tends to be presented as a clear and deliberate choice, which, of course, can be the case, but in much research that focuses on matters of national security and that involves studying actors of the state, things most likely will have been a bit more complicated. Sharing these complications and how to navigate them as a scholar is as insightful and important as the final results of the research.

Starting with my arrival story also serves the important purpose of positioning the story that this book intends to tell within the ever-growing literature on borders, migration, and mobility. Although this book is about Europe's internal 'borderlands' (Moffette & Pratt, 2020) which I will refer to as the intra-Schengen borderlands from now on, I 'arrived' in these borderlands through my interest in studying the RNM as an organisation that seemed to have a shared responsibility with other actors for a range of things, amongst which policing and monitoring mobility in the internal borderlands between the Netherlands and other EU member states. This means that this book tells the story of the intra-Schengen borderlands with a strong emphasis on analysing, explaining, and reflecting upon the myriad of actors that play a role in developing and 'performing' internal border control. In so doing, the book places the individual RNM officer within a larger forcefield of (in)actions, practices, and decisions around mobility control in the Schengen area to better understand where and how street-level decisions

fit into this forcefield. Having a better understanding of the dynamics of this forcefield can be useful when thinking about possibilities and strategies for reform, but it can also provide a more nuanced perspective on *where* the most impactful decisions are being made.

1.2.1 Responding to different calls in the literature

By adopting the aforementioned approach and focus, this book contributes to several tensions and calls that have been observed and voiced in the ever-expanding literature on migration and borders. In describing these calls, this section will also give an overview of the main theoretical discussions the book will engage with.[1]

1.2.1.1 Exploring the apparatus from within

First of all, various scholars working in the area of policing and immigration control have called for the necessity to acquire a better insight into the experiences, perspectives, and attitudes of 'on the ground' border officials (Coté-Boucher et al., 2014; Loftus, 2015). As I will further unpack in the book, this perspective is invaluable to fully grasp the complexity, pervasiveness, and symbolic nature of Europe's (internal) border control apparatus (Feldman, 2011). I intentionally, but also carefully, use Foucault's notion of the apparatus, or the *dispositif*, here, as it most aptly captures how I would describe how the policing of Europe's internal borderlands has taken shape (Foucault, 1977). The apparatus in Foucauldian terms should be seen as a device whose purpose is population control and economic management through a combination of different otherwise scattered elements – discourses, architectural arrangements, laws, scientific statements and so on. It is a strategic assemblage that is open to unforeseen and unpredictable events and '(…) composed of a grouping of heterogeneous elements and can be deployed for specific purposes at a particular historical conjuncture' (Rabinow & Rose, 2003: 50). The historical conjuncture that was the creation of one European internal market through the implementation of the Schengen Agreement in 1999 definitely led to the grouping of a broad variety of elements on the European and member-state level that were geared towards the management of the mobility of this paradoxical space in which the economic benefits of the free movement of goods, services, and people had to be balanced against the perceived (national) security risks of this same free movement (Hollifield, 1992/98). Only by exploring the workings of this apparatus from *within* I have been able to get a better understanding of the politicised nature of this apparatus

and the fact that border control officials, alike individuals on the move, in many ways also are 'caught' in the border control performance they embody and represent. Various works have illustrated that state agents play a pivotal role in mediating, altering, negotiating, and contesting policies and laws (Hill, 2003; Lipsky, 1980; Zacka, 2017). Taking a view from within thus allows one to uncover the different predicaments that (various) actors operating within the apparatus might be facing and allows for an understanding of intra-Schengen mobility control that is much more fluid, flexible, and open to contingency than one might expect when looking at intra-Schengen mobility control from *without*.

1.2.1.2 A multiplicity of (in)formal norms

Understanding the movement of the machine, of the apparatus, requires an understanding of the interplay and interaction between its different parts and the role of the law in all this. Franko (2022) underlines the importance of understanding European borderlands through both an empirical lens and a legal lens with a particular focus on understanding how spaces for abnormal justice in response to migration and mobility within and outside of the European geographical space (e.g. through the externalisation of borders) are spaces that are created by law and not spaces that are beyond the law. It is the in-between nature of borderlands, as spaces that are both governed by national laws as well as by European laws, that allows for the playing of jurisdictional games between various national, supranational, and humanitarian actors (Cliquennois et al., 2021; Moffette & Pratt, 2020). Which, as noted by Franko, '… creates possibilities for the avoidance of responsibility and tacit acceptance of violations of rights' (2022, p. 133). In a similar vein, Brandariz et al. (2024) call attention to the necessity of legal arrangements underpinning several law enforcement and criminal justice devices that, although seemingly heterogeneous, are all part of a coordinated plan by the European Union to boost judicial cooperation in matters of immigration and crime control. In other words, bordering practices cannot exist without a legal framework which is as much a result of decisions made by the legislature as of decisions taken by the judiciary. Given the function of the European Union and, in particular, the establishment of the area of freedom, security and justice with, amongst other things, the aim to harmonise migration processes and policies between the member states, this means that there are multiple legislatures and judiciaries that are part of the apparatus as well. Not only the European Commission and the Court of Justice for the European Union, but also national legislatures and judiciaries. In order to grasp the implications and challenges

of operating as part of a larger system, I will draw from the literature on multi-level governance and legal pluralism. Whereas literature on multi-level governance calls for 'an understanding of the state as a multi-scalar construction, constantly negotiated and reconfigured by its actors at different levels' (Laine, 2016, p. 467; also see Wonders, 2017; Wonders & Solop, 1993), the literature on legal pluralism calls attention to 'the multiplicity of different legal systems' existing and operating simultaneously in one space and that can thus 'interact in interesting and important ways' (Barber, 2006, p. 329 in Cornelisse, 2018, p. 373).

I will add to the more legal understanding of the pluralistic nature of legal systems the more *socio*-legal understanding of the concept by also paying attention to the role of informal norms and rules developed on, within and in interaction with the level of organisations (Griffiths, 1986; Kagan, 1989). By adopting a holistic approach and viewing the border apparatus from within and through the eyes of street-level and senior-level officials tasked with managing intra-Schengen mobility, this book aims to paint a more complex and holistic image of these officials and the ways in which their (inter)actions and decisions are shaped and guided by their social surround and various decision fields (Hawkins, 1992). Whereas the social surround refers to larger societal and (geo)political forces, with the notion of the decision-field, Hawkins aims to capture the sum of formal rules and regulations as well as informal guidelines or policies that will influence their actions and inactions. Within this decision-field, the formal and informal norms and policies that are developed by organisations are as – or perhaps even more – important as the rules and policies developed by the formal legislature.

1.2.1.3 The criminalisation of migration and crimmigration

The third central strand of literature this book speaks to is the literature on crimmigration. Ever since its introduction to a wider audience in 2006, the concept has been used and studied widely by a broad range of scholars from within various disciplines. The concept has proven to be particularly useful in getting a deeper understanding of the *how* of border control (Weber & McCulloch, 2019) by unpacking its various legal mechanisms or technologies. Crimmigration *law* criminalises immigration offences, emphasises the immigration consequences of criminal acts and super-sizes enforcement regimes. It securitises borders, enhances enforcement and 'force multiplies' with local police. Central to the crimmigration thesis is the observation that, while the immigration procedure is turning more into a criminal procedure, and, with that, the

powers of immigration and criminal law enforcement agencies are also becoming interchangeable, this has not resulted in an equal transfer of the due process protections that individuals enjoy under criminal law. Over time, the interpretation of the concept has widened as the narrow legal scope was felt to be too limited to fully capture the developments that were observed. In later writing, Stumpf also broadens her focus to take into account the lived experiences of those subjected to crimmigration processes, noting that '[w]hen the government seeks to impose a penalty through crimmigration law, or noncitizens widely experience as punitive the procedural web that crimmigration has woven the process has become the punishment' (Stumpf, 2013, p. 73). By no longer talking about crimmigration law but instead using the term crimmigration control, more socio-legal, discursive, and criminological dimensions were included (see also: Van der Woude et al., 2014), resulting in a more interdisciplinary and richer scholarship. Although crimmigration has been shown to be a powerful and systematic framework for the examination of punitive practices such as criminal deportation, immigration detention and migration policing, the concept does not capture all developments in contemporary border control, particularly outside the United States (Brandariz, 2021). Despite exceptions (e.g. Aas, 2014; Chacón, 2014), the concept also places a strong focus on finding points of convergence between the criminal justice and the immigration system. As mentioned by Moffette and Pratt (2020) and Bosworth et al. (2018), in focusing too much on convergence, points of divergence, where border control and crime control may not always fit comfortably together, might be overlooked. By engaging with the literature on crimmigration, this book aims to contribute to a further refinement of the crimmigration thesis as it has developed over the years. In so doing, the book will communicate directly with some of the critical legal and criminological scholarship on the matter (see also Brandariz, 2021; Hudson, 2018; Moffette, 2020; Moffette & Pratt, 2020). Does the crimmigration thesis indeed allow us to better understand what is happening in Europe's borderlands and how it is happening? In line with Moffette and Pratt (2020) and the general approach in socio-legal scholarship, the working hypothesis for this project has always been that, in order to fully grasp the dynamics of crimmigration control, it is necessary to 'decentre formal law and the nation-state'. In other words, it is only by looking at the local level, the level where formal – state and/or European – laws are implemented and take their effect, in interaction with the national and the international level, that the complex workings of crimmigration and those who are seen as the dominant 'crimmigrators' can be understood. Furthermore, by focusing on Europe's different internal borderlands and

the norms, practices, and techniques that are being applied in these different borderlands to monitor and manage mobility, this book also responds to the need for more comparative and cross-national analyses on crimmigration as expressed by various scholars (Bosworth et al., 2018; Brandariz, 2021; van der Woude et al., 2017). As this call tends to find its roots in a wider critique on the dominance of crimmigration research focusing on single case studies from the Global North, this book will only be partially able to respond to this call.

1.2.1.4 Discretion

As I will further unpack in the following chapters, European intra-Schengen borderlands are places of 'incommensurable contradictions' (Gupta & Ferguson, 1992, p. 18) where tensions between notions of openness and closedness, between security and insecurity, between freedom of movement and the restriction of mobility are all present at once. And, very often, these tensions can be linked to the presence of a substantial grey area that is experienced within bureaucracies, as well as by those who have to enforce the rules in practice, which clouds and complicates thinking in these (false) dichotomies. Being forced to think in such dichotomies, or in legal categories for that matter, can in itself lead to frustration and confusion when these categories do not match the reality on the ground or when these categories collide in one and the same case. As I will illustrate and argue, the role of (formal and informal) laws, policies, and rules in creating or maintaining 'greyness' on the ground cannot and should not be overlooked. I will argue that *discretion* can be seen as the 'ghost' in the intra-Schengen border apparatus that, on the one hand, keeps it together and allows for the development of a mobility regime built on what Shamir calls a paradigm of suspicion (Shamir, 2005, p. 200), whereas it, at the same time, creates spaces for contestation and resistance from within as well (Cheliotis, 2006). It is precisely this discretion that allows member states and also border control bureaucrats to develop different practices and to give expression to them. Discretion in the context of the book needs to be understood in a socio-legal way which sees discretion as inherent in the presence of rules, so even if these rules do not explicitly create discretionary powers. Furthermore, a socio-legal interpretation and analysis of discretion goes beyond the tracing of discretionary space within the law and aims to understand the wielding and implementation of discretion as an act of power that needs to be contextualised in the larger societal, political, legal, and cultural environment in which discretionary decisions are made.

1.2.2 A decade of researching Europe's intra-Schengen borderlands

As stated earlier in this introductory chapter, academic works addressing sites or actors of national security do not always provide the level of transparency about matters such as getting access, making sure to keep access and the different challenges – other than ethical challenges – surrounding the process of data collection and the sharing of results. I am a firm believer that it is crucial to continue studying these sites, as well as the actors and agencies involved in national security – including the area of border control – from *within*. This approach helps better understand how the state apparatus operates and identify possibilities and spaces to trigger change from *within*; this section will continue to shine some light on the journey underpinning my research. In so doing, it will describe the different stages of the research, which are all characterised by their own research focus and methods of data collection and thus also by their own challenges that needed to be navigated.

The insights shared in this book are the result of several years of studying Europe's internal borders by myself as well as together with small research teams. Parts of the research have been funded by the Dutch Science Council (NWO) and grants issued by the Gratama Foundation and the Schim van der Loeff Foundation, but also through funding by the Directorate Migration Policy of the Dutch Ministry of Justice and Security. Over the years, various publications (articles, books, dissertations and blogs) have been developed based on parts of this body of data; yet, one comprehensive work in which all the data are brought together was missing. Therefore, while building upon previous publications, this book presents new analysis and new insights aimed at reflecting more broadly on intra-Schengen border mobility and control and placing the case of the Netherlands within the wider story and context of Europe and the Schengen space in particular.

1.2.2.1 Stage I: 2012–2015

The majority of the data on intra-Schengen border control in the Netherlands was collected between 2012 and 2015 with the help of two PhD students at the time. During these years, intensive fieldwork was conducted, including (systematic) observations, semi-structured and more ethnographic interviews (Spradly, 1979), focus group sessions, and the analysis of legal and policy documents. The thick descriptions that we collected through the combination of the different methods that were used allowed us to get a good understanding of *how* migration checks were organised and carried out in the Dutch-Belgian and Dutch-German

intra-Schengen borderlands and how these checks were experienced and perceived from both the perspective of policymakers and border officials that were conducting the checks as well as that of the people who were subjected to these checks. We excited the field before the onset of what would become known as the 'European Migration Crisis' (see further in Chapters 3 and 4).

With the only other research – a policy and process evaluation based on secondary data – addressing the work of the RNM in the Schengen borderlands dating from 2001, our research was welcomed with a sense of curiosity. Yet at the same time, in light of the 2010 ruling from the Court of Justice for the European Union in the case of Melki & Abdeli (CJEU 22 June 2010, C-188/10 and C-189/10) that forced the Dutch government to change the national legal framework under which the RNM was operating in the borderlands, our research was also viewed with some concern and even suspicion. The latter was also related to the fact that national discussions around discrimination and, in particular, ethnic profiling by the Dutch National Police started to flare up around 2013/2014. These discussions definitely framed our entry into the field. 'Are you here to show that we are discriminating?' and 'We know that it is not allowed to discriminate' were often the most uttered responses to our introductions at the six units where we did our research, which made me very aware of the level of distrust we were facing.

The overarching aim of this first project was to understand the decision-making process of individual RNM officers when conducting immigration checks in the Schengen borderlands. We wanted to understand how these officers were manoeuvring the complicated legal framework of these checks, in which migration law, criminal law, and European law all came together, but especially what factors *other than the law* were influencing their decision to check certain cars and individuals over others. Clearly, in so doing, we would also pay attention to the role of race and perceived ethnicity, and clearly, our respondents were aware of that. By really taking the time to introduce and explain our research each time, we got to a new brigade and by emphasising that we wanted to understand the complexities and challenges of conducting migration control in the Schengen borderlands, of which ethnic profiling was only one aspect, we were mostly able to convincingly formulate our research in a way that kept our respondents and informants' engaged and interested (Schwell, 2019, p. 84). This, combined with the fact that we spent over 800 hours in the Schengen borderlands hanging deeply with the RNM and spending quality time going on patrols, having dinner in funky roadside restaurants, having lots of coffee while waiting for some 'action', attending briefings and debriefings, chatting, etc., led us to build a relationship that allowed us to do the research that we

ended up doing. Following Austin (2019), I intentionally use the term *deep hanging* over the more conventional term participant observation, as it does more justice to the often very fluid nature of the interactions and the process of building trust and to how I, looking back at our own process, experienced what we did. It was much more than just building rapport to get access, which always sounds rather instrumentalist, somewhat detached and seems to, rather snobbishly almost, assume that our respondents or informants are not highly aware of what we are trying to achieve. The latter seems particularly naïve to think when dealing with actors operating in the field of national security. In order to access the life worlds of actors in the field of national security, which is necessary to get a true understanding of what moves them in their personal and professional lives and practices, deep hanging, and flexibility regarding your envisioned method of data collection – also known as 'self-forgetfulness' (Austin, 2019) – is necessary. It is only through such flexibility that the time and space is created to do justice to the life worlds of respondents. This self-forgetfulness also, to a certain extent, entails the necessity to apply a non-judgemental frame towards one's respondents. Such a frame allows researchers to 'move past suspicious attitudes and inquire, more broadly, into how agency and responsibility is often a "distributed" rather than "concentrated" quality' (Austin, 2019, p. 104). In other words, it helps to put the actions of one individual working in the broader context of a state agency in perspective by acknowledging that 'responsibility for what happens in the world can only very rarely be attributed to a single individual or small group of individuals who are deliberately controlling those outcomes' (Austin, 2019, p. 104). This highlights the importance of viewing the state not as a monolithic entity but as a network of complex actions, inactions, and interactions. These dynamics involve individuals, state and non-state actors, and are shaped by a mix of formal and informal rules and regulations in areas such as crime control, migration control, border control, or their combination, along with the politics surrounding them. Although adopting a non-judgemental frame makes sense in the light of gaining trust, if one really wants to understand what is driving certain respondents, it can certainly be difficult in situations where the very actions of one's respondents are coercive, exclusionary, and sometimes even discriminatory in nature. In such situations, it might be – and it *was* – impossible not to judge. Besides feeling a moral (and perhaps also human) disconnect with one's respondents based on their (in)actions, the difficulty to remain non-judgemental can also be the result of feelings of sympathy that one can develop for one's respondent, which can be, partially, related to the observation of discomforting similarities between oneself and one's respondents when getting to know them better.

I personally found it most challenging when both of these difficulties intersected in one and the same person, making it impossible to easily categorise RNM officers as either 'bad' or 'good'. The latter was something that I initially seemed to be inclined to do. Conducting migration checks in the intra-Schengen borderlands was difficult and challenging for numerous reasons, amongst which a lack of available personnel, ambiguous European, national and organisational policies and priorities, combined with long periods of waiting in not always the most exciting parts of the intra-Schengen borderlands. Especially during the moments of downtime and while waiting for a next vehicle to check, I had lots of informal conversations with the RNM officers. The fact that I was the only woman on the research team and the fact that I am a white woman who finds it easy to interact with new people due to a natural curiosity and ability to empathise helped me to have these types of conversations. Besides having really interesting conversations about their work, I had conversations about their families, relationship problems, their upbringing, their education, their experiences during military missions abroad, their views on the organisation they were working for, their aspirations, etc. These conversations created a much more complex image of 'the' state agent as merely a wielder of force and a possible source of injustice. My respondents were passionate about their work, had a broad range of interests, were proud to contribute to national security, cared deeply about their families and friends, and were able to – despite the growing politicisation of their work – maintain a pragmatic mindset.

Nevertheless, when these same officers at other moments could engage in problematic racially charged commentaries or other problematic displays of power when interacting with people whose paperwork was being checked, it created a schism in my mind. Whereas the informal, more personal, and even intimate conversations showed how my life world was very much intertwined with that of the RNM officers. In these other instances, I felt an almost insurmountable distance between our subsequent life worlds, which made it, at times, difficult, if not impossible, to refrain from judgement. My way of coping with these moments changed over time. In the beginning of the fieldwork, I would refrain from any comments, partially because I felt some of the officers were 'testing' me. Over time, and especially after spending more time around the same officers, I responded to these moments by asking questions to help me understand what assumptions, concerns, and ideas were underpinning their actions and comments. Through asking these questions, I was led down a path of deeper understanding of where these officers were coming from, which allowed me to climb – and sometimes even overcome – the wall of empathy that was standing in between us (Hochschild, 2016).

The mere choice of conducting research amongst state agents that are partaking in an exclusionary system that causes grave harm to people on the move can result in words of caution and sometimes even sentiments of suspicion by fellow scholars. I was asked several times whether I thought that the only reason to grant me access to do this research was to co-opt me and thus, in a way, to control my research findings and the narrative about the RNM that would be shared through my scholarship. Was I able to remain critical while getting so close?

Although these concerns and questions are, to a certain extent, understandable, it is important to stress that researching the practices of state agents and agencies from within, while adopting a non-judgemental framework, can be done in a way that is still very critical, as adopting such a framework and climbing the wall of empathy only applies to our individual respondents. It does by no means entail a suspension of normativity itself. It is thus perfectly possible to retain a caring and non-judgemental attitude towards one's respondents and empathise with them while still normatively rejecting and perhaps even attempting to combat the particular social system or events that they are connected with or represent. As Hochschild, while talking about her own journey as a researcher while conducting her fieldwork that would lead to *Strangers in their own Country* (2016), observes: 'We (…) wrongly imagine that empathy with the "other" side brings an end to clearheaded analysis when, in truth, it's on the other side of that bridge that the most important analysis can begin'.[2]

1.2.2.2 Stage II 2015–current

Between 2015 and 2022, the Dutch case study was further deepened by placing it within the larger European context. Whereas the European context, of course, played a role in the Dutch case study through the fact that the legal mandate for the intra-Schengen mobility checks that were studied was based in European legislation and jurisprudence, the question into the role of 'Europe' as a stand-alone actor in the larger intra-Schengen mobility control apparatus had not been discussed as such. This led to a closer analysis of European laws, policies and jurisprudence, as well as to the introduction of two new case studies carried out by two junior (PhD) researchers: the case of Poland and the case of Germany. Both researchers conducted qualitative research in the borderlands of Poland and Germany, and through the supervision of their work, my own thoughts and ideas about internal border control in Europe continued to be further sharpened. So, where the first years of

my borderland adventure were characterised by a significant amount of on-the-ground, qualitative fieldwork, my gaze now also shifted to analysing legal and (socio-)political discourse around border control and border policing. It was an interesting time to broaden my scope from the Netherlands to wider European dynamics as the 2015 'long summer of migration' (Kasparek & Speer, 2015) and the subsequent 'great autumn of migration' (Hameršak & Pleše, 2017, p. 102) led to a movement of more than one million refugees and other migrants towards and through Europe. This unprecedented mass and visible movement of people made European countries reassess their ideas and positions within the European migration regime and reflect on ideas of solidarity and burden-sharing in giving shelter to those who were on the move. Ever since, countries have invested greatly in various ways to deter migration not only through the construction of physical and technological barriers but also through a range of restrictive policies and practices both inside and outside of the European geographical space.

1.2.3 Structure of the book

Now that it has been clarified what the aim of this book is, what approach is used to achieve this aim, and with which different academic debates and concepts I will engage, all that is left to this introduction is to provide a road map that will guide you through the upcoming chapters. Chapter 2 will provide a more in-depth discussion of the notion of the apparatus and, related to that, the role of discretion as the ghost in the apparatus. With discretion being an important sensitising lens through which this book aims to understand the movement of the apparatus, Chapter 2 should be read as the book's theoretical foundation. It provides a holistic approach towards researching the role of discretion in the intra-Schengen mobility apparatus by identifying how discretion should be studied both as a top-down and a bottom-up, as well as an in-between phenomenon that gets both granted and wielded by a broad variety of actors. Chapter 3 will discuss the development of the political-geographical space that is the stage of this book: the Schengen space. In so doing, the chapter will illustrate how, from the very onset, this space was meant to reconstruct and not deconstruct intra-Schengen border controls. This idea of border reconstruction in the Schengen space will be further unpacked in Chapter 4, which focuses on the development of the legal framework that creates various possibilities for Schengen countries to, despite the abolishment of permanent border checks at the intra-Schengen borders, closely monitor mobility in the intra-Schengen borderlands. In describing the legal framework, the chapter focuses

specifically on the ways in which different actors involved in the creation and negotiation of the legal framework – the Schengen Borders Code – have either granted or wielded discretion to pursue or protect specific interests and/or values. Whereas Chapter 4 thus analyses how the granting and wielding of 'top-down' discretion shapes the movement of the intra-Schengen mobility control apparatus, Chapters 5 and 6 are the impact of discretionary decisions and actions taken from 'below' (Chapter 6) and taken in-between (Chapter 5) on this process. Chapter 5 shifts focus from the legislative level, the level of 'high' politics, to the context of the organisations tasked with implementing European and national laws – so the RNM as an organisation – and, amongst other things, analyses to what extent border enforcement organisations use legal endogeneity and ambiguity to pursue organisational goals and interests. Furthermore, the chapter also addresses the impact of judiciary decisions on street-level discretion and, in so doing, reflects on the power that courts have to impact (in)formal norms and practices. Chapter 6 brings us to the level where it all began, the street level of border policing in the Dutch-German and Dutch-Belgian borderlands. In this chapter, the uses of discretion on the street level will be addressed and also placed in the larger context of preceding discretionary decisions that frame the (inter)actions and practices of RNM officers in the intra-Schengen borderlands. In an attempt to close on a positive note, the closing chapter, Chapter 7, asks the question of whether it is possible to use the mechanisms and workings of the intra-Schengen mobility control apparatus to counter its movements through deliberate actions from *within* by using what we know about the ghost in the apparatus.

Notes

1 As mentioned in my acknowledgments, I am very aware of the fact that given the rapid developments in this area of scholarship by the time of publication of this book new calls can be identified and (more) new responses to the calls identified here in this chapter have been formulated. Omnia mutantur, nihil interit.
2 The interview can be found here: http://cultureofempathy.com/References/Experts/Arlie-Russell-Hochschild.htm).

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2

DISCRETION AS THE GHOST IN THE APPARATUS

> "Power is not an institution, and not a structure; neither is it a certain strength we are endowed with; it is the name that one attributes to a complex strategical situation in a particular society."
>
> Foucault (1978, p. 93)

2.1 Introduction

As explained in the previous chapter, this book aims to assess the intra-Schengen mobility regime, by focusing on the (inter)actions of different central state institutions, in a somewhat holistic way. By looking not only at the larger socio-political and historical context against which the Schengen Agreement and the politics of mobility have taken shape but also by asking the question of which state actors' (legal) decisions are the driving factor(s) behind these politics, the complexity and intertwinement of politics and lawmaking will be highlighted. Whereas this complexity is present in most political regimes, it seems to be specifically salient in so-called multi-scalared (Wonders & Solop, 1993) regimes in which national politics, laws and policies are inextricably tied to supranational politics, directives, and regulations. The European Union is a prime example of such a regime. A useful concept that allows for an integrated approach to studying the intra-Schengen mobility regime is Foucault's notion of *the dispositif* or the apparatus. This chapter will introduce the dispositif and explain how it is used as a sensitising lens more so than as a rigid analytical tool. By looking at state arrangements in their entirety and by approaching these arrangements as important loci of granting and wielding of power that allows for the apparatus to move in a certain direction, or to move at all, the concept allows for a reflection on the role of discretion in directing the movement of the apparatus. As will be further explained in Section 2.3. discretion is a concept that can mean different things depending on who is defining it. This

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book takes up a socio-legal understanding of discretion and, in so doing, sees discretion as an inevitable and necessary part of (arrangements of) rules and regulations while also acknowledging that acts of granting and wielding of discretion by different actors involved in these arrangements are to be viewed, and analysed, as important acts of power.

2.2 Through the looking glass of the apparatus

Foucault's notion of the apparatus or dispositif forms the sensitising lens (Blumer, 1954) through which this book looks at the functioning of the intra-Schengen mobility control regime as part of the larger European Migration Regime (also see Feldman, 2011). According to Rabinow and Rose (2003, p. xv), the idea of the dispositif or apparatus is 'one of the most conceptual tools introduced by Foucault'. Yet, as observed by Raffnsøe et al. (2014), it is not one of Foucault's most used conceptual tools and it often gets conflated with his wider used theoretical perspectives on discipline and governmentality leading to reduction of the dynamic nature of the concept and to 'totalizing claims about a disciplined and regimented monolithic order' (Raffinsoe et al., 2014, p. 274).

Although the different concepts – the dispositif, discipline and governmentality – are closely related and can all be connected to Foucault's explorations of 'how government began to revolve bio politically around the specific question of population' (Dillon, 2007, p. 43) but also to his research into uncovering and understanding 'the motivations and calculations that have engendered the government of conduct in the period of the consolidation of neoliberalism' (Lazzarato, 2009, p. 110), the dispositive needs to be understood independently. Feldman explains the tendency to conflate the three concepts by the fact that local empirical research better allows for studying 'the disciplining of the individual […] than the regulation of the population' (Feldman, 2011, p. xx). Yet, another reason for the conflation might be the lack of clarity – or the lack of consistency in providing clarity – that Foucault provided in defining the apparatus/the dispositive as an analytical concept. While tracing the various meanings that Foucault has attributed to the concept over the years, Raffinsoe et al. (2014) show that, according to Foucault, the concept refers to a heterogenous relational – contrary to a material – 'something' that is omnipresent, dynamic, and multifactorial (Foucault, 1977b). Understood this way, the dispositive is 'a manifestation of an arrangement distributing a variety of real effects within social reality' (Raffinsoe et al., 2014, p. 11). This arrangement is dynamic and subject to change and can be seen as a 'multifactorious network in which knowledge and the exercise of power reciprocally organize and

find themselves organized by each other in a certain manner' (Raffnsøe et al., 2014, p. 11.) Understanding the movement, or evolution, of the dispositif requires an understanding of its surroundings and the way changes in these surroundings lead to alterations and adjustments of the interaction between the various parts of the dispositif. Besides the larger socio-political field within which dispositifs operate, legal systems – or decision fields – are also part of the surroundings that influence the movement of dispositifs. Law, according to Foucault, contributes to the functioning of power in society and the shaping of societal and institutional norms and practices. Thus, whereas Foucault did not explicitly designate law as a dispositif in a straightforward manner, his work can be interpreted in a way that suggests that law plays a role within larger dispositifs of power.

Whereas these definitions might spark a variety of questions of both theoretical and empirical nature, this book uses the concept of the dispositive not so much to 'map' the different actors and factors that together form the apparatus – or multiple apparatuses – that together constitute the intra-Schengen crimmigration control regime. Instead, this book takes the existence of the apparatus(es) that (together) form the intra-Schengen crimmigration control regime more or less as a given based on the research that has already mapped the various assemblages that are visible in Europe's borderscapes and instead tries to explore ***how*** this/these (interdependent) dispositive(s) revolve around and exercise an influence upon certain social experiences and problematics. Put differently, this book seeks to explore what Foucault would deem the 'ghost' of the apparatus: what allows the apparatus to provide both structures while at the same time being flexible, open to unforeseen and unpredictable events and able to adapt to these events when and where needed (Foucault, 1977b; Rabinow, 2003:, p. 299).

2.3 The ghost in border apparatuses?

Rabinow and Rose (2003) define the apparatus as 'a device oriented to produce something' and as a 'grouping of heterogenous elements (…) deployed for specific purposes at a particular historical conjuncture' (Rabinow & Rose, 2003, p. xvi). As will be further explained in the next chapter, the historical conjunction that led to the creation of the Schengen Agreement triggered discourses on (secondary) migration and practices of mobility control on multiple levels, to on the one hand ensure the economic prospering of the Union and its citizens while on the other hand mitigating the risks of unwanted mobility. The intra-Schengen mobility control regime was thus meant to 'produce' both

economic welfare whilst at the same time protecting European and national security. These various goals could only be achieved by creating a set of flexible yet strategic rules, regulations and practices that allowed the signatory countries to, while 'signing away' part of their sovereignty to the Schengen-ideal, still exert national powers in their borderlands.

In applying the notion of the dispositif to various bordering practices and bordering sites, authors of critical migration and border studies have called attention to a broad range of dispositifs that developed in different parts of the world: a dispositif of helping (Fleischmann & Steinhilper, 2017), a humanitarian dispositif (Moraña, 2021), a necropolitical dispositif (Estévez, 2018), dispositifs of containment (Tazzioli 2018), detention/expulsion dispositifs (Mezzadra 2010), a risk dispositif (Aradau & van Munster, 2007), a counter-trafficking dispositif (Clemente, 2022), etc. Often times without specifically addressing the mechanics and/or components of the specific nature of the border dispositive that is distinguished or taken as the central focus of the analysis, these studies use the notion of the border dispositif to capture concrete and locatable sites of production of border power and to focus at the modes of production through which 'the border' comes into being as a concrete location and set of practices. By choosing the dispositional approach while looking at borders an border practices, the notion of borders as such gets to be 'de-totalised, de-objectified, de-homogenised' and, in so doing, the complexity of borders and bordering practices is acknowledged (Nieswand, 2018, p. 594). Understanding border dispositifs as such brings us to the question of *what* allows these complex apparatuses to function the way they do, which is where we turn our gaze to the notion of discretion.

In his analysis of the migration management apparatus that regulates the European Union's Area of Justice Freedom and Security, Feldman identifies four 'devices' that according to him allow for the migration management apparatus to be adaptable: (1) rationales of governance that policymakers, technocrats, analysts, speechwriters, public officials, politicians, etc. deploy which encourage morally entrenched 'rhetorical tropes' that seemingly apply to a heterogenous group, e.g. 'migrants' or 'border control', with the aim to shut out alternative moral positions; (2) 'Nonce bureaucrats' whose expertise gets deployed to only temporarily work on specific projects; (3) 'Shifters' which are 'linguistic devices that can move across and integrate disparate policy domains because of their generic quality' (Feldman, 2011, p. 17); and lastly, (4) Technical standards that enhance the exchange and processing of information coming from or stored in different IT systems. As Feldman explains: 'All of these devices create a network effect throughout the apparatus as they

can be adopted in countless different contexts and obtain a tremendous power of synthesis' and '(…) are critical to the proliferation, expansion and refinement of the apparatus because they serve both technical and moral purposes' (Feldman, 2011, pp. 17–18).

2.3.1 Discretion and the Dispositif

Although these devices as identified by Feldman indeed play a crucial role in the functioning of the European migration management apparatus, this book suggests another device – or, to stick with Foucault, 'ghost' – to be considered as crucial to said functioning and perhaps even to be seen as the foundation that allows for the devices as identified by Feldman to operate the way they do. By defining what discretion entails, why it is being created and where it can be identified in the different parts of (supra)national structures, this chapter introduces the notion of discretion as the device that 'make the sundry "tactics" work in awesomely synergistic ways to encourage a global mobility regime built on what Shamir calls a "paradigm of suspicion" (Shamir, 2005, p. 200 in Feldman, 2011, p. 16).

In his works, Foucault has not explicitly focused on the concept of discretion, yet his ideas on power, the dynamics of social structures and also knowledge are naturally relatable to the notion of discretion. Scholars have made the links, especially in applying and researching Foucault's ideas on governmentality by focusing on how discretion is exercised within systems of governance and, in doing so, shedding light on power dynamics and mechanisms of control (Garland, 1997, 2001; Rose et al., 2006). The concept of the dispositif as such has not been widely examined in relation to discretion. Nevertheless, several connections between both concepts can be explored: First, discretion can be seen as one of the mechanisms through which power operates within the apparatus. Those who are in a position of granting or wielding discretion may have the ability to interpret and create or apply rules and norms in a way that aligns with their own understanding or interests, thus influencing the functioning of the apparatus. Secondly, Foucault emphasises how the apparatus shapes subjectivities. As discretion within the apparatus allows individuals or institutions to exercise agency in interpreting and implementing its elements, discretionary power might contribute to the formation of subjectivities within the broader power structures of the apparatus. Discretion furthermore also can enable the apparatus to adapt to changing circumstances or challenges. The flexibility inherent in discretion allows the apparatus to modify its operations without undergoing significant structural changes. This adaptability is crucial for

the sustainability and effectiveness of the apparatus over time. Lastly, when exercised within the apparatus, discretion can play a role in the regulation and normalisation of behaviour. It allows for the negotiation of norms and the application of rules in a way that accommodates certain variations while still maintaining the overall functioning of the apparatus.

Although Foucault's notion of the apparatus and the notion of discretion are distinct concepts, they can be interconnected in the way power operates within societal structures. By tracing discretion within the apparatus, it is possible to better understand the dynamic and adaptive nature of power relations in a particular (socio-political) context. The connection – and the value of this connection – between discretion and the works of Foucault has been emphasised by Pratt and Sossin (2009). Although Pratt and Sossin do not mention Foucault's work on the apparatus, they emphasise how the study of discretion benefits from the application of a Foucauldian lens as it shines light on the way in which discretion works to enable different forms of governance in different settings and contexts. In other words, it illuminates the process of governing through discretion. To uncover the workings of this process in the context of the governance of intra-Schengen mobility, it is necessary to approach discretion not simply as a matter of individual decision-making, but rather as an interactive broader phenomenon that is shaped by a range of (f)actors, including power dynamics, institutional structures, and individual beliefs and dispositions. This perspective on discretion aligns with the socio-legal understanding of discretion and the fact that discretion is, at the same time, a top-down, bottom-up, and in-between phenomenon.

2.4 Discretion as a top-down, bottom-up, and in-between phenomenon

When looking at the discussion of discretion in the context of studies focusing on migration or border control, discretion has gotten a bad reputation. Predominantly studied as a phenomenon that is wielded by street-level/frontline migration or border control decision-makers in a problematic way, the image of discretion, *where* it gets exercised and by *whom* is limited. Also, the question of *where* discretion gets granted and *why* is rarely asked. As a result, it might seem as if street-level agents are not just the most visible 'abusers' of discretion at the expense of the individuals who get to be subjected to their discretionary decisions, but also as if the street-level constitutes the prime locus of discretion. Scholarship from the field of law and society as well as the field of public

administration has nevertheless shown that not only is discretion a phenomenon that gets to be created both top-down, bottom-up, and in-between, but also that it is crucial to see how the discretionary decisions of one actor can influence those of another (see for an overview of this scholarship: Van der Woude 2017). Both aspects are closely connected since the discretionary decisions that are made and felt at the street level, will be the result of a chain of discretion starting in the higher political echelons, while then trickling down through different 'links' of the bureaucratic chain. While discretion can be granted by the legislature it gets 'translated' and transformed by the different organisational institutions to which it is granted. Within these organisations, individual agents or officials will furthermore be taking the actual, on the ground, decisions based on a broad range of factors that are unique to them. At the same time, these decisions can be scrutinised by the judiciary which could lead to an adaptation of the discretionary space that was granted to these organisational institutions and/or the way these organisations delegated this discretion to individual agents. The multifaceted nature of discretion and the multiple (f)actors that influence, and are influenced by, discretionary decisions is reflected by the fact the phenomenon is studied extensively in various disciplines. In an analysis of how discretion is conceptualised theoretically, Hupe (2013, pp. 427–431) distinguishes between a legal/juridical view, an economics view, a sociological view, and a political science view on (street-level) discretion. In this book, discretion is predominantly conceptualised through a socio-legal approach, which combines a more bottom-up approach to understanding discretion and discretionary practices that acknowledges law – and discretion as closely intertwined with law – as endogenous, as generated within and in interaction with the social realm that it seeks to regulate (Edelman, 2004) with a more top-down understanding of discretion that acknowledges high politics and deliberate decision of legislatures and policy officials to cede substantial policymaking authority to the executive and bureaucrats (Huber & Shipan, 2002; also see Schneider, 1992). Discretion is thus to be seen as a key factor that contributes to the making of laws and policies by other actors than just the formal legislature and, as such, is 'distributed' across legislative bodies, administrative agencies, and levels, as well as jurisdictional units (Grattet & Jenness, 2005)

Before further exploring the (combined) top-down and bottom-up perspective of discretion in the following subsections, it is key to come to a working definition of discretion. In an attempt to come to a more generic understanding of what the concept of discretion represents or stands for in these different disciplines Evans and Hupe (2019, p. 1) come to the following observation in their introductory chapter to their

collected volume *Discretion and the Quest for Controlled Freedom*: 'Discretion presumes some form of hierarchical relationship. A body or person grants a degree of circumscribed freedom to another body or person, to be exercised in a particular setting according to particular standards. As such, the phenomenon of discretion is generic and ubiquitous – although its occurrence is pluriform and dynamic.' This description of discretion acknowledges that discretion is something that *can* be granted – from a more top-down position – while, as the word 'presumes' suggests, also questioning that hierarchical dynamic and thus inviting the researcher to look beyond this dynamic. Furthermore, it calls attention to the fact that discretion, whether in a *de jure* or *de facto* sense, is intrinsically connected to the notion of rules ('particular standards'), understood in the widest sense possible and not just as *legal* rules. Lastly, and connected to the notion of identifying non-legal rules and norms that might be affecting discretionary practices, Evans and Hupe (2019) highlight the setting in which discretion is exercised and thus the importance of contextualising discretionary decisions. The importance of understanding discretion by reference to its embeddedness in interpretative practices, frames, decision fields and social surrounds is central to socio-legal accounts of understanding endogenous discretionary practices (Hawkins, 1992; Hawkins, 2011; Manning & Hawkins, 1990). In the following sections, three different perspectives on discretion, as discussed in the literature, will be concisely discussed: The top-down (Section 2.4.1), the bottom-up (Section 2.4.2.), and the in-between perspective (Section 2.4.3).

2.4.1 A top-down perspective on discretion

Understanding discretion from a top-down perspective requires an engagement with high politics and conflicting interests between various (formal and informal) political and policy actors that, at various stages of the lawmaking and/or policy-making process try to provide input on this process. It is important to recognise the institutional context in which discretion emerges in public policy processes. In most cases, it will be formally mandated and delegated by the legislature. In this form, delegated legislation implies that an initial legislative act gives discretionary power to public officials to take further steps to translate the law into actions that allow for the aim of said law or legal provision to be most adequately met. In this situation, the legislature deliberately builds discretion into the law by attributing the authority to decision-makers to further give shape to the law based on their assessment. While assessing the conscious granting of discretion by legislators to lower-level

decisionmakers, Ross observes that, in so doing, legislators are able to 'avoid the blame for the oppressive acts of the "regulators" and earn favour by individually rescuing constituents who appeal to them for help. The constituents then do not blame the legislators for having given the regulators improper powers in the first place' (Ross as cited in Weber, 2003, p. 254). According to Schneider (1992) the choice to deliberately attribute discretion to lower-level decision-makers can be based on the assessment of the legislature that (a) cases are too complex and unpredictable to allow for unambiguous rules and proper functioning of the rules requires the use of more vague norms that are open to interpretation (rule-failure discretion), (b) that the system will function better or more efficiently if decision makers are allowed to develop rules as they go along on a case-by-case basis based on their practical and professional experience (rule-binding discretion), or (c) when law makers cannot agree on the rules and deliberately choose to pass responsibility to the decision makers for the unpopular outcomes of contradictory of vaguely –defined polices (rule-compromise discretion). This understanding of discretion directly opposes, or at least challenges, the legal perspective of discretion being present in the *absence* of rules. Following the socio-legal perspective on discretion as something that is inherent to rules, Schneider also suggests that to curb the unwanted or undesired effects of allowing such discretion to decision-makers, it will not be useful to do so through the creation of more rules and regulations. Instead, he suggests that one of the most effective ways to limit the discretion of a decision-maker is to ensure that one or more of the parties before them, over whom the discretion gets wielded, is endowed with rights. In her application of Schneider's framework to the use of the Immigration Act in the United Kingdom, Weber (2003) illustrates how the act created vague and permissive detention guidelines which, as a result, were used differently by different immigration officers influenced by factors beyond the guidelines themselves, such as organisational culture and resource constraints. Furthermore, the article shows the near-total absence of procedural rights for Immigration Act detainees. Whereas the granting of discretion is to be seen as a conscious decision of the legislature, following Schneider, so is the decision of the legislature to *not* include a 'backstop' to this granted discretion in the form of (procedural) rights for the detainees.

Although Section 2.4.2. will show that the wielding of discretion by the lower, street, level of the bureaucracy is influenced by a plethora of (f)actors besides those of the formal legislature or higher policy-making institutions, it is crucial to not overlook the power of these decisions of 'high discretion' and how they impact following decisions. In

underlining this observation, Bushway and Forst (2013) call attention to the interplay between what they call type B discretion (the ability to create rules and policies and, in so doing, grant discretion to other decision-makers) and type A discretion (the discretion that individual actors have to make decisions with variation given a set of rules), and how type B discretion can be deliberately used to limit and shape type A discretion. By taking the US political system and its division between Federal law and State law as their point of departure, the authors observe how by using their type B discretion, State legislatures have been able to set sentencing rules that, although they all fall within the general guidelines of constitutionality, differ tremendously from state to state. The authors note how 'This variation [in the basic structure of sentencing across US states] is potentially more influential than variation in type A discretion of individual actors within any given set of rules' (Bushway & Forst, 2013, p. 201). Huber and Shipan (2002) call attention to the implications of the 'delegation' of substantial policymaking authority to the executive and bureaucrats through the deliberative creation of 'astonishingly vague and general laws' (2002: xiii). The authors speak in this context of the granting of 'deliberate discretion' with which they refer to the amount of flexibility that legislators give to agencies when creating laws. Discretion, understood this way, becomes a crucial factor in the policymaking process through which higher policymakers, to a certain extent, can 'govern' the wielding of discretion by the lower levels of the bureaucracy.

A similar dynamic of delegation of 'type B' discretion from one legislature to the other can be observed in a supranational union such as the European Union where the European Parliament, can delegate discretion to national legislatures, e.g. EU member states. Scholars have long observed and analysed the power dynamics at play, and the power games that can be played in multi-scalared regimes such as the European Union where there is constant negotiation between the EU legislature and national legislatures. Studies have focused, amongst other things, on the conditions under which EU legislation delegates discretion to member states (for instance: Franchino, 2007; Pollack, 2006), or on the ways in which national transposition actors (e.g. responsible ministries, NGOs, etc.) negotiate the conversion of EU measures into national law leading to the further delegation of discretion – and thus the responsibility for actual compliance with the EU legislation – to practical implementers (de Massol de Rebetz, 2023; Dörrenbächer & Mastenbroek, 2019; Steunenberg & Rhinard, 2010).

Most studies addressing the transposition of European rules into domestic legislation focus on the implementation of 'directives,' which

are binding on the results to be achieved and thus form-free in terms of *how* to translate them to domestic, national, law. If the results are met, the member state is meeting is complying with EU law. Directives need to be distinguished from 'regulations' and 'decisions,' which are *directly* applicable. While assessing the ways in which national legislatures have transposed European Union directives on discrimination into their respective national legal frameworks, Bruce-Jones (2017) observes that, in doing so, national legislatures enjoy a lot of discretion. He illustrates how, despite all falling under the same Race Directive (red), there are great differences in how the German, French, and United Kingdom (at the time still part of the European Union) national legislature had translated the directive into national law. The author acknowledges the necessity to allow member states a certain level of discretion on how to translate European directives into national legislation in a way that is locally appropriate, yet he also questions whether the current situation does not undermine the central notion of legal harmonisation across Europe:

> "(…) on the issue of racial discrimination, it [the discretion that member states have] leaves a significant gap between the articulation of common principles and the ways divergent mechanisms of implementation impact on the everyday lives of European citizens. This gap allows member states to sideline the discourse of racism, which has the consequence of obscuring the social effects of racism".
>
> *(pp. 4–5)*

Despite the layer of accountability and oversight to the ways in which racial discrimination in Europe is regulated added by the European Union system, by consciously granting this discretion and allowing for the aforementioned gap between fundamental principles and daily practices to exist, Bruce-Jones concludes that '(…) it is clear that the European Union as a concept and set of institutions is complicit in a set of discursive and legal practices that endanger people of colour' (Bruce-Jones, 2017, p. 5). Whereas the following chapter will further look into the different (racialised) narratives and discourses that are part of the intra-Schengen migration control apparatus, for now, it is important to see how the European Commission can grant discretion through directives and to see how the act of granting discretion can be a highly political act.

Yet, it is not only through directives that discretion gets granted within the European Union. Although regulations and decisions do not have to be translated into national law, this does not mean that they are

void of discretion. In order to 'fit' national legal cultures and specific political interests – to be locally appropriate – these supranational legal instruments will often be formulated in such a way that the require 'substantial fleshing out by national legislatures in order to become fully effective', sometimes even more so than directives (Van den Brink, 2017, p. 218). Van den Brink illustrates this through Article 5(1) of Regulation No 1782/2003/EC on support schemes under the common agricultural policy which states:

> 'member states shall ensure that all agricultural land, especially land which is no longer used for production purposes, is maintained in good agricultural and environmental condition. member states shall define, at national or regional level, minimum requirements for good agricultural and environmental condition on the basis of the framework set up in Annex IV, taking into account the specific characteristics of the areas concerned, including soil and climatic condition, existing farming systems, land use, crop rotation, farming practices, and farm structures. (…).'

In this example, the open-ended wording, or open norm, of 'good agricultural and environmental condition' combined with the fact that member states' are made responsible to establish minimum requirements on either a national or a regional level without giving any direction as to what these requirements should contain, leave the national authorities ample policy discretion, despite the legislative act being a regulation. The conscious use of these discretionary terms only enhances the endogenous character of the regulation allowing it to take shape according to the *couleur locale* of each of the member states. Although the area of immigration law in the European Union is dominated by directives, intra-Schengen mobility management is largely management through Regulation (EU) 2016/399 of the European Parliament and of the Council of March 9, 2016, on a Union Code on the rules governing the movement of persons across borders, or the Schengen Borders Code. In Chapter 4, the Schengen Borders Code will be analysed through the lens of discretion.

Now that we have established an understanding of 'top-down' discretion as the discretion that gets created and delegated by (supra) national legislative bodies, is influenced by negotiating and political bargaining and that can lead to the deflection of the responsibility for rule-compliance of policymakers and politicians to practical implementers, we will shift our attention to the opposite side of the spectrum: discretion from below.

2.4.2 A bottom-up perspective on discretion

The importance of seeing and studying discretion in a wider context that acknowledges the distance that can exist between the 'reality' of legislatures and policymakers and the reality of the application of the rules and norms these actors created in the everyday interactions between state representatives applying these rules and norms and those subjected to them, has been highlighted by studies analysing a broad variety of street-level practices. Michael Lipsky's seminal work on street-level bureaucrats as the *true* policymakers has sparked a wide array of research further uncovering how discretion takes shape when focusing on the law – or norms – in action (Lipsky, 1980; 2010). This discretion as it gets wielded on the street-level, is the Type A discretion that Bushway and Forst (2013) refer to.

Whereas earlier works in public administration had already dismissed the idea of 'neutral' administration by, amongst other things, calling attention to the tensions between law and practice and formal and informal organisations (Simon, 1946; Stein, 1952; Waldo, 1948) and the complex web of players, interests, and strategies entangled in the policy process (Pressman & Wildavsky, 1979), Lipsky was the first to highlight the centrality of frontline staff in this complex web. Not only did he call attention to their existence and crucial role in this web, but he also presented them as actors with power and agency using discretion in deciding on and between several courses of action and inaction. According to Lipsky, 'Public policy is not best understood as made in legislatures or top-floor suites of high-ranking administrators because in important ways it is made in the crowded offices and daily encounters of street-level workers' (Lipsky, 1980, p. xii). Scholarship on street-level bureaucracy sees the existence of discretion on the street level, or front line, as part of any interaction between street-level agents and their 'clients'.

2.4.2.1 The false dichotomy of rule implementation and street-level discretion

In understanding how street-level, or front-line (both will be used interchangeably), agents wield discretion, it is important to ask the question of what discretion on the street-level can look like. Whereas top-down granted discretion can, and will often, take the form of intentionally and specifically 'open-worded' or ambiguous laws and policies to 'pass the buck' to the lower echelons of the bureaucracy (e.g. street-level organisations and the bureaucrats working for these organisations), for a proper understanding of the ubiquitous workings of discretionary decision-making it is crucial to realise that street-level bureaucrats

enjoy – and practice – discretion even if there are seemingly clear rules and regulatory frames. As Handler puts it:

> "Despite the masses of legislation, rules, regulations, and administrative orders, most large, complex administrative systems are shot through with discretion from the top policymakers down to the line staff —the inspectors, social workers, intake officers, police, teachers, health personnel, and even clerks. How they interpret the rules, how they listen to the explanations, how they help the citizen or remain indifferent, all act the substance and quality of the encounter, an encounter made increasingly important because of our widespread dependence on the modern state".
>
> *(Handler, 1990, pp. 3–4)*

The dichotomy that sometimes is presented between rules (or rule-based implementation) on the one hand and (street-level) discretion on the other, to which Handler is referring as well as if both relate to each other in a zero-sum manner, paints a false reality (also see Maynard-Moody & Portillo, 2010). Discretion is nested within the context of routines, practice ideologies, rule-following, and law. It is not a deviation from rules, it is an inevitable, ineludible, and inherent part of there being rules (Hupe & Hill, 2007) and the fact that these need to be interpreted before they are applied to a broad variety of cases. While drawing on Wittgenstein's work, Wagenaar (2020, p. 261) explains:

> "(…) there is no such thing as a watertight, exhaustive explanation of any rule. Every rule, when applied in real world circumstances may lead to misunderstanding. There is no final and decisive way of settling a disagreement or confusion caused by a rule, by invoking another rule. Every explanation of a rule will inevitably run into the problem of infinite regress or further requests for explanation, extenuating external circumstances or cultural exceptions. The premise that there is an obviously correct way to follow a formal rule or law lies at the foundation of a lot of studies, it is a misguiding premise".

From a socio-legal perspective, any rule, no matter how clear or how open it is formulated, will trigger a discretionary response on the street level according to this understanding of rule application. Discretion in this sense can best be understood as the necessary interpretation that street-level agents engage in while making formal rules work in the real world. And, because the real world is too complex and opaque to capture unequivocal rules and be reduced to programmatic efforts, the

application of rules requires street-level agents to make 'make judgements about intention and motives that are often unknowable and can only be inferred indirectly from the particulars of the situation at hand' (Wagenaar, 2020, p. 273). Despite leaving room for arbitrariness and even misuse or abuse, this type of 'administrative discretion' does not automatically compromise the integrity of the democratic order. As Spader (1984) explains, discretion and the rule of law – or discretion and the existence of clear rules – are both part of this democratic order and are necessary to treasure and uphold its integrity. Both too much discretion as well as too legalistic rule application will lead to unwanted and more importantly, unjust, and punitive street-level practices. The often-voiced idea by critics of discretion that it is to be seen as an undefined and undesirable space between formal rules and informal behaviour, does not acknowledge the importance of discretion on the street level as 'a powerful heuristic towards more effective, responsive and democratic public organizations' (Wagenaar, 2020, p. 274). Street-level discretion, in other words, is as needed and essential for justice as the rule of law.

When looking at practices of front-line officers engaged in policing practices, there is a broad array of scholarship convincingly illustrating *why* street-level discretion has gotten a bad reputation in the context of a variety of policing practices, including migration and border policing. Practices of racial profiling, the misuse and abuse of (coercive) powers have been mapped by scholars of (border and migration) policing worldwide (Maynard-Moody & Musheno, 2003; Beckett, 2016; Fagan, 2021; Glaser, 2015; Parmar, 2021; Vega & Woude, 2024). This begs the question of what can – and needs – to be done to prevent these practices from happening to thus prevent the harm that is caused to individuals and communities. This is a key question that I will get back to in the last chapter of this book. For now, it is important, considering the discussed dichotomy between rules and discretion, that these injustices at least will not and cannot be adequately addressed through more, stricter, rules and regulations. Following Wittgenstein's notion of the interconnectedness of rules and discretion, in his foundational work, *People-Processing*, Jeffrey Prottas warns for the effect, by critics of discretion often overlooked or underestimated, that creating (more) rules with the aim to curb discretion will in fact have the opposite effect. It will enhance discretion as every rule will require interpretation. He writes: '(…) The substantial number of such rules and the fact that their applicability must be decided on a case-by-case basis makes effective monitoring of their use inherently difficult. In effect their use becomes discretionary' (Prottas, 1979, p. 93).

Over the years, socio-legal and psychological research has further unpacked the way in which street-level agents use their discretion and

especially what actors influence it. In presenting a more holistic conceptual framework for studying discretion, Hawkins (1992) points at both the importance of the wider 'decision field' influencing discretionary decisions and that of different decision frames. Whereas the *decision-field* includes the formal rules – the 'law' so to speak – but also formal and informal organisational and occupational standards, the decision *frames* are 'structure[s]of knowledge, experience, values, and meaning that decision-makers employ in deciding.' (Hawkins, 1992, p. 52). Hawkins furthermore places the decision-field and the decision-frames within the larger context of a changing social surround or the larger societal and political context within which street-level organisations and front-line agents are functioning.

Within the decision-field, socio-legal scholarship has long shown the importance of the existence of regulatory frameworks or *fields* over formal legal rules and norms (Griffiths, 1986; Merry, 1988; 2012; Moore, 1973). For the wielders of street-level discretionary decisions, examples of influential regulatory decision-fields are organisational standards and occupational rules and expectations. The effects of organisational and occupational socialisation in which the pressures of having to meet certain expectations both in terms of 'output' as well as performance and attitude have been mapped extensively showing how decisions and actions of street-level agents such as police officers, social workers, teachers, and others are shaped by their organisational context where their relations with supervisors, peers, clients, and citizens shape their motives and judgments. The existence of these different – sometimes perhaps even competing – fields leads to an interplay of 'action prescriptions' that, apart from formal rules, are also formed by professional standards, societal expectations, and market incentives (Hupe & Hill, 2007; Thomann et al., 2018). Hence, at the street level, there is a multiplicity of both action prescriptions and related accountabilities that inform individual agent's discretionary decisions.

Whereas the decision *fields* are addressing the impact and the importance of the organisational context in shaping discretionary practices, the decision *frames* are geared towards understanding how an individual's personal belief system also plays a role in this. The latter also includes a person's moral blueprint. Whereas morality and engaging in street-level migration and border control practices might seem like a *contradictio in terminis* to some, research shows how moral conflict can – and does – arise at the street level and how it can influence discretionary practices. Whereas it is important to acknowledge the racialised notions and foundations upon which state bureaucracies engaged in policing (including border and migration control) are built, which, when combined with

specific job competences, might attract people with specific characteristics and ideologies, it is as important to acknowledge that street-level bureaucrats are not monolithic nor void of any moral sensibilities. Yet, as Zacka describes in *When the State meets the Street*, the predicament in which street-level bureaucrats find themselves caught can 'erode and truncate their moral sensibilities' (Zacka, 2017, p. 4). As mediators between two worlds that are not necessarily in sync – the world of 'the state' or the laws and rules on the one hand, and the 'real' world of people and difficult, wicked, and societal problems – street-level agents are asked to deal with these real-life situations and problems without being equipped with the resources or authority necessary to tackle them in any definitive way. Through wielding their discretion, street-level agents are expected to apply hierarchical directives that are often vague, (morally) ambiguous, and conflicting to messy real-world situations. This might lead to moral distress and moral injury when they, in doing so, are trying to meet diverging expectations of the state on the one hand and the people they interact with on the other, as well as a plurality of normative demands (decision fields) that point them in competing directions.

Looking at discretion from a bottom-up perspective illustrates the impossibility for top-down law and policymakers to predict how delegated discretion will play out in practice. Furthermore, it also illustrates that even in those instances where there is no *clear* delegation of discretionary power to the street level, through interpretation and the balancing of different national and organisational interests as well as individual moral sensibilities, street-level officials hold a great amount of power in deciding on courses of action and inaction. Whereas the delegation of discretion by the higher echelons of bureaucracies could be constrained and limited to situations of rule-failure and rule-binding discretion to prevent the ambiguous of results political conflict and haggling being passed on to 'deal with' on the street level, it is impossible to 'curb' the interpretation of rules – no matter how 'clear' they are. This insight on the various loci of discretion is important as it begs the question of what this means for the locus of responsibility in addressing the injustices that may be created by bureaucracies. Before further addressing this question in the context of the intra-Schengen crimmigration control apparatus, a third locus for discretion needs to be discussed: the discretion that is created (or shaped) 'in between'.

2.4.3 An in-between perspective on discretion

Top-down created discretion doesn't get wielded on the street-level without any further 'translation' or influencing of discretionary decisions

and practices in between these two loci. As mentioned in the previous section, the level of the organisation for instance also needs to be acknowledged as a locus of discretion to understand the way in which discretion gets expressed on the street-level. Following Reitz' (1998) image of a hydraulic chain of discretion through which the discretionary action of one actor in the chain affects the discretionary practices of another actor, this section will introduce organisational norm-making and judicial decision-making – as forms of 'in between discretion'. Whereas the division that has been made so far in discussing the central loci for discretion, moving from top-down discretion to bottom-up discretion has followed the more traditional 'hierarchical' take on the creation of discretion, this section will move beyond this hierarchical division (Hupe & Hill, 2007, p. 252).

2.4.3.1 Organisational discretion

Whereas the role, and influence, of the organisational context within which street-level bureaucrats are performing their tasks has already been addressed in the earlier section, the organisational context – and organisational policymaking – also needs to be mentioned while discussing 'in between discretion'. It plays a crucial role in translating national policies and norms to organisational policies and guidelines. In so doing, these policies and guidelines set up responsibilities and accountability and provide clarification and guidance to the organisational community, e.g., the street-level implementers of the policy.

Although the image of a neatly structured hierarchical chain of policymaking might arise (national – organisational – street level), numerous studies in public administration have long debunked that image by showing how policymaking is both a horizontal and a vertical matter. Whereas the horizontal axis points to the influence of bargaining, coalition formation, and compromise among actors who are roughly equal in power, the vertical axis highlights the importance of relationships involving the downward transmission of orders and the upward transmission of information and advice (Hammond, 1986). The specific nature and internal structure of an organisation (Cyert & March, 1992; Weick, 1976), its role within the larger (inter)national bureaucracy within which it has to operate as well as the prominence of managers and/or central authoritative figures (Howlett & Walker, 2012), institutional pressures (DiMaggio & Powell, 1993; Scott, 2009; Zucker, 1987), resource dependency (Pfeffer & Salancik, 2003) all affect the choices that are made in the formulation of organisational policies and thus also in the translation of national discretionary laws into concrete policies and guidelines that can be enforced

on the street-level. In this process, the organisation thus acts as an 'in between' actor both engaged in interpreting delegated discretion as well as further delegating discretion 'down' to the street level.

Seeing, and acknowledging, organisations as active agents in shaping the meaning of the law that regulates them, is best captured by the socio-legal notion of legal endogeneity (Edelman et al., 1999). Legal endogeneity suggests that the content and interpretation of the law are influenced by the interactions within the social context it aims to govern. It implies that the law is not just an external imposition on organisations, but rather a product of the ongoing interactions among organisations, professions, and legal institutions. Consequently, organisations are not only subject to the law but also play a role in shaping and constructing it (also see Paquet 2019). This dynamic process results in the continuous evolution of the meaning and application of the law across these interconnected fields. By showing how the meaning of 'hate crimes law' is not fixed or uniform across agencies, Grattet and Jenness (2005) argue that legal endogeneity is a key factor in understanding how the law is reconstituted at the local level. They emphasise that the ambiguity of laws and regulations allows locally situated decision-makers to craft novel interpretations of abstract statutes, leading to varying responses to statutory law. Whereas legal ambiguity creates the space for the construction of different meanings being attributed to the law, legal endogeneity draws attention to how these meanings become incorporated and institutionalised within the social and organisational contexts in which they operate. Understanding legal endogeneity can therefore provide a more comprehensive understanding of the dynamics of discretion within law enforcement and regulatory agencies or organisations, as well as the broader impact of legal interpretations on social institutions. Furthermore, the significance of legal endogeneity becomes even more apparent when exploring the nexus between law and power dynamics. It underscores that law transcends its role as a neutral set of rules, instead serving as a potent instrument wielded strategically to navigate and influence power structures within and between organisations. In essence, a comprehensive understanding of legal endogeneity is indispensable for unravelling the complex interplay between organisational discretion and the deliberate use of law as a dynamic tool in orchestrating and consolidating power dynamics.

Approached in a socio-legal way, organisational discretion can be seen as a form of 'in between' discretion because it exists at the intersection of street-level and institutional decision-making – between high politics and street-level politics. It reflects the dynamic interplay between individual and institutional influences, as well as the autonomy and

influence that organisations have within their structured and interorganisational environments. Understanding organisational discretion as a form of 'in between' discretion is crucial for understanding the complexities of decision-making within organisations and the broader institutional contexts in which they work. The importance of paying attention to organisational discretion in the context of migration and border control has been voiced by Borrelli et al. (2023). Based on a review of the literature on discretion in migration control, the researchers observe that while there has been a considerable increase in studies focusing on the significant influence of discretionary decision-making by frontline workers on migrants and migration control outcomes, there is still a lack of focus on broader patterns and general conclusions about the role of organisational discretion in shaping migration control practices and outcomes. They highlight the complex interplay between frontline workers' discretion, organisational practices, and government strategies in the context of migration control and thus the necessity to understand the various forms of discretion and how they interact with each other.

2.4.3.2 Judicial discretion

The second form of in-between discretion highlighted in this book is judicial discretion. Judicial discretion has received ample attention from socio-legal scholars over the years with studies, amongst other things, focussing on the impact of court rulings on shaping policy and practice. Theoretical frameworks such as judicialisation of politics (Hirschl, 2008), legal mobilisation (McCann, 1994), and principal-agent theory provide a foundation for understanding this influence (Epstein & Knight, 1998). Although these theoretical frameworks all emphasise different dynamics of judicial decision-making, they all contest the notion that the judiciary's role is primarily to interpret laws and ensure they align with constitutional frameworks, rather than actively shaping policy or making significant social reforms (Berry & Wysong, 2012). The notion of the judiciary as a wielder of in-between discretion is most aptly captured by the concept of the judicialisation of politics which posits that judicial bodies have become central actors in political decision-making through, amongst other things, the delegation of discretion to the judiciary by legislatures. This aligns with Schneider's assessment of the deliberative granting of discretion by lawmakers as discussed in Section 2.4.1. which particularly applies to the dynamics of lawmaking in transnational legal orders. In these contexts, the transnational legal frameworks must fit a plethora of national contexts and legal cultures which will automatically result in more legal ambiguity

and thus also a larger role for both national and transnational judicial bodies to play a role in the interpretation (Stone Sweet, 2000). Several notable examples illustrate how the judicialisation of politics manifests as discretionary decision-making by courts. In the United States, the U.S. Supreme Court's decisions in cases like Brown v. Board of Education of Topeka (1954) and Citizens United v. FEC (2010) prove the court's discretionary role in shaping education and campaign finance policies, respectively (Hasen, 2011; Klarman, 2004). In Europe, the European Court of Human Rights ruling in Dudgeon v. United Kingdom (1981) decriminalised homosexuality in Northern Ireland and influenced similar reforms across Europe, highlighting the court's discretionary power in human rights issues (Mowbray, 2004).

Looking at European migration and border policies the Court of Justice of the European Union (CJEU) has played a significant role in shaping migration and border control policies within the European Union through its discretionary decision-making. This influence is clear in several landmark cases that have set important precedents and guided national policies. For instance, in CJEU Metock v Minister for Justice, Equality and Law Reform (2008), the CJEU ruled that non-EU spouses of EU citizens have the right to reside in any member state, regardless of prior legal residency in another EU country. This decision emphasised the principles of family reunification and free movement, significantly affecting national immigration policies (Papagianni, 2006). Similarly, the court's ruling in El Dridi (2011) addressed the detention of irregular migrants. The CJEU declared that member states could not imprison individuals solely for their illegal status if less coercive measures were available. This landmark decision forced several member states to amend their detention policies, aligning them more closely with EU standards on fundamental rights (Wiesbrock, 2010). Another critical ruling came in N.S. v. Secretary of State for the Home Department (2011), where the court held that member states could not transfer asylum seekers to another EU country if there was a risk of inhumane or degrading treatment, even under the Dublin Regulation. This decision had significant implications for national asylum policies, particularly concerning the conditions in reception centres and the treatment of asylum seekers (Guild & Minderhoud, 2011). The court's discretionary power was further illustrated in X and X v. Belgium (2017), where it ruled that EU member states are not compelled under EU law to issue humanitarian visas. This decision, while limiting the scope of EU law in compelling member states to grant such visas, highlighted the discretionary authority of national governments within the EU legislative framework (Cogolati et al., 2015). Moreover, in Jafari (2017) the CJEU

addressed the application of the Dublin Regulation concerning asylum seekers' irregular entry into the European Union. The court reinforced the principle that the member state of the first irregular entry is responsible for examining asylum applications, thereby influencing national border control policies to conform with EU standards (Mowbray, 2004).

Judicial discretion can thus be seen as having the potential to affect and change national legislation and policy and, as a result, also legal practices on the ground. This makes judicial discretion a form of in-between discretion that could alter the course of the (implementation) of a law along the way. The changes resulting from judicial discretionary decision-making can range from potentially having to stop a certain practice or abolish a certain law altogether to more subtle changes in the ways in which laws and policies get enforced. It is exactly this aspect, the question of whether, and if so, how, judicial decisions are followed up in practice by those whose decisions or practices are most directly affected by the court ruling that is underpinning Rosenberg's analysis of the impact of US Supreme Court Decisions (Rosenberg, 1991). Based on a critical examination of the judiciary's ability to drive social change, Rosenberg argues that courts are inherently constrained and lack the necessary tools to bring about significant societal transformations on the ground. In line with Rosenberg, over the years, several authors have raised similar concerns regarding the actual impact of decisions by the CJEU, highlighting how its capacity to change national practices independently is often constrained by political, institutional, and social factors (see for instance Hoevenaars, 2018; Hoevenaars & Kramer, 2020; Hofmann, 2018; Mieńkowska-Norkiene, 2021).

2.5 In conclusion: Finding discretion in the intra-Schengen mobility control apparatus

This chapter has elucidated the potential intricate role of discretion within the movement of the intra-Schengen mobility control apparatus. In so doing, it has explored the nuanced manifestations of discretion at various levels: discretion at the top level of the bureaucracy plays a critical role in shaping the framework within which lower levels operate. This form of discretion involves legislative and policy-making decisions that set the tone and direction for the entire apparatus. The conscious choices made by legislators and policymakers in granting discretion, often embedded in vague or broadly defined laws and policies, not only delegate authority but also deflect responsibility for the outcomes of these laws. While discussing bottom-up discretion, this chapter has illustrated the inevitability and necessity of discretion in the day-to-day

implementation of policies. Frontline workers, such as border control officers and immigration officials, exercise discretion in interpreting and applying rules to real-world situations. This level of discretion is deeply influenced by the complexities of individual cases and the practical realities of enforcement, reflecting the nuances and contradictions that often arise between policy and practice. The exercise of this discretion can significantly affect individuals' lives, highlighting the ethical implications and the need for accountability at this level. Organisational and judicial discretion as forms of in-between discretion function as critical intermediaries in the dispositif. Organisations translate national policies into actionable guidelines and practices, while the judiciary interprets laws and provides oversight. This level of discretion is crucial in balancing the directives from above with the realities on the ground. It reflects the interactions and negotiations that occur within and between organisations, shaping the application and interpretation of laws and policies. This 'in-between' discretion is where much of the dispositif's adaptability and responsiveness to changing circumstances is realised.

Transforming a complex policy goal, like setting up an open European market and a free movement zone like the Schengen area, into reality hinges on a series of political and policy choices, each having elements of discretion. Beneath the surface of formal public policy decisions lies a web of political manoeuvring. This scenario is marked by the presence of numerous decision-makers with discretionary power, coupled with the multifaceted nature of public policy as a message. Essentially, in the policy-making process, there are multiple contributors of ideas and a variety of suggestions, all of which serve as guidelines for practical actions at the implementation level (Hupe & Hill, 2007, p. 255). Understanding how discretion works on various levels and how it either gets wielded or granted by different actors, is thus crucial to understanding the movement of policy regimes by illuminating the process of governing through discretion. As with all discretionary processes, this process is both necessary and problematic as it, on the one hand, allows for the necessary flexibility in decision-making, something that is extremely important in multi-scalared regimes such as the European Union in that need to bring together various national legal cultures, whereas it, on the other hand, also allows for subjectivity, inconsistency and the prioritisation of objectives that are not necessarily serving the greater good.

Following the various loci of discretion as identified in the previous sections, when looking at bordering practices in the context of the European Union, seven interrelated loci for top-down, in-between, and bottom-up discretion can be identified: (1) the European legislature, (2) national legislature(s), (3) European enforcement agencies, (4) national

enforcement agencies, (5) European Judiciary, in particular the Court of Justice for the European Union (6) National judiciary, and (7) street level border control agents. In the following chapters, the way in which discretion plays out at these different loci, except for European enforcement agencies as they do not (yet) play a role at the intra-Schengen borders, and in the application of Article 23 SBC, will be further discussed.

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3

SHAPING SCHENGEN, SHAPING THE APPARATUS

> "Schengen is integral to our European identity. Our citizens cherish and rely on the right to move freely in Europe. To continue enjoying the benefits of Schengen, we need to make it stronger, more resilient and fit for current challenges."
>
> Ursula von der Leyen on X, 2 June 2021

3.1 Introduction

To really grasp what is happening in the intra-Schengen borderlands, and to understand the workings of the mobility control apparatus in these spaces, it is crucial to contextualise the Schengen area and some of the key images and narratives that underpin its continued existence. In so doing, and while drawing inspiration from De Sousa Santos' 'Law: A Map of Misreading. Towards a Postmodern Conception of the Law' (1987), it can be useful to compare the construction of the Schengen area to the construction of a map (also see: Van der Woude, 2022). A map that imagines a certain reality, but a reality that is in many ways distorted. De Sousa Santos describes that it is only through projection that the curved surfaces of the earth are transformed into imaginary flat surfaces. He explains how in this transformation shapes are distorted and relationships distanced based on conscious choices and compromises reflecting the ideology of the 'cartographers' and on the specific use intended for the map (de Sousa Santos, 1987, p. 284). The imagined reality of Europe is that within the legal and geographical Schengen space – where internal border controls at the physical land borders between two countries have been abolished by mutual agreement – Europeans can traverse national borders without passport or identity checks. The imagined reality is that this inner open space, which guarantees the freedom of mobility, is protected by the simultaneous fortification of Europe's exterior borders (Oelgemöller et al., 2020; Zaiotti, 2007).

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This is one snapshot, one particular and idealised image, of 'fortress Europe': that of an imagined political solidary community with an interior borderland that is envisioned as open, liberal, and democratic, and an exterior borderline that is policed and protected against enemy-outsiders, including refugees, immigrants, asylum seekers and non- Europeans (Linke, 2010). Both this snapshot image, as well as the juxtaposition of internal openness and militarised exterior closure, are misleading. In the process of monitoring, capturing, and detaining unwanted populations, the regime of borders in Europe is not confined to a fixed periphery but comes into evidence as a decentred, dislocated, and ubiquitous process of exclusion and containment that can be far removed from the actual physical borders between two Member states (Koca, 2019). Even though Schengen technically means that there are no permanent border checks inside, internal 'controls' surely have not disappeared and were also never meant to fully disappear albeit only in their permanent form at fixed physical border crossings (de Genova, 2017; Van der Woude, 2020; Oomen et al., 2021). As the previous chapters will illustrate, the various 'cartographers' on the European and the national level that play(ed) an important role in shaping the imagined space that is Schengen made sure that giving up internal border control would never mean fully losing control.

The legally supported limitations to the reality of 'openness' within the Schengen area became exceedingly visible when eight Schengen member states introduced controls at their national borders in response to the long summer of migration in 2015 (Karamanidou & Kasparek, 2022). Although much of the international political and media attention indeed went to those EU countries that temporarily reinstated permanent border checks, this chapter will explain and illustrate how – apart from temporarily reinstating permanent border control *at* the national border – Schengen member states have always had the ability to, at all times, monitor cross-border mobility *within* their national borderlands.

By calling attention to the inherent tension that underpins the Schengen Area and the fact that, in response to this tension, the monitoring of mobility of securitised and sometimes also criminalised 'others' has always played a crucial role in the daily functioning of the Schengen Area, this chapter aims to set the stage to further reflect upon what it means to be working as a border official in a conflicted and paradoxical social surround (Hawkins, 1992). A social surround in which migration is at the same time both supported for economic reasons and problematised for reasons of national security and national identity. In describing the social surround of 'Schengen' or intra-Schengen mobility, this chapter will draw on insights from political economy and in

particular Wonders' use of such insights in the development of what she calls 'border reconstruction projects' (Wonders, 2007). A political economy analysis of borders takes the border as a constructed (and thus imagined) space, that is, a space where different social forces, each with specific economic and political interests, meet and interact. It underlines how borders and borderlands are to be seen as social spaces producing power relations, while they are also, at the same time, sites of power relations. Conceiving borders as such problematises the automatic link with the state or with some economic sectors and opens the realm of social actors and forces involved in the practice of bordering. In defining 'border reconstruction projects' Wonders (2007, p. 34) writes:

> "I use the phrase *border reconstruction project* to refer to a variety of state-sponsored strategies designed to reinforce and/or reconstitute borders in response to challenges posed to nation-states and borders by globalization. These projects are historically situated, dynamic processes that often involve not just governments and their agents, but also major cooperations, the business sector and the media, and even, increasingly, ordinary citizens".

The starting point for borders to be reconstructed is the construction of cultural and rhetorical borders that separate insiders from outsiders or citizens from non-citizens. As Wonders (2007, p. 35) explains: 'This is primarily achieved through racialized and classist messages designed to foster public fear and antagonism toward members of particular groups. The goal is to (re)frame certain identities and groups as "dangerous" or "criminal" to reinforce their status as "other"'. Through the creation of specific narratives contributing to the securitisation of border and border regions, the way gets paved for legal and physical reconstruction and enforcement of (new or existing) geographical borders and the close monitoring of mobilities by using various technologies and the sharing of information (systems) between actors and institutions (Broeders, 2007; Dijstelbloem, 2021; Vrăbiescu, 2022).

Chapter 4 will present a socio-legal analysis of the Schengen Borders Code (SBC) with the aim to illustrate how the SBC can be seen as the legal foundation for the reconstruction of intra-Schengen borders while it, at the same time, seems to serve as the legal foundation for letting go of these borders. This chapter will present the dominant narratives around intra-Schengen mobility that have been constructed over time. It is through these narratives that, even before the implementation of the Schengen Agreement, cultural and rhetorical borders between wanted and unwanted migrants were already created. And, it is through these

borders and the image of immigrants as an all-encompassing threat they gave rise to, that the foundation gets laid for a plethora of so-called 'crimmigration' measures (see Miller, 2005 for a discussion on the relationship between the expansion of social control and the criminalisation of immigration law in the United States). Yet, the rise of these narratives cannot be understood apart from a brief discussion of the historical development of a European open internal market. In so doing, attention will be paid to the relationship between the border of economic integration and the border of security (Pellerin, 2005). After discussing the frames and linking them to the ever-expanding intra-Schengen border control apparatus, the chapter will conclude by shifting back from the supranational and national level to the operational level by questioning why the choices of the 'cartographers' are crucial to understanding the movement of the intra-Schengen mobility apparatus.

3.2 Globalisation and the reterritorialisation of economic space

Human mobility has always been part of a broader trend of globalisation, which includes the trade in goods and services, investments and capital flows, greater ease of travel, and a veritable explosion of information. While trade and capital are the twin pillars of globalisation, migration is the third leg of the stool on which the global economy rests (Hollifield & Foley, 2022, p. 5). This section will discuss, albeit with rather broad strokes, the key developments and transformations that have shaped the relationship between economic interests and mobility and migration in Europe and, in so doing, the positioning of 'Schengen' in this larger story. This is, obviously, only a specific part of a larger story on the history of migration and mobility in Europe that has been discussed more in-depth by others (see for instance: Fauri, 2014; Lucassen, 2019; Lucassen & Lucassen, 2019; Zaiotti, 2011)

3.2.1 From European trading States to migration States

Although at the time seen as rather groundbreaking, the signing into force of the original Schengen Agreement on June 14, 1985, by Belgium, France, Germany, Luxembourg, and the Netherlands, can be seen as the fruition of the various integration and cooperation experiences of the post-war era (Comte, 2018; Favell, 2014; Guiraudon, 2018). In their economic analysis of the impact of the Schengen Agreement on European Trade, Davis and Gift (2014) describe how the First World War abruptly ended a period of mobility for citizens on the continent.

Until 1914 international migration was driven primarily by the dynamics of colonisation and the push and pull of economic and demographic forces (Blanco Sio-López, 2020; Hatton & Williamson, 1998). The so-called *trading state* (Rosecrance, 1986) came to fruition which shifted the emphasis from crude power maximisation to economic considerations such as free trade and a stable monetary system. As noted, both by Hollifield and Foley (2022) and Lucassen (2022), the European model of the nation-state and trading state would, after its establishment, be violently exported around the globe with the subjugation of Indigenous populations and colonisation. Yet, with the emergence of an international market for economic migration and its self-perpetuating nature, the challenges for many receiving states to manage the increased mobility of foreign workers grew. Although illegal or irregular migration was not recognised as a major policy issue and there were virtually no provisions for political or humanitarian migration, in the postwar years there became an increasing awareness of the tension that existed between trade and investment on the one hand and migration and mobility on the other (Hollifield & Foley, 2022, p. 5). Before this tension was able to materialise into concrete bordering policies and regulations, the first World War put an immediate end to mobility altogether. States would never return to the relatively open migration systems of the eighteenth and nineteenth centuries when markets (supply – push and demand – pull) were the dominant forces driving international migration (Hollifield, 2022).

Quite the contrary, in the twentieth century the foundation was laid for (further) restriction of migration through, amongst other things, the introduction of travel documentation such as visas and other permits. This more restrictive, or at least less 'laissez fair' approach towards the mobility of people to and through the European continent interestingly enough also coincided with the start of the movement of people as a result of the end of the age of imperialism and (struggles for) independence and decolonisation in Asia and Africa (Hollifield, 2021; Lucassen, 2019). In the interwar years, the Westphalian system of nation-states thus seemed to harden and became further institutionalised in the core states of the Euro-Atlantic region. Fuelled by 'intense protectionism, nativism, atavistic policies and racism (Hollifield, 2021, p. 417)', states guarded their sovereignty, their markets and their populations which coincided with stronger notions of national citizenship and national identity. The Second World war only further affirmed these sentiments and restrictive developments. It left Europe deeply divided 'with travel – let alone labour mobility – nearly impossible between the East and the West' (Davis & Gift, 2014, p. 1542). Nevertheless, whereas mobility on

a grand scale seemed difficult to realise, there were several developments in the postwar period that opened up new corridors for migration and that led to the transformation in which European countries shifted from being *trading states* into *migration states* in which migration and citizenship policy started to be driven by a complex concoction of refugee rights, economic interests and security and ideational (culture) concerns (Hollifield, 2021, p. 423).

3.2.2 Guest workers and growing ethnic consciousness

The importance of (political) refugee rights in post-war Europe is, amongst other things, illustrated by the development of the United Nations and the 1951 Geneva Refugee Convention. At the same time, the postwar period also opened a new corridor for economic migration through the necessity to reconstruct the war-ravaged economies of Western Europe. As there were not enough workers within the industrial states of northwest Europe to, together, start the economy back up together, countries such as Germany, the Netherlands and France entered into agreements with countries in Southern Europe and Turkey. These countries had a labour surplus and ended up being important source countries for the millions of guest workers that were recruited by (mostly) Western European countries during the 1950s and 1960s. By using these foreign 'guest workers' as a 'kind of industrial reserve army or shock absorber to solve social and economic problems associated with recession, especially unemployment' (Hollifield, 2021, p. 423), despite the impact of WWII, these countries were able to sustain high levels of noninflationary economic growth (Hollifield, 1992/1998; Kindleberger, 1967; Martin et al., 2006). Yet, while guest worker programs initially were meant to be only temporary – lasting as long as it was beneficial for the receiving economy – with guest workers being used as commodities, in the late sixties/early seventies many of the guest workers exercised their right to family reunification (following Article 8 of the European Charter of Human Rights) to bring over their families before most of the Western European countries put an end to the guest worker programmes with the economic turn of the mid-seventies. The combined impact of the previously mentioned process of decolonisation that led to the uprooting of entire populations between 1945 and 1963 and the post-war settlement of guest workers in various Western European countries, led to a change in the cultural landscape of many of the old, established, European societies. The influx of migrants into these societies created new ethnic cleavages and brought ethnic consciousness to European societies (Ireland, 2004).

3.2.3 The creation of a single European market, for insiders only

In the same period in which the previously mentioned guest worker programmes were started throughout (mostly) Western Europe, several Western European countries also started to explore the possibilities for economic cooperation and collaboration which then again slowly stimulated economic mobility between the participating countries. Examples of such collaborations are for instance the liberalised labour mobility regime between Belgium, the Netherlands, and Luxembourg (BENELUX), leading to the elimination of border controls among the three countries in 1948. Following the example of the BENELUX in 1952 border controls between Denmark, Sweden, Iceland, Norway and Finland were lifted as a result of the formation of the Nordic Passport Union. In that same year, Germany, France, Italy, the Netherlands, Belgium, and Luxembourg sign the treating leading to the establishment of the European Coal and Steel Community and a joint common management of the coal and steel industries in the signatory countries. The success of the ECSC quickly led to an expansion into the European Economic Community (ECC) which partially vouchsafed the free movement of labour in the 1957 Treaty of Rome. Although countries were collaborating for economic purposes, issues concerning immigration and asylum were mainly arranged through bilateral or multilateral agreements by member states and other third countries as these issues were seen as domestic matters and thus the exclusive competence of the member states. The urge for (Western) European countries to further collaborate was amplified by the severe economic recessions of the 1970s (Hollifield, 2021, p. 425). This was addressed through a revision of the Treaty of Rome in the form of the Single European Act of 1986 which was promoted on the promise that trade liberalisation would renew employment growth. Through the introduction of a single market which was defined as 'an area without internal frontiers in which persons, goods, services and capital can move freely in accordance with the Treaty establishing the European Community',[1] the goal was to not just further collaborate economically but also to further enhance and strengthen the European Union as a whole and, as an important aspect of that, the relations amongst member states.

In the same period in which the European Single Act was established, France, West Germany and the three members of the Benelux Economic Union signed the Schengen Agreement. Signed on the same day that the new European Commission released its white paper entitled 'Completing the Internal Market' which laid out the single market program and inspired the Single European Act and the Maastricht Treaty (Maas,

2005), the Schengen Agreement had a clear economic aim. Predating the European Union by eight years the Schengen zone was instrumental in erecting the first large-scale international labour market. In addition, the fluidity of labour enshrined by Schengen was heralded as the perfect complement to the free movement of capital and goods implemented by earlier treaties. Political leaders across the world were optimistic that a unified European market would produce gains from travel, ease of market access and economies of scale (Davis & Gift, 2014). Although it was clear that the mobility of people was a necessary part of meeting these high hopes, the actual materialisation of the principle of free movement in the form of the Schengen Agreement also quickly gave rise to concerns.

3.2.4 *From Schengen I to Schengen II and rising concerns over immigration*

In her description of the evolution of the debates underpinning the principle of free movement since the very first establishment of Schengen Blanco Sio-Lopéz (2020, p. 10) marks this first period of Schengen where there is 'a clear focus on the economical dimension' as a period in which the principle of free movement was predominantly viewed as a means to serve the economic objectives of the European Economic Community (ECC), as *Schengen I*. This first phase of Schengen, ironically enough, seems to already come to an ending before the implementation of the agreement started on March 26, 1995 (Schengen Implementation Agreement). Or perhaps, it is precisely because of this implementation, and the fact that the principle of free movement became 'real', that other concerns than merely economic concerns began to rise to the surface. This shift marks the beginning of *Schengen II* (Blanco Sio-Lopéz, 2020, p. 10), which introduced a more restrictive perspective fuelled by concerns about migration and security. Interestingly enough, this moment also more or less aligns with the establishment of the European Union in 1992 and, as a result of this, the notion of European citizenship. The promise, or the idea, of a 'People's Europe' and later a 'Citizen's Europe' was closely connected with the right for every EU citizen, that is the holder of the nationality of an EU member state, to move and reside freely within the territory of the Union. The best way to describe this period is as a coming together of economic priorities and attempts to build a shared and inclusive EU identity, whereas, at the same time, the various concerns that were triggered by the principle of free movement also sparked more exclusive tendencies. These tendencies were specifically addressed by the Committee of Inquiry on Racism and Xenophobia (European Parliament, 1991) who, in their report to the European

Parliament, flagged how immigration in the post-war years seemed to have fuelled discriminatory attitudes and actions towards labour migrants and refugees across Europe. While also emphasising the significant contributions that immigrants made to the rebuilding of European economies, the report notes that economic factors such as unemployment and poverty contributed to the scapegoating of immigrants for social and economic problems. The report furthermore acknowledges that refugees, despite being entitled to protection under international law, have been a significant target of racism and xenophobia in Europe. It notes that their arrival to Europe, particularly from conflict zones, had led to fears of cultural differences and national security concerns.

With these tensions already brewing in European societies, it is not so surprising that the different manifestations of free movement (persons, goods, services, and capital) were not implemented at the same speed and with the same enthusiasm. Whereas major progress was made on the liberalisation of capital movements, this could not be said for the freedom of movement for workers or in actions to give substance to the auspicated 'People's Europe'. In her analysis of debates amongst members of the European Parliament, Blanco Sio-Lopéz shows how, at that time, progressive EP players considered that 'the overestimation of economic integration prevailing over a European sustainable social model could engender the gradual rupture of the links between the European institutions and the citizens' (Blanco Sio-Lopéz, 2020, p. 38). Yet, international terrorism and (civil) wars in the MENA region as well as the war in former Yugoslavia did not make it easy to keep the ideal of an open and inclusive People's Europe alive. As a result of these, and other international pressures, the already existing concerns around national security and migration but, in particular, asylum, were only further affirmed. Despite the first Dublin Convention of 1990 (which entered into force in 1997) and, the 1999 development of a Common European Asylum System based on the Convention, the issue of asylum has remained highly contentious until the present day.

From this moment onwards, the internal security of the European Union would become a top priority. Knowing that the costs of a non-united Europe with an open internal market would not outweigh the benefits, a greater emphasis was placed on the protection of both external, but also intra-Schengen borders – even if crossing the latter should no longer result in a border check. The expansion of Schengen eastwards in 2004 and 2011 and the opening of east-west borders only further enhanced the internal security within the European Union. With the increased mobility of CEE labour migrants as the 'new face of East-West migration' (Favell, 2008; Favell & Recchi, 2010; Van Ostaijen, 2019)

split labour market concerns seemed to arise in the receiving EU countries with mandatory measures or any provisions related to entitlements for EU citizens being perceived as illegitimate 'disturbances' of EU free movement regulations. Furthermore, as will be discussed more in detail in the next section, in various Western European countries labour migrants from CEE countries are being linked to various forms of public nuisance as well as criminal behaviour (Auerhahn, 1999).

3.2.5 The migration state and the liberal paradox

The inherent tension created by wanting the economic benefits of 'open' borders, on the one hand, while at the same time fearing the risks of this openness, which underpins the very existence of Schengen and in particular its aspect of the free movement of people, has been referred to as the Western liberal paradox (Hollifield, 1992/1998; Van der Woude, 2020). In liberal political economies, there is always a constant tension between markets and rights, or liberty and equality. Rules of the market require openness and factor mobility; but rules of the liberal polity, especially citizenship, require some degree of closure, mainly to have a clear definition of the citizenry and to protect the sanctity of the social contract – the legal cornerstone of every liberal polity. Equal protection and due process cannot be extended to everyone without undermining the legitimacy of the liberal state itself. According to Hollifield a potential answer to this dilemma can be found in the construction of a true international migration regime. The absence of such a regime, and therefore leaving the issue of migration to each individual liberal state to deal with would lead to 'draconian (illiberal) policies that may threaten the foundations of the liberal state itself' (Hollifield, 1992/1998, p. 623).

> "It is not efficient or desirable for a liberal state to close or seal borders. This would be the ultimate strategy for external control. Likewise, strategies for internal control, including heavy regulation of labour markets, limiting civil rights and liberties for foreigners and citizens, and tampering with founding myths (e.g. weakening birthright citizenship) also threaten the liberal state and can fan the flames of racism and xenophobia by further stigmatizing foreigners".
>
> *(Hollifield, 1992/1998, p. 623)*

In his 1998 publication Hollifield flags the European Union as a good example of an area where the threats that globalisation poses to the foundations of the liberal state are curbed by a functioning international – EU-wide – international migration regime. Looking at the legal

discourse that is also often deployed by European policymakers (see Van Ostaijen, 2019), one could indeed argue that the EU, at least 'on paper', succeeded in creating such a regime. Nevertheless, as this book argues when looking *beyond* this legal discourse on the EU level to what is happening on a national and a local level, another picture arises. Especially when it comes to dealing with secondary movements in the light of the principle of free movement, national discourses are highlighting the necessity to keep 'controlling' the intra-Schengen borderlands to make sure that only those who are desired and deserving are reaping the benefits of being able to move freely throughout the Schengen area. As illustrated by the previously mentioned 1990 report by the Committee of Inquiry on Racism and Xenophobia and as will be further discussed in the next section, Hollifield's warnings for the possibility of racism, xenophobia and stigmatisation playing a role in these discourses have turned out to be quite on point.

3.3 Creating outsiders through the rhetorical and cultural bordering

The evolution of the European Union has continually navigated and shaped the dynamics between insiders and outsiders, often prioritising the former in terms of economic benefits, mobility, and access, while approaching the latter with a mix of economic pragmatism and protective caution. Through the creation of a large-scale labour market for insiders, removing internal borders for easier movement the Schengen Agreement can be seen as a crucial milestone in defining these insider-outsider dynamics. The latter is best understood by taking a closer look at how 'outsiders' – people from outside the European Union – were framed in political (and public) discourse and how these frames intersect with concerns about mobility.

The previous section already alluded to the growing concerns and insecurities that Schengen member states expressed around the idea of losing control over who would be able to freely enter into their national territories. It is through these insecurities that migration, especially secondary migration, was articulated and framed as a threat to society, (nation) state, community, individual, or systemic entity (van Baar, 2021; van Baar et al., 2019). The notion of framing entails different phases: (1) the construction of information and the definition of a 'problem' by political elites, (2) the application of frames by the media, and (3) the impact of frames on individual opinions (Matthes, 2012, p. 248). The use of the word 'frame' in the context of this section will refer to the first and second stages of the process of framing, as these stages have been

mostly studied and analysed in the light of the framing of immigration. In Section (3.4), I will reflect upon the last phase of the process of framing when addressing the question of why these frames matter in the larger context of understanding the actions of those employed in the field of mobility and border control in the intra-Schengen borderlands.

The scapegoating of alien others over decades is well traced and documented by scholars from a broad variety of disciplines. In the social sciences, the 'other' and the process of 'othering' are seen as the basis of our understanding of social dynamics on a macro-, meso-, and micro-level. The observed 'other' is seen to be different from an 'us' because of their different religion or their different ethno-racial background as well as for (sub)cultural, political, temporal, and special reasons. 'The other' forms a seemingly necessary contrast in arriving at a concept of 'self'. This mechanism is also visible in Said's (1978) classical work Orientalism, in which he describes the process of 'othering' of individuals or social groups in terms of creating the social belief that one particular (ethnic or cultural) group is superior to others groups and then, based on that conviction, constantly emphasising the negative cultural value of these 'others'. Said links this idea of superiority to the imperialism and colonial history of Western societies, which serves to keep certain assumptions about 'the other' alive and assesses 'the other' based on images of what civilisation entails prevalent in these societies. According to Becker (1963), the label of 'the other' does not have an inherent quality that legitimises this 'otherness'; rather, the label seems to legitimise itself. It sees as the 'established', the 'moral entrepreneurs', those in power who create and support the labelling of 'outsiders'. A functionalist approach to an 'ultimate other' can be found in the work of criminologist Nils Christie. His idea of the *suitable enemy* (Christie, 1986) illustrates how mainstream societies need (to create) a common enemy to close the ranks. This enemy must be clearly visible and morally distinctive and can never be completely destroyed, because that would negatively affect social cohesion. In other words, societies need a (or various) 'others' to stay afloat. According to the criminologist Jock Young (1999), Western liberal democracies are exclusive societies in which – on a superficial level – there seems to be a certain degree of tolerance for diversity – but only if groups of 'others' or individual 'others' assimilate. Those who do come to eventually be seen as members of society, as someone who 'belongs'. Those who don't or are seen as potentially disobedient or even dangerous are marginalised. In that sense, there is less and less room to diverge from the dominant norm, and there is increasing social pressure to conform. There is selective room for diversity in our society, inasmuch as it 'fits'.

If we look at the developments in Europe, it is safe to say that the most prominent debates on 'the other' now take place in the context of larger discussions on migration and mobility (see Jesse, 2020 for an interdisciplinary discussion on 'othering' migration and the law in the European Union). Fears and concerns about increased numbers of so-called 'third-country nationals' seeking asylum and refuge in Western – and Northern – European destination countries as well as the seemingly uncontrolled 'secondary movements' of irregular migrants through the Schengen Area are urging countries to reassess how they protect their national borders. Enhancing the mobility of some while, at the same time, fixating 'others' by preventing their onward mobility seems to go hand in hand. In the words of Rodriguez (1999, p. 27): 'The global landscape in the late 20th century presents a dramatic socio-geographical picture: the movement across world regions of billions of capital investment dollars and of millions of people, and concerted attempts to facilitate the former and restrict the latter. In the post-modern performance game between places, others are welcome, but some others are more welcome than other others'. Whereas the mobility of third-country nationals is definitely the viewed with most suspicion, they are, in many ways seen as the quintessential 'crimmigrant others' (Brouwer et al., 2018; Franko, 2019; Heber, 2023; Kmak, 2018; Thorleifsson, 2017; Van der Woude & van der Leun, 2017), it is important to note that the notion of the 'other' in Europe is limited not just to those who enter from outside the European Union. As the various frames that will be discussed in this section will illustrate, in order to fully grasp the impact of the erection of cultural and rhetorical borders around the mobility of people within the Schengen Area, it is crucial to also pay attention to the discursive construction of the intra-EU other. This 'other' is an EU citizen who is, despite formally belonging to the in-group of 'Europeans', still ostracised (Van der Woude, 2023).

3.3.1 Mobility as a concern in the light of national security

In many ways, this first frame can be seen as the foundation for the three other frames that will be discussed as part of the first criterium. Since the securitisation of migration at large, but also some of the other frames, have extensively been discussed by other scholars, particularly from within the field of International Relations and Security Studies (Bigo, 2002, 2014; Bourbeau, 2011), this section aims to present an overview of some of the key insights from these works as much as it focuses on the European Union and in particular on the Schengen Area. It is by no

means intended to be exhaustive as, if that would be the case, each frame would deserve a stand-alone chapter.

Huysmans' (2000) seminal work, *The European Union and the Securitization of Migration*, was one of the first works to, in the context of the European Union and the Schengen Area, ask the question of how migration, in the development of the EU and the principle of free movement, was being connected to different representations of societal dangers. Huysmans described how in the late 1970s immigration increasingly became a subject of public concern in the EU and how political rhetoric increasingly linked migration to the destabilisation of public order (Huysmans, 2000, p. 274). As explained in the Section 3.2.2., it was around this time when the economic crises of the mid-1970s changed the labour landscape from one that was in dire need of guest workers, to one in which there was growing unemployment. Nevertheless, many guest workers who were brought to different European countries decided to not return to their countries of origin and to also bring their families over based on the right to family reunion. As a result of this growth of the immigration population, public awareness of the immigration population increased (King, 1993) and migration as such became more problematised and politicised with growing concerns, especially around asylum seekers and irregular migration. Asylum became increasingly politicised as an alternative route for economic immigration in the EU (den Boer, 1995). As Huysmans and others (Ceyhan & Tsoukala, 2002; Huysmans, 2000; Tsoukala, 2016) have observed, from the 1980s onwards the politicisation of migration contributes to the presentation of migration as a danger to domestic society because for its possibility to undermine public order, domestic stability but also to the welfare state and the cultural composition of the nation. Although the representation of migration as a threat to national security, especially from securitisation point of view, is intrinsically connected with these other 'representations', in the further description of this frame I will now solely focus on the notion of national security in relation to the development of the Schengen Area and the free movement of people.

As noted by Hollifield and Foley (2021, p. 6), 'Unlike goods and capital, individuals have agency and become actors on the international stage whether through peaceful transnational communities or violent terrorist and criminal networks'. It is precisely the latter that has always been cause for concern amongst the Schengen signatory countries. The relaxing of internal borders highlighted the need to enhance security at the external borders. This linking of internal and external borders of the European Community has played a key role in the production of a spillover of the socio-economic project of the internal market into an

internal security project. In so doing, the illicit aspects of the same free movement that were also driving the economic benefits of the single European market (Andreas, 2015) were highlighted by European and national policymakers.

These concerns led to the inclusion of various 'compensatory measures' as part of the Schengen agreement, such as provisions and cooperation between the Schengen member states around matters of terrorism, migration and policing. The latter resulted in the development of the European Police Office (Europol) and, as part of Europol, the formation of a European Drugs Unit in 1994. Whereas the fight against drugs within the European Union was the initial focus of the EDU this gradually expanded to illegal money laundering, immigrant smuggling, trade in human beings and motor vehicle theft and terrorism. All these criminal phenomena were, and still are being, associated with the mobility of people and contributed to an increased level of suspicion towards, predominantly but not exclusively, asylum seekers and irregular migrants (De Goede, 2011). The underlying assumption of this risk perception is that large population movements increase the opportunities for criminals to channel their resources through countries by using migrants or bogus asylum seekers as couriers. Furthermore, the idea is that large immigrant communities can also potentially provide shelter and anonymity to foreign criminals or, even worse, terrorists.

The so-called 'War on Terror' that was unleashed by the United States of America and supported by most countries in the Global North after the attacks of September 11, 2001, had a significant effect on the framing of migration in the European Union as well. It further reinforced the security logic of migration through the ideological merging of migration, crime and terrorism as interrelated issues. This merger happened both on a national level as well as on the European level. In a working paper from December 5, 2001, the European Commission pictures migrants and refugees as potential terrorists and proposes strict measures and amendments to European laws so that there is 'no avenue for those supporting or committing terrorist acts to secure access to the territory of the member states of the European Union' (European Commission, 2001, p. 6). According to the Working Paper:

> "(…) pre-entry screening, including strict visa policy and the possible use of biometric data, as well as measures to enhance co-operation between border guards, intelligence services, immigration and asylum authorities of the State concerned, could offer real possibilities for identifying those suspected of terrorist involvement at an early stage".

Through the lens of terrorism, especially asylum seekers but also refugees are presented as high-risk categories for terrorist acts (Galantino, 2022). The fact that both the attacks of 9/11 but also the various terrorist attacks that have followed within the European Union were not conducted by asylum seekers has not led to a shift in this narrative. Quite the contrary, the rise of the terrorist organisation Islamic State and their alleged use of migration networks to send terrorists to Europe combined with the threat of the 'returning foreign fighter' (Baker-Beall, 2019) only seems to have further affirmed the ongoing securitisation of Islam. After 2014, Eurobarometer results indicated a fear of immigration which is linked to the fear of terrorist attacks (Kinnvall et al., 2018). The immigration – terrorism nexus frame has led to the widespread ethnicisation of Muslims living in the European Union, who are increasingly represented and categorised as another 'other' and 'enemy' within the European Union (Hellyer, 2009; Sayyid, 2018; Simonson & Bonikowski, 2020). The depiction of Muslims as a threat to the 'European way of life', a concern that also links to notions of national identity and national culture as will be discussed below, combined with the fact that most of the refugees coming to the European Union are coming regions in the world where the Islam is practised, has sparked widespread Islamophobia within the Union (De Genova, 2020; Ennaji, 2010; Jaskulowski, 2019; Kalmar & Shoshan, 2020; Laitin, 2010; Wigger, 2019). Despite research showing that the assumptions and perceived mechanisms underlying these frames are false (see for instance Boateng et al., 2021; Ihlamur-Öner, 2019), both the immigration – crime nexus as well as the immigration – terrorism nexus represent 'strong' frames in the sense that they are reaffirmed through the wordings of European and national policy makers and political elites as well as through the media.

3.3.1.1 The securitisation of Schengen and the long summer of migration

Whereas the securitisation of migration and mobility seem to go hand in hand with the implementation of the Schengen Agreement and intensified over time as a result of (national security) incidents, the 2015 long summer of migration (Kasparek & Speer, 2015) needs to be highlighted as an important moment in the securitisation of Schengen. The movement of more than one million refugees and other migrants towards and through Europe made various individual member states decide to (temporarily) reinstall intra-Schengen border controls at their national borders (Guild et al., 2015). In so doing, member states were actively going against the principle of free movement as once of the foundational

pillars of Schengen and the European Union. Although the decision to temporarily reinstate intra-Schengen border controls might have been driven by the different narratives presented in this section, and thus also by the securitisation narrative and connected fears for national security (Lazaridis & Wadia, 2015), it also triggered another process of securitisation: the securitisation of the Schengen area as such. With the foundation of the Schengen agreement being shaken to its core, European policymakers shift their focus to reinstating the internal security of the EU and bringing back the internal order to otherwise uncoordinated patterns of member state action instead of addressing the plight of the 'othered' migrants (Ceccorulli, 2020, p. 303). The implications of the securitisation of Schengen in terms of concrete policy decisions that were made will be discussed in Chapter 4.

3.3.2 *Mobility as a concern in the light of national identity and culture*

This second frame entails the fear that common norms and values that bind society together will be irretrievably weakened if newcomers do not adapt to the host country's language, culture, and identity. Immigration under this frame is presented as a phenomenon that strongly challenges and possibly endangers notions of national identity, as nations propagate a sense of shared identity and solidify a distinctive cultural heritage and personality for a given population (Bloemraad et al., 2008). Cultural differences resulting from a changing society due to immigration, are seen as a threat to the existing way of life. It is a common characteristic of migration discourses in Europe to highlight the threat that migration might pose to the culture and the identity of the host country. Migrants and asylum seekers are often discursively presented as a threat to the communal harmony and the cultural homogeneity of the receiving country. Especially the concentration of seemingly homogeneous populations of 'newcomers' (e.g., Muslims in Europe or Latinos in the United States) is seen as more threatening than a multiethnic wave of immigrants – as these homogeneous groups are more likely to emphasise their own subculture rather than to integrate into the mainstream (Karyotis, 2007). Visibly and religiously different newcomers are thus thought to challenge closely held notions of who the 'we' is in society, even when they comprise only small portions of the foreign-born population.

Many scholars have focused on understanding why some of the world's most seemingly open and wealthy societies feel the need to restrict mobility and, as Barker states in so doing 'undo their own historical, albeit complex, trajectories towards equality, democratization and

individual liberty' (Barker, 2017b, p. 442). Border criminologists have found the underlying drivers behind the use of penal power at the border in the urge of the state to control unwanted mobility for specifically nationalistic purposes linked to the aforementioned idea of 'protecting' the state's national identity and its national culture (Bosworth, 2011; Kaufman, 2015). In the context of this frame, it is necessary to act against immigration through restrictive policies and increased border control to ensure the survival of national cultures, as these restrictive policies and practices serve a nation-building and identity-establishing function. To give up control of territorial borders is to relinquish one powerful instrument in the production of national cultures, as borders mitigate social pluralisation, which in turn is a political challenge to the hegemony of state-sanctioned modes of national existence (Vasilev, 2014). The dynamics that are underpinning this frame are closely related to the workings of what Koslowski has called the 'demographic boundary maintenance regime' (Koslowski, 1998; 2000). This regime helps states to clearly demarcate and identify their native population in relation to that of other states. The mobility of people as such, but in particular a substantial influx of migrant populations into a nation-state disrupts this process, as it might make it more difficult to draw boundaries between the native population and the incoming others and, as a result, to identify one's population. This insecurity derives from a fear that the presence of immigrants could eventually alter the ethnic, cultural, religious and linguistic composition of the host country, a fear that is often fed by the high birth rate of immigrant groups. When this happens, a social and political backlash against migration like a nationalist discourse is to be foreseen. The creation of boundaries and the exclusion of non-members are critical for the manifestation of a collective identity and for the construction of a community based on identity (Neumann, 1998).

The link between mobility and fears around national identity has become painfully clear in the European Union after the long summer of migration and the Schengen crisis that caused far-right politics to gain momentum all throughout Europe and refugees to be dubbed a threat to the project of nationalism. Ever since, we can see evidence of (new) nationalism displaying distinct xenophobia reshaping the electoral landscape and political order in Europe from West to East (Kraemer, 2020; Koulish & Van der Woude, 2020; Huigen & Kołodziejczyk, 2021; Ivekovic, 2022). Even in countries that used to be associated with a strong emphasis on human rights, tolerance, and inclusivity such as the Netherlands, but also Sweden and Norway, there is a clear nationalistic shift with a strong emphasis on a restrictive migration policy and a growing distrust towards the functioning of the European Union (Franko et al., 2019).

3.3.3 *Mobility as a concern in the light of the national welfare state*

The third frame that is often used to problematise mobility is linked to the notion of the welfare state and its accessibility by 'others'. Migrants are often seen as some sort of threat to the economical position of the host population. Depending on the state of the economy, there is a general fear that the influx of economic immigrants will drive down wages and create unemployment while at the same time, it will drive up the cost of housing and other goods (Karyotis, 2007). As aptly described by Auerhahn (1999) in the context of the settlement of different immigrant groups into the United States, the influx of low-paid immigrant workers can also lead to a split labour market along ethnic and racial lines based on the fear that nationals of host countries will have to compete with low-paid immigrants for scarce jobs. Going back to the general notion of 'othering' and the in-group/out-group dynamics that underpin the different frames, the idea is that jobs are only for those who 'belong' to and originate from within the country and thus are deserving of economic stability. Whereas these economical concerns affect *all* immigrants, there is an economic 'subframe' that mostly seems to address intra-EU mobility of EU citizens that highlights the struggles of European integration and the creation of a 'Peoples Europe'. This is the frame of (having access to) welfare provisions (also see Barker, 2017a).

Under EU social security Regulations 883/2004 and 987/2009 the principle of free movement allows EU workers the right to freely work in any EU member state but also the right to fully and equally access to the welfare state of the country they work in. As noted by Cappelen and Peters (2018, p. 389) this 'opening up' of traditionally more inward-oriented national welfare states has led to a situation in which 'social policy *de jure* is a national prerogative, [but] *de facto* it is not since EU states no longer can choose whom to give social rights to'. The subframe feeds into the perception that a member state's sovereignty is being infringed upon insofar as it concerns social policy now that European Community rules and regulations have partly dissolved national state borders in this area and the use of social policies and welfare provisions is left to the whims of the influx of intra-EU immigrants. From here, it is a small step to present this group as putting an added burden on the social security systems of host countries and thus a threat to the welfare state. A welfare chauvinistic argument (Andersen & Bjørklund, 1990; Barker, 2017a) underpins this subframe – the idea that foreigners should not have the same access to social rights as native citizens as these rights only belong to nationals (Reeskens & Van Oorschot, 2012). For non-EU

immigrants there exists a welfare chauvinistic relief mechanism in the form of the restriction of this group's access to social benefits, through which the natives can satisfy discriminatory preferences that they feel towards the out-group (Eger & Valdez, 2015; Sniderman et al., 2004). The fact that European rules stand in the way of a welfare chauvinistic relief mechanism to respond to intra-EU immigration, even if national governments would want this, amplifies the ever-present tension between market liberalisation – including the free movement of workers – on the one hand, and their social protection and rights on the other.

Research has shown that this concern especially seems to affect intra-EU labour immigrants from CEE countries (Cappelen & Peters, 2018; Van Ostaijen, 2019; Van der Woude, 2023). Despite the fact that this group of immigrants has played, and continuous to play, a crucial role in the success of the European project as it is based on the capitalist triumvirate of free moving goods, services and people, it is interesting to note that, while trying to exercise their right to free movement, they are also subjected to social exclusion. In her study of the position of Polish workers in pre- Brexit UK, Rzepnikowska (2019) describes how the public discourses on Polish migration in the United Kingdom have rapidly turned hostile. While initially Poles were seen as 'desirable' migrants and labelled as 'invisible' due to their whiteness, after the economic crisis in 2008 and subsequently after the EU referendum in 2016 this perception shifted rapidly. All of a sudden Poles were depicted as taking jobs from British workers and as putting a strain on public services and welfare. While racist and xenophobic violence in the United Kingdom has been particularly noted following the Brexit vote, several studies show that Polish and other East European migrants – in particular Romanians (see Anghel, 2018) – have always been subjected to issues of discrimination, racialisation prejudice in the post 2004 accession period (Dawney, 2008; Rzepnikowska, 2016;Yıldız & De Genova, 2018). A 2019 study by the European Union Agency for Fundamental Rights (FRA, 2019) shows how EU migrant labourers particularly from CEE member states, continue to be seen and treated both as threats to western European societies and as workers for whom exploitation and abuse is acceptable treatment. A division thus seems to be made between 'core' Europeans and non-core Europeans who, despite their countries position within the European Union, are not trusted with, nor seen as deserving of, the right to free movement. Whereas 'core' Europeans can fully and without any (spatial) restrictions enjoy their right to free movement, social benefits and labour rights, a group of second-class Europeans seems to have to accept continuous infringements on their right to free movement as well as being exploited. They are allowed to cross borders to conduct cheap labour but do not

deserve to share in the limited pie of public benefits and must be prevented from making citizenship claims. The 'citizenship gap' that is being created this way is structural and vital to global capitalism (Brysk & Shafir, 2004).

Like the previous frames, the economic frame has been challenged through research: Economists have highlighted the benefits of migration on host economies as it helps boost economic growth and provides skills. With an ageing population in many European countries, intra-EU labour migrants can be of crucial importance to keep a healthy and flourishing economy (De Haas, 2023). Furthermore, while immigrants might also receive help from the welfare systems in the host countries, they also contribute to these systems by paying taxes (Afonso et al., 2024). Nevertheless, alike the national identity and the national security frame, the national economy/welfare frame through which migrants are portrayed as a threat and especially as abusing their right to move freely at the expense, quite literally, of their host countries, seems to be more convincing than research proving the opposite.

3.3.4 Mobility as a concern in the light of public health

The COVID-19 crisis cast a stark light on the disparities between core and non-core Europeans, illuminating the contradictions inherent in the Western liberal model. This period was marked by a heightened sense of protectionism in Western European nations, which were quick to implement measures like border closures, travel restrictions, and mandatory remote work to safeguard the health of their citizens. These actions were underpinned by a narrative that portrayed non-natives as potential carriers of the virus, causing stringent controls to prevent their entry. However, this narrative of protectionism was contradicted by the same Western European countries' reliance on seasonal workers from Central and Eastern European (CEE) countries. These workers were brought in to perform essential tasks, such as harvesting crops, despite the prevailing health risks. This practice laid bare a troubling dichotomy: while the health and well-being of native populations were prioritised, these migrant workers were treated as expendable, their value seen solely in terms of their labour contribution. Their health was only considered important to the extent that it might affect the domestic population, not in terms of their own well-being. This situation, as highlighted by Bejan (2020), underscores a profound hypocrisy within the Western liberal paradigm. It reveals how, in times of crisis, the principles of equality and universal rights can be overshadowed by a utilitarian approach that values individuals based on their economic utility rather than their inherent human dignity. This phenomenon raises critical questions about

the ethical and moral foundations of contemporary European policies and attitudes towards migration and labour.

Historically, the movement of populations has been linked to the spread of infectious diseases, prompting public health measures to control such movements (Birdsall & Sanders, 2023: Garcés-Mascareñas & López-Sala, 2021; Koulish, 2021; O'Brien & Eger, 2021; Van Der Woude & Van Iersel, 2021). In 2018, the World Health Organisation published the report 'No Public Health Without Refugee and Migrant Health' to counter this narrative in the context of the European continent (WHO, 2018). Although recently triggered by the COVID-19 pandemic, the image of the migrant as a threat to public health is not new: the narrative that migrant populations around the globe carry a wide array of communicable diseases, and therefore pose a threat to public health in destination communities is a strong one that tends to resurface, particularly, in moments of crises. For instance, during the late 19th and early 20th centuries, Portuguese emigrants were subject to strict sanitary controls to prevent the spread of diseases as they moved to new destinations. This historical precedent set the stage for contemporary responses to public health crises involving migration (Scott & von Unger, 2022).

The COVID-19 pandemic has been a critical period for examining the interplay between mobility and public health. Governments worldwide implemented unprecedented travel restrictions and border closures to curb the virus's spread. These measures significantly affected migration flows, with notable reductions in both voluntary and forced migrations. For example, African governments used the pandemic to justify border closures, aligning their policies with European restrictions that undermine free movement within regions like West Africa. The framing of mobility as a public health concern has led to restrictive migration policies aimed at mitigating disease transmission. These policies often disproportionately affect marginalised and vulnerable populations. During the COVID-19 pandemic, mobility restrictions exacerbated existing socio-economic inequities, particularly for migrant workers. In India, for instance, lockdown measures led to widespread discrimination and marginalisation of migrant labourers, highlighting the adverse effects of such policies on already vulnerable groups (Krishna et al., 2024). Various studies on the impact of Covid-19 on migrant communities and migration studies illustrated how (see Brandariz & Fernández-Bessa, 2021 on Spain as an exceptional outlier in that sense) countries' responses to Covid-19 either exposed recognition gaps associated with key cultural processes of inequality, including the racialisation, stigmatisation, and evaluation of immigrant spaces (Voyer & Barker, 2023) or further sparked exclusionary and coercive measures against immigrants (Klaus, 2021; Serpa, 2021; Tsiganou et al., 2021).

3.4 The intra-Schengen mobility complex?

The image that arises based on the description of the development of the Schengen Area and the various rhetorical and cultural rebordering dynamics that are not only part of this development, but that were also further sparked by it, shows similarities with what Garland called the rise of a 'crime complex' (Garland, 2001). This crime complex which is central to the development of a culture of control is characterised by a distinctive cluster of attitudes, beliefs and practices regarding crime and crime control. In his 2001 book, *Culture of Control*, while trying to make sense of the punitive turn in criminal justice policies in the United Kingdom and the United States, Garland highlights the impact of the development of a crime complex in response to the many ripples caused by late modernity. In finding not only explanations for the punitive turn in criminal justice policymaking and the general public and political discourse around (the fear of) crime but also for the limited impact that experts and research seem to have in debunking some of the strong and emotive frames that developed around (the risk of) crime and punishment, Garland reaches a rather grim conclusion. The interconnectedness of crime and criminal justice policies becoming an organising principle of everyday life affecting both public perception and discourse but also political discourse combined with the role of media as a driving force behind feeding and also changing public and political discourse and performance, making the crime complex hard to penetrate with the aim to shift its (dis)course. Garland speaks of a high level of 'crime consciousness' that comes to be embedded in everyday social life and institutionalised in the media, in popular culture and in the built environment in countries in the Global North as a result of which 'Public knowledge and opinion about criminal justice are based upon collective representations rather than accurate information: upon a culturally given experience of crime, rather than the thing itself' (Garland, 2001, p. 158).

One of the 'indices of change' that, according to Garland's analysis, signals the rise of a culture of control is what he describes as the development of a 'criminology of the other' which directly refers to a shift in how crime and criminal behaviour are being framed in government discourse. No longer is crime viewed as something that is part of society and thus something that could happen (in the sense of becoming offenders) to all of 'us'. It is seen as behaviour that is displayed by dangerous 'others' who are different from us. The 'threatening outcast, the fearsome stranger, the excluded and the embittered' (Garland, 2001, p. 137). This notion of the criminology of the other gets taken up by populist politicians who, in an attempt to feign control over the (partially) uncontrollable developments of rising crime rates and fear of crime, escalate

penal responses. The workings of the crime complex, and particularly the interaction between the media, political discourse and public perception create a difficult situation for agency administrators, governmental departments and local authorities in which it becomes very hard to push back against these escalating, emotive, penal responses.

The image of the crime complex seems fitting to describe the way in which migration and migrants are being depicted in the context of the European Union and the Schengen Area. As the previous section has illustrated, the growing emphasis on the existence of a 'dangerous other' has led to the intersection of debates on crime control with debates on mobility and gave rise to a migration – crime – terrorism nexus. In many ways, the same dynamics that Garland describes as underpinning the crime complex seem to apply to the development of the (public and policy) debates around the mobility of people in the context of the (initially) emerging Schengen Area. The mediatisation of mobility to and through the Schengen space – with a focus on the 'risks' of this mobility more so than on the normalcy of it – is fuelling a growing public awareness of the possible negative consequences of the movement of people as well as a political discourse in which not taking a tough stance against migration and mobility (as the two are often seen and presented as one and the same) does no longer seems to be an option. Alike crime, migration and mobility have become heavily politicised topics within Europe, the roots of which – as illustrated in the previous section – can be traced back to the very first discussions about the Schengen Area and in particular the principle of free movement. These first concerns about the mobility of people have only increased over time, with the responses to the 2015 European so-called migration 'crisis' as a clear, and painful, illustration of these concerns. Other than approaching migration as part of human nature and as a natural and universal phenomenon, migration was depicted as out of the ordinary, problematic and something that was taking European countries by surprise. Media and politicians were speaking of 'waves' and 'tsunami's' of refugees and asylum seekers making their way to Europe. The reference to these forces of nature in describing the situation at the time – and never really disappeared – both underlines but also reinforces the image of things being 'out of control' and largely uncontrollable. This image of uncontrollable, possibly dangerous or at least threatening, movement of unknown 'others' has triggered similar policy responses as described by Garland in his analysis of the shifts in criminal justice policy. In fact, there has been a concomitant growth in border control practices that are separate to, yet increasingly integrated within, systems of punishment. It has become clear that in times of insecurity, unrest and (perceived) crisis the dynamic of (economic) markets and rights gives way to a culture-security

dynamic which has opened the door to virulent nationalism within the European Union and amongst Schengen member states and therewith laying the foundation for crimmigration measures and practices.

Understanding the rise and the roots of the intra-Schengen mobility complex is important when analysing the further legal and policy responses to it and when further analysing the role discretion might have played in shaping these responses. In trying to make sense of the punitive turn in immigration control across the Global North, Barker makes a call to 'bring the state back in' (Barker, 2017b, p. 442). With the state being central to the transformation in which mobility of unwanted migrant 'others' is being restricted, it is key to understanding the ways in which criminal justice tools, practices and legal frameworks intermesh with migration control. A response to Barker's call necessitates reflecting upon the question of how the development of this mobility complex might impact and shape the actions of (national) legislators, enforcement agencies and street-level border agents. The mobility complex is, in other words, a key part of the social surround that serves as an environment for further (operational) practices and decisions (Hawkins, 2002). Political, economic and societal forces that are part of the social surround play a role in the transmission and interpretation of phenomena and events that are shaping the social surround and the 'decision frames' within which the various 'cartographers' operate. These frames are the 'interpretative and classificatory devices' (Hawkins, 2003, p. 189) that state agents and agencies will (unconsciously) fall back to. In other words, an important first step in understanding the intra-Schengen mobility control apparatus from *within* is to acknowledge that the workings of the apparatus do not happen in a vacuum but are as much influenced by shifts in social, political, and economic forces as they contribute to such shifts themselves.

Note

1 http://europa.eu/legislation_summaries/internal_market/internal_market_general_framework/index_en.htm

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4

TOP-DOWN DISCRETION AND INTRA-SCHENGEN MOBILITY CONTROL

> "There is no real peace in Europe if the states are reconstituted on a basis of national sovereignty. (…) They must have larger markets. Their prosperity is impossible unless the States of Europe form themselves in a European Federation."
>
> Jean Monnet's thoughts on the future (Algiers, 5 August 1943). Fondation Jean Monnet pour l'Europe, Lausanne. Archives Jean Monnet. Fonds AME. 33/1/

4.1 Introduction

One of the central arguments of this book is that to understand the movement of the apparatus, it is crucial to understand the delegation and wielding of discretion as this takes place at different loci within the intra-Schengen migration control apparatus. With discretion being understood as inextricably connected to (political) power (see Chapter 1 & 2), finding and analysing these different loci can further help to understand the differentiated nature of the apparatus and the politics behind it (Ackleson, 2016).

This chapter focuses on what in Chapter 2 has been called 'top down' discretion or, in other words, the granting of discretion by, in this case, European and national policymakers, to be applied and used further 'down' into the bureaucracy. Despite the hierarchical image that might arise from discussing discretion in these terms and the fact that some discretionary processes might indeed follow a more or less hierarchical structure, it is good to recall the existence of many 'in between' translations of discretion that happen as well. The next chapter will focus explicitly on this 'in between' discretion that arguably breaks through the often-portrayed hierarchical chain of discretion within policy regimes. Going back to this chapter, understanding how and why discretion gets granted and delegated in the preceding stages of street-level implementation of policy, e.g. the stages of European and national policy- and

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decision-making, is part of understanding how discretion works on the street level. Whereas discretion on the street-level might feel void of anything other than the individual street-level bureaucrats' beliefs, perceptions, biases and perhaps organisational pressures, such an a-political understanding of street-level decision-making unjustly ignores that the very nature of the powers that are applied or the rules that are being enforced on the street level, is political. Despite the fact that the street-level bureaucrat policing the intra-Schengen borders might not feel connected to, or part of, the larger European political context, or even the national political context, street-level decisions and practices are the translation of European and national politically granted power into concrete courses of (in)action (Galligan, 1990).

Trying to fathom the reasoning behind the granting of discretion by European and national political actors means entering the, often rather opaque, practices and rationales of 'high politics' regarding intra-Schengen mobility management (Hill & Hupe, 2021, p. 247). As this chapter will illustrate, part of these high politics is for these actors to (in)directly engage in negotiations – or, as some scholars would state 'games' (Adler-Nissen & Gammeltoft-Hansen, 2008) – aimed to manage various, sometimes conflicting, interests around the establishment of the European Schengen area. While tracing discretion and how it gets delegated, by whom and why, this chapter will loosely draw from the literature on policy regimes to structure the analysis (Ackleson, 2016; May, 2015; Wilson, 2000). As the European level and the member state level are inextricably tied up with each other, the different choices about the granting and wielding of discretion by the European Commission or by the individual member states will be discussed in close communication with each other.

4.2 Discretion and policy regimes

As much as the translation of discretion into specific courses of action on the street-level can be challenging, the delegation or granting of discretion by higher policy officials can be equally challenging. The latter is especially the case when discretion gets granted in the context of supranational efforts to develop shared policies. As political regimes can be organised quite differently – e.g. presidential versus parliamentary systems, Westminster model system and consensus model system – this will also affect the way in which discretion will manifest itself (Hupe & Hill, 2021, p. 248 e.v.; Huber & Shipan, 2002). As Huber and Shipan note, it needs to be acknowledged – both theoretically and empirically – that there is 'a coherent and systematic relationship between the political

and the institutional contexts in which politicians find themselves and the way in which they use legislation to delegate authority to bureaucrats' (Huber & Shipan, 2002, p. 13). In the context of the European Union and the delegation of powers for implementing the Schengen Borders Code (SBC) across member states, it is essential to consider the coherence between the political and institutional contexts of both the European Union and the member states. This consideration includes questioning the intentions and expectations behind delegating authority to take further steps towards achieving a common policy goal – a shared European market – to both European and national actors. In order to uncover the dynamics behind these political-administrative arrangements (Knoepfel et al., 2007) involving supranational and national policymakers as well as supranational and national government agencies, May's (2015) 'policy regime perspective' offers interesting insights to understand the delegation of discretion in so-called 'boundary spanning regimes' or 'governing arrangements that span multiple subsystems and fosters integrative policies' (Jochim & May, 2010, p. 307). The intra-Schengen mobility management apparatus can be seen as an illustration, or an example, of a boundary-spanning regime as it aims to foster integrative policies regarding border control in an area that spans multiple subsystems – e.g. the different member states and their national systems.

Policy regimes, according to May, are to be understood as the governing arrangements for addressing policy challenges (also see: Jochim & May, 2010; May & Jochim, 2013) which are shaped by the 'three forces' that, together, comprise a regime: ideas, institutional arrangements, and interests (see Wilson, 2000 for an alternative operationalisation of policy regimes). While *ideas* are the foundations for shared policy, they serve as the 'currency for debate about political commitments' (May, 2015, pp. 281–281) while also providing a sense of direction. *Institutional arrangements* 'structure authority, attention, information flows, and relationships in addressing policy problems'. Institutional arrangements can thus lead to decisions on the delegation of discretion to existing or new to-be-created governmental or non-governmental entities. The institutional design of policy regimes because of these institutional arrangements may also lead to the creation of 'oversight entities, designated categories of representation of interests for oversight, specified public engagement mechanisms, and shared management structures' (May, 2015, p. 281) Lastly, policy regimes are successful if the different parties forming the regime feel this serves their *interests*. Especially, but not uniquely, in boundary-spanning regimes such as the European Union and the intra-Schengen mobility regime, there can be conflicting interests between the different parties involved in which case it will be

necessary to negotiate and find solutions or compromises to these conflicts. Delegating or granting discretion can be part of this process of negotiation and can thus be an important part of ensuring that a complex policy aspiration gets translated into concrete action(s).

4.3 The connection between freedom and security within the preliminary stages of Schengen

Applying a policy regime lens to understand the granting and wielding of discretion between different actors that all partake in 'high politics' on either the European or the national level, entails looking at discourse and the way in which certain matters are framed and problematised in order to uncover other interests that the most clearly stated ones. This can happen in a rather direct way by, in discourse, connecting certain phenomena (e.g. free movement and crime or mobility and crime). Framing also happens by not asking certain questions that would push towards a more critical stance on whether these connections are in fact there and, more importantly, if they relate to each other in a zero-sum fashion or if things are a bit more multifaceted and complex.

Chapter 3 described the driving forces and ideas behind the creation of Schengen: aligned with the creation of the European Single Act in 1986 which was geared towards creating a single European market 'without internal frontiers in which persons, goods, services and capital can move freely in accordance with the Treaty establishing the European Community'. Intricately connected to this idea of creating a single and 'open' European market are the economic interests that come with succeeding in doing so. This narrative around economic benefits, the necessity of freedom of mobility in order to achieve these benefits, and at the same time the notion of increased security to counter the growing threats that were seen to derive from the abolition of border controls within Europe, has been the narrative upon which the Schengen regime is founded. As part of this official narrative, the 'trade-off' between economic benefits, freedom and security is presented as integral to the success of Europe and not really problematised by EU officials. In reality, this trade-off was highly politicised as it forced member states as well as European bodies to reassess the notion of modern nation-state and ideas around sovereignty (Zaiotti, 2011b, 2011a).

Whereas the original text of the 1985 agreement between the governments of the states of the BENELUX economic union, the Federal Republic of Germany and the French Republic lacks specific normative rules or procedures, the text does create a framework for the abolition of border controls on persons and goods between the participating

states. When looking at the text through a lens of discretion, one can say that the 1985 Agreement is more of a working program giving shape to specific intentions that needed to be further fleshed out into a more detailed plan of action with specific rules, regulations and an institutional framework. Such a plan, in the form of the Schengen Implementation Convention (SIC), would take five years to complete. The 1985 Agreement identifies short-term and long-term measures that need to be taken to honour the idea behind Schengen. Whereas the Agreement is urging member states to, in the short term, replace the permanent checks at their internal borders with 'spot checks' (Article 2), when it concerns the movement of people, the Agreement states that in the long term:

> (…) the Parties shall endeavour to abolish the controls at the common frontiers and transfer them to their external frontiers. To that end, they shall endeavour to harmonize in advance, where necessary, the laws and administrative provisions concerning the prohibitions and restrictions which form the basis for the controls and to take complementary measures to safeguard security and combat illegal immigration by nationals of States that are not members of the European Communities.

The 1990 Schengen Implementation Convention (SIC) can be seen as the legal foundation for the Schengen regime. Together with the 1985 agreement it codified the main formal rules of the regime and, by also formalising the institutional framework of the Schengen regime, it also set up who was in charge of the European borders. The SIC would not enter into force until April 1995.

Despite the clear connection between the idea of Schengen and the European Community, interestingly enough, European institutions such as the European Commission or the European Parliament were not part of the (development of the) institutional structure of Schengen (Zaiotti, 2011b). This sense of 'illegitimacy surrounding the Schengen initiative' (Zaiotti, 2011b, p. 75) led to concerns about what its development would entail for the functioning of the larger European Community. These concerns seemed to question the extent to which underlying predominant economic *interests* the founding members of Schengen were pursuing through this idea were in fact reconcilable with the mission to move beyond a purely 'businessmen's Europe' (Welsh, 1993) to a 'people's Europe' in which the benefits of free movement would be available to all and would also contribute to a greater sense of community and foster a shared European identity. Despite the lack of transparency that was experienced at the time by European institutions and representatives

thereof, the fact that the idea behind Schengen aligned enough with the European wish to create a Common Market appeased some of the concerns that were voiced by European stakeholders (see Zaiotti, 2011b, pp. 77–78). Schengen was presented as a perfect 'laboratory' to test out what the reality of abolishing internal border checks would look like before transplanting the idea and model to the European space as a whole.

The crossing of internal borders was described in Article 2 of the SIC:

1 Internal borders may be crossed at any point without any checks on persons being carried out.
2 Where public policy or national security so require, however, a Contracting Party may, after consulting the other Contracting Parties, decide that for a limited period, national border checks appropriate to the situation will be carried out at internal borders. If public policy or national security requires immediate action, the Contracting Party concerned shall take the necessary measures and shall inform the other Contracting Parties thereof at the earliest opportunity.
3 The abolition of checks on persons at internal borders shall not affect either Article 22 below or the exercise of police powers by the competent authorities under each Contracting Party's legislation throughout its territory, or the obligations to hold, carry and produce permits and documents provided for in its legislation.

The article shows an interesting contradiction between on the one hand, in the first clause, emphasising the abolition of checks at the internal borders, while clauses 2 and 3 make important reservations about this. In case 'public policy' or 'national security' require immediate action, border checks can temporarily be reinstated (clause 2) and, in general, parties are free to exercise police powers on their territory, which also includes the areas close to the border. By using ambiguous concepts such as 'public policy', and 'national security', and by being equally ambiguous about the scope and location of the police powers, the article grants a lot of discretion to the national governments of the member states on what the abolition of internal border checks *actually* looks like.

As part of the deliberations around the SIC, France proposed the introduction of 'mobile and rigorous control' in a border area of twenty kilometres on each side of the border (Zaiotti, 2011b, p. 97). Although there was police cooperation between different Schengen states based on bilateral agreements, the French felt the urge to also introduce these mobile checks in the borderlands around the physical border to adequately protect the French nation-state under the reality of absent permanent intra-Schengen border checks. The French proposal was met with a lot of

criticism from the other member states who underlined that the lifting of internal border checks was the key objective of Schengen. In a response to the criticism that France was trying to undermine the idea of Schengen, French Foreign Ministry spokesperson Jacques Rummelhardt, said: 'We don't need less Schengen, what's needed is more and better Schengen. The problem is not access for citizens of countries who have signed the agreement but access for citizens of third countries' (Statewatch, 1995). Apart from concerns about immigration, the French found the idea of uncontrolled secondary movement also very problematic in light of international drug trafficking and terrorism. As will be revealed later on in this chapter, the French suggestion has proven to be rather visionary.

4.3.1 Discretion as a space to negotiate between different interests

When looking at this first 'stage' of Schengen through the lens of discretion, it is clear that the idea of open internal borders and strong external borders to support the economic interests of the member states is also closely connected with the notion of trust. Trust in the effectiveness of the checks that would now only be conducted at the external borders and thus also trust in the countries located at these external borders. Concerns about the interconnectedness of unchecked mobility once individuals have crossed the external borders into the 'open' Schengen space whilst also wanting this openness required continuous negotiation around shared economic interests and national security interests (also see: Hreblay, 1998; Zaiotti, 2011b). One outcome of early negotiations addressing the aforementioned concerns led to a package of so-called compensatory measures such as stronger collaboration on the level of policing through the development of Europol, the development of a shared asylum and visa system and the introduction of an information system to share information for law enforcement, border and migration management (the Schengen Information System). The Schengen Implementation Convention furthermore clearly states that – despite the idea(l) of openness – member states continue to have the discretion to decide that there are special circumstances that justify the temporary reinstatement of permanent border checks at intra-Schengen borders and that they, at all times, continue to have the discretionary power to exercise police power in these intra-Schengen borderlands. Discretion in this context can thus be seen as used in as a way to appease differences between member states who were actively embracing Schengen and thus adamant about fostering the free movement of people as much as possible and those who were a bit more hesitant about the latter. The central

point of departure is the abolition of intra-Schengen border checks, yet, in case it would be necessary, national measures affecting the free movement of people *may* be taken. In the years to come, the institutional and legal arrangements in the form of, amongst other things, the SBC, would shine further light on the scope of these measures.

4.4 Schengen goes European: New actors, new interests, new arrangements?

From a policy regime approach perspective, the integration of the Schengen agreement into European law in 1995, followed by the signing of the Amsterdam treaty in 1997, can be seen as a watershed moment. The Schengen Regime had been operational for several years and the 'laboratory' for an open internal market had proven to be successful. More countries had joined, no major security breaches had occurred, and the system of pooled border management was functioning smoothly. The integration of Schengen into the larger (economic) structure of Europe, was thus a logical next step. This incorporation made the Schengen *Acquis* (the original 1985 agreement and the SIC taken together) part of EU legislation and, with the development of an area without internal frontiers in which the free movement of persons is ensured (also) an EU goal since the Lisbon Treaty, rules concerning the free movement of persons were now within the scope of Community policy-making. The introduction of new actors, new interests and the incorporation within institutional EU structures have led to a shift in the governance of internal borders through the creation of the SBC.

During a summit of the European Council in Tampere in 1999, heads of state placed cross-border crime and asylum and migration policy at the heart of the discussions of the abolition of intra-Schengen borders and the free movement because of this. A discourse of securitisation of mobility dominated the summit and it was clear that in the newly established 'Area of Freedom, Security and Justice' there was ample attention to the possible collateral effects of the free movement of people and goods in the absence of border controls or customs inspection throughout the Schengen Area. A consistent theme – as one of these collateral effects – was the theme of 'illegal immigration' and its intersections with organised crime. One of the editors of Statewatch, who covered the Tampere process observes that although 'Prime Ministers and Ministers knew they should be emphasizing the positive "citizens-friendly" aspects of "freedom", and "justice", the "security" aspects, "threats", "illegal immigrants", "organized criminal gangs" and "illegal immigration" and "asylum shopping" kept slipping out' (Statewatch Briefing,

2003). This dominant discourse of securitisation around mobility and migration which was also laced with concerns about the possibility of migrants abusing the differences in asylum procedures between different countries within the Union, underlined the need not only for a common European asylum and migration policy but also the need for more clarity as to what the abolition of internal border control meant in light of the pressing concerns over (national) security. This brings us to the development of the SBC, the legal framework that – up until this day – regulates mobility into and within the Schengen area.

4.4.1 The development of the SBC

When looking into the early deliberations by the European Commission on the establishment of a 'Community Code on the rules governing the movement of persons across borders' (European Commission June 2004), it becomes clear that the SBC finds its foundation in the wish to revise the already existing 'Common Manual on Checks at the External Borders'. This Manual was produced as part of the Schengen intergovernmental cooperation and incorporated into the institutional and legal framework of the European Union following the entry into force of the Treaty of Amsterdam in 1997. Yet, as the European Commission observed, the fact that the Manual did not have the form of standard Community law in the sense that it did not have the legal status of either a regulation or a directive, could lead to ambiguity amongst member states about the legal value of the provisions and obligations following from the Manual (European Commission, 2004, p. 5). Furthermore, as the Manual was the outcome of negotiations that happened in the context of the intergovernmental contractual framework that Schengen started out to be, the instrument as such was not the result of a normal, transparent, legislative procedure under EU law which would involve the participation of the Community institutions and in particular the European Parliament. Lastly, the Manual seemed to be somewhat of a hybrid document that through the creation of rights and obligations was a source of Community law whereas it, at the same time, also was a more practical handbook for border guards. (European Commission, 2004, p. 6).

While considering how to best revise and recast the Common Manual on Checks on External Borders, the Commission reflected on the necessity to, as part of this revision, broaden the scope of such a new to be developed legal instrument to also include the internally borders and to 'thereby establish a full Community code on the rules governing the movement of persons across borders, consisting of two parts – one on external borders, the other on internal borders' (European Commission,

2004, p. 7) Although the debate on the necessity to recast the Common Manual dates back to October 1999 and was triggered by an initiative by the at the time Finnish Presidency to send a questionnaire to the member states on the matter, it is interesting to observe that the idea to extend the scope of the Manual in its revised form to also include internal border crossings did not surface until 2004.

Several developments might explain the sudden focus on the internal borders around this time: First of all the enlargement of the European Union with 10 countries on May 1, 2004 following the negotiations about this during the Copenhagen European Council of December 12 and 13, 2002.[1] This was, and still is up until this day, the largest expansion of the Union which was viewed with great caution and scepticism by the majority of the incumbent member states who were fearful that the inclusion of the newly democratic and poorer Central and Eastern European states would destabilise the European Union and cause its economic growth to stagnate. Citizens of the old member states worried that their labour markets would be flooded with poor migrants from the East, who would take already scarce jobs away from current EU citizens by their willingness to work for low wages. Therefore, to prevent a flood of unwanted migrants, during accession negotiations the old member states demanded and won the right to impose transitional measures that would temporarily deny the citizens of the new member states their right to complete freedom of movement as enjoyed by citizens of old member states. (Shimmel, 2006) As Sedelmeier (2014) observes, 'member states did not acknowledge enlargement as a shared objective until 1993; it took until 1998 to start accession negotiations with the first post-communist countries; and (…) the accession treaties were distinctly unfavourable to the new members'.

Secondly, following the terrorist attacks in the United States on September 11, 2001, during the meeting of the European Council in Laeken on December 14 and 15 of that year, it was decided that in order to be better equipped to more effectively combat 'terrorism, illegal immigration and human trafficking' a more integrated management of external borders was necessary. As the Commission observes, whereas the control of external borders had, for a long time, predominantly been discussed in relation to illegal immigration, it was now time to adopt a broader definition of security of external borders that acknowledged the 'magnitude of crime, terrorism, crimes against children, arms trafficking and fraud' in relation to poor – or weak – border management. According to the Commission (European Commission, 2002), the security of external borders is a key challenge to be met if the free movement of persons and goods is to be encouraged. Although the monitoring or the management of internal

Schengen borders is not mentioned directly in the Presidency conclusions following the Laeken meeting, by stating this, the connection with the internal borders is clear. The threat of terrorism is mentioned directly in relation to the internal borders in the explanatory addendum to the 2004 draft of the SBC which states that in light of the overall objective to develop a community code on the rules governing the movement of people across borders it is crucial to not just integrate the content of the Schengen Convention on internal borders into this framework but also to add a new element. This element is 'the possibility for member states of jointly and simultaneously reintroducing checks at internal borders in the event of exceptionally serious cross-border threat, and particularly a cross-border terrorist threat' (European Commission, 2004, p. 8)

4.4.2 Granting discretion to monitor intra-Schengen mobility

To safeguard the acceptance and operational efficacy of the Schengen Agreement, provisions were implemented to grant member states the discretion, under exceptional circumstances, to reimpose border controls at the intra-Schengen borders in response to threats concerning public policy or internal security. The provisions would eventually be organised in Chapter II 'Temporary reintroduction of border control at internal borders' of the 2006 Schengen Border Code (Articles 23–31).[2] This temporary suspension of Schengen necessitated compliance with two prerequisites: a delimited timeframe for the imposition of such controls and the mandatory provision of advance notification to other Schengen nations, the European Parliament, and the Commission (Articles 23–24). In cases where a Schengen member state exhibited persistent and grave inadequacies in executing external border control measures (assessed through a specified set of criteria assessing adherence to the Schengen acquis) that jeopardised the overall functionality of the borderless zone and, consequently, posed a serious risk to public policy or internal security, other member states were granted the discretion to decide to reintroduce border controls (Article 25).

Besides granting member states the discretion to temporarily reintroduce internal border checks when faced with the aforementioned exceptional circumstances, the European Commission also granted member states the discretionary power under Article 21 of the SBC 2006 to monitor intra-Schengen cross-border mobility when there are no exceptional circumstances. This article is a distinct codification of the sovereign power of member states to monitor their intra-Schengen borderlands in other ways than through border checks at the physical border. Whereas

the Schengen Convention already specified this continuous power for the signatory states in Article 2 (3), Article 21 SBC gives a more detailed account of this power. Before materialising into Article 21, the 2004 draft of the SBC Article 19(a) discussed what in the 2006 version of the SBC would be called the 'checks within the territory'. The explanatory memorandum to Article 19(a) emphasises the compatibility of 'checks on persons in the discharge of general police powers that are allowed throughout the territory, provided they are carried out in accordance with the same frequency and intensity as checks in the territory generally' (European Commission, 2004, p. 31). In other words, if these checks are not indirectly (also) used as a means to replace the border checks. To ensure this member states cannot 'lay down provisions applicable solely in the internal border area, determining for instance a perimeter zone for identity checks on a random or visual basis not carried out elsewhere in the country. Even reduced checks in a border-crossing area or nearby areas are unacceptable. The purpose of the checks is the decisive factor' (European Commission, 2004, p. 31).

Article 21 (a) SBC 2006 seems to have incorporated some of the language of the exploratory memorandum to the 2004 SBC draft by emphasising the necessity for distinguishing between the exercise of police powers and border control. The article reads as follows:

> The abolition of border control at internal borders shall not affect:
>
> a 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; that shall also apply in border areas. Within the meaning of the first sentence, 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;

Upon first examination, Article 21 appears to be relatively straightforward, delineating certain guidelines and concomitantly imposing constraints regarding the manner in which individual member states

may implement internal verifications. Nonetheless, by looking at the article more closely and in conjunction with the Commission's Report to the European Parliament and the Council concerning the enforcement of Title III (Internal Borders) of Regulation (EC) No 562/2006, which establishes a Community Code on the norms governing the free movement of individuals across borders (SBC),[3] it is evident that individual member states are granted significant discretion in regulating the movement across borders within the Schengen area.

First, there is the question of police powers and what this exactly entails – and whether the understanding of police powers is similar across various Schengen member states. Whereas the most collective understanding, or association, of the notion of police powers, might be with crime control and thus with the application of criminal law, police powers might also include migration control as part of border policing powers. The latter entails that Article 21 sub (a) SBC checks could happen both under criminal law as well as under administrative – migration – law Member states have the freedom to decide what best fits their specific (legal, organisational, political, geographical, etc.) situation. The second central concept in the first paragraph of the article that leaves ample room for interpretation – and thus discretion – on the national level, is 'border areas'. It is clear, following the overall spirit of Schengen and Article 22 SBC which states that 'Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out' that the concept refers to something other than the actual physical borderline between two Schengen States. Yet, other than this, the concept is exceedingly vague with as a result complete unclarity as to the exact scope of these so-called border areas.

The opening paragraph of Article 21 (a) SBC closes with the statement that the police checks that are carried out in the border areas cannot be considered the equivalent of border checks, with which the article intends to make the distinction between the situation pre-Schengen when everyone crossing an intra-Schengen border would be stopped and checked and the situation after the implementation of Schengen. This is where the European legislature clearly felt the need to be a bit more specific as to when said police checks cannot be seen as border checks. In so doing, four criteria were formulated that, when they are all met, should prevent the usage of these police checks as a hidden form of border control.

The first criterion states that the checks cannot have border control as an objective. Whereas this criterion might make a lot of sense considering the spirit of the Schengen Agreement, at the same time, it is also a rather empty shell as it gives no further direction as to how member states can or should ensure this. In the aforementioned 2010 Commission Report

on the SBC, it is also noted that it might not always be easy to distinguish in practice between a border check and a check conducted with another aim. Although the report particularly problematises the demarcation between a check conducted to enforce immigration law (which would be allowed under 'Schengen') and a forbidden border check, it can – and has been – argued that it is generally difficult to assess with what intention any discretionary state power is enforced in these borderlands (van der Woude & Brouwer, 2017). As will be further discussed in Chapter 6, the suspicious gaze of the intra-Schengen border apparatus trickles down to the individual border agent, regardless of whether they are conducting a traffic check or an immigration check.

The second criterion states that the checks, which do not have border control as an objective, are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime. First of all, linking back to what was mentioned earlier about the aim of Article 21(a) SBC checks and whether they should be seen as a form of migration control, crime control, or both, this criterion seems to shift the focus of the checks firmly to the realm of crime control by emphasising the notion of cross-border crime. As discussed in Chapter 3, the possible rise of cross-border crime because of the lifting of the permanent border checks, was indeed a concern from the very start of Schengen. From that perspective, this criterion makes sense, yet it also incorporates the problematic connection between mobility and crime into this article. Although legislation in all but three EU member states (Malta, Portugal, and Spain) punishes irregular entry with sanctions in addition to the coercive measures that may be taken to ensure the removal of the person from the territory of the state and (European Union Agency for Fundamental Rights, 2014), as such, irregular entry might be seen as a form of cross-border crime, the criterion leaves room for a much wider interpretation. Apart from leaving ample room for member states to interpret the specific aim of these checks, as will be discussed in the next chapter, this unclarity – or ambiguity – on the European level can have serious, problematic, consequences on the 'street-level' of intra-Schengen mobility control by, amongst other things, giving rise to crimmigration practices. The first part of the criterion furthermore references the use of general police information and experience regarding possible threats to public security as a requirement for the organisation of the checks. The various components that together form this first part of the sentence don't offer much clarity or direction: Not only is it unclear what falls under 'general police information' or what constitutes 'experience' – and whose experience the article is referring to – the notion of 'threat to public security'

as such is absolutely ambiguous as well and open to interpretation. The fact that according to the European Commission (European Commission, 2010, p. 3) the checks must be based on 'concrete and factual police information as regards threats to public security' which must be 'constantly reassessed' does not help in clarifying this part of the provision – or limiting the possibility for problematic practices as ethno-racial profiling – either. With regard to the latter, various authors have called attention to the dangers of the ambiguous category of national or public security, by raising the question of who is included in the 'national' or 'public' part of this form of security and whose rights will need to be infringed upon by accepting a specific interpretation of these forms of seemingly collective security (e.g., Waldron, 2010; Zedner, 2014).

The third criterion, alike the previous one, is rather 'form free' in the sense that it states that Article 21(a) SBC checks need to be devised and executed in a manner clearly distinct from systematic checks on persons at the external borders without any further specifications other than adding, as a last criterion, that the checks have to be carried out on the basis of so-called spot-checks. By contrasting Article 21(a) SBC checks with checks on persons at the external border and in light of the overarching goal of Schengen to abolish internal border checks, it makes sense to assume that this criterion implies that the 21(a) checks cannot be carried out on the physical border between two member states. Nevertheless, it is not clear how close to the physical border would be considered too close – and if this would be problematic at all as long as the checks are 'spot-checks'. The notion of a spot check, according to the Cambridge Dictionary, alludes to a 'quick examination of a few members of a group instead of the whole group'. While projecting this definition on the intra-Schengen borders, this indeed seems to imply that – following the spirit of the Schengen Agreement – not all people can be stopped but only some. On this matter, the Commission notes that an essential element in deciding whether or not the exercise of police checks constitutes border checks is the frequency of checks carried out in intra-Schengen border areas compared to other parts of the national territory where similar checks would be equally needed. Despite this observation, the Commission states that:

> "A strict definition of the appropriate frequency and regularity with which checks may be carried out is not possible since this should reflect the security situation in the territory of the Member State concerned. Although a high frequency of checks may give an indication, it remains difficult to assess in individual cases whether this has an effect equivalent to systematic border checks".
>
> *(European Commission, 2010, p. 4)*

It is thus clear that member states have the power to decide what the frequency of the ambiguous police checks needs to be and, based on the previously discussed criteria, more in general of the form and scope of the checks. At the same time, while referencing a ruling by the Court of Justice for the European Union (Joint Cases C-188/10 and C-189/10, Melki and Others), the Commission also acknowledges the necessity to get more clarity on what member states are actually doing in their borderlands. In what seems to be an attempt to indirectly address the possibility of member states unjustly using Article 21 SBC as a way to continue to conduct permanent border checks the Commission furthermore underlines the possibility that member states have to temporarily reintroduce border controls at the intra-Schengen borders in case 'regular and systematic checks as a response to the security situation in their territories' are needed (European Commission, 2010, p. 5). The Commission's comments on the policing of the intra-Schengen borders and the 'freedom', or discretion, that member states have in deciding what this looks like, especially in light of the specific security concerns of said member state, are interesting for – at least – two reasons. First of all, as will be further discussed in Chapter 5, the two rulings by the CJEU the Commission is referring to can be seen as 'landmark' rulings with a clear intention to 'curb – or at least give further direction to the discretion granted to the member states through the SBC. The fact that the Commission is making a point of emphasising the importance of this national discretion to adequately respond to national security concerns despite the ruling of the CJEU not only illustrates some tension between these two European actors in the apparatus, it also underlines the political nature of these intra-Schengen police checks and the fact that they are a crucial part of the intra-Schengen mobility control game. Secondly, the Commission's comment is at least tendentious in relation to the idea of the harmonisation of EU rules and polices on migration as it does not seem to acknowledge, or problematise, the fact that the article allows for fragmentation of intra-Schengen border control in the sense that it can look very different in different countries.

The latter was illustrated in 2018 through a survey conducted by the European Migration Network (EMN, 2018).[4] The findings of the EMN survey show that Article 23 SBC was indeed actively being used by the responding Schengen countries, yet there were differences in the described aim of the national checks, as well as the agencies responsible for their implementation. Furthermore, the notion of the 'borderland' seemed to be different: whereas the intra-Schengen borderland in the Netherlands and France was the 20-KM zone behind the intra-Schengen borders, in Germany, this was 30 km and in Poland, there was no clear demarcation at all. What the countries have in common regarding the

use of article 23 SBC is that their national practices are driven by a language of risk around the notion of mobility, with this mobility being directly connected to matters of national security, in particular terrorism and cross-border crime. The majority of the countries responding to the survey mentioned that agents tasked with the Article 23 SBC check are operating under a dual mandate of criminal law and migration law, the choice of which is left to the discretion of the street-level agent, the national translation of Article 23 SBC seems to contribute to the (further) integration of the immigration and criminal sphere.

4.5 Changing regime dynamics during and after the long summer of migration

Despite the discretion that was granted to member states to temporarily reintroduce border checks at the internal borders, until 2015, member states only rarely used it (Groenendijk, 2004; Gülzau, 2023; van der Woude & van Berlo, 2015). And, if they did, they made sure to act in compliance with the legal framework and normative expectations of the Schengen regime. The Commission consistently highlighted the importance of aligning EU policy measures to protect free movement rights, while discouraging independent actions by countries, which it believed ineffective against shared challenges (European Commission, 2011, p. 3). As mentioned in the previous section, it is from this perspective that the European Commission also seemed to urge member states to be mindful of how to apply Article 21 SBC under their national legislation. Whereas this first period of Schengen after its implementation in the European framework can be viewed as quite successful from the point of view of 'open' intra-Schengen borders and the use of the discretionary 'valves' that were built into intra-Schengen mobility apparatus, the apparatus was put to the test in 2015.

The SBC has been amended several times since its first implementation, but considering the focus of this book – the management of mobility across the intra-Schengen borders – the 2015 Borders Package needs to be mentioned. The European Council described the Package as 'an important set of measures aimed at securing the EU's borders, managing migration more effectively and improving the internal security of the European Union while safeguarding the principle of free movement of persons'. The announcement of the Package coincided with Europe's 2015 'long summer of migration' (Kasparek & Speer, 2015) in which Europe was seeing an unprecedented mass and visible movement of refugees and other migrants through Greece, Macedonia, and Serbia towards the European Union and countries like Austria, Germany or Sweden.

Whereas the Package as such mostly resulted in changes regarding the (checks and monitoring of the) external borders which included the development of a European Border and Coast Guard to protect Europe's external borders and the promise of a more integrated border management system (European Commission, 2015), its effects were also intended to affect the intra-Schengen borders. In response to the long summer of migration, while seeing the mass movement of people entering the European Union who, because of the failing Dublin system, continued their movement through the Schengen area where there were no permanent border checks, many countries turned to the discretionary options the SBC gave them to bolster up their intra-Schengen mobility control.

Although a minority of countries ended up reintroducing permanent intra-Schengen border checks under Articles 23–25 SBC 2006 (Guild et al., 2015), the Borders Package and the perceived porosity of the external borders of the EU did spark a larger debate on the functioning of Schengen and the freedom of movement within. The long summer of migration laid bare the lack of shared solidarity between the different member states with regard to taking in refugees who, after entering the European Union by crossing the external border, had been able to continue their journeys through the Schengen area without encountering any border checks. Fuelled by growing public concerns around what was pictured through the media and political discourse as the rampant and mass movement of refugees and asylum seekers whose cultural and religious beliefs were questioned for potentially being risky or dangerous, governments across Europe turned to more nationalist rhetoric and policies, trying to slow down immigration into their territories (Postelnicescu, 2016; Neuhauser et al., 2018). The 2015 New Year's Eve sexual assaults in Cologne, the terrorist attacks on the Bataclan in France in that same year and news reports on the usage of migrant boats by ISIS to send terrorists to were seen to only affirm these concerns.

The long summer of migration and most importantly the political responses to it, made the tension that had always been present in the Schengen Area extremely visible: Once people were 'in' they were in and, due to the lack of border checks, they were then also free to move around. And, when combined with a faltering registration system at the external border, they were free to claim asylum wherever they pleased. In response to these 'weak spots' in the functioning of the Schengen space, member states started to wield their discretion to take back power over their national – internal – borders. As the re-imposition of border controls went counter to the core idea of Schengen and, as the Commission also wrote in 'Back to Schengen: A Roadmap', would also greatly impact the EU economy as a whole, measures needed to be

taken. The adoption of the European Border and Coast Guard is seen as a crucial step in that process, especially to ensure that '(…) all Members of the Schengen Area apply fully the Schengen Borders Code and refuse entry at external borders to third-country nationals who do not satisfy the entry conditions or who have not made an asylum application despite having had the opportunity to do so' (European Council 18/19 February 2016/120 final, p. 2) as referenced in European Commission (2016, p. 120), the Commission also acknowledges that whilst this is not adequately organised, Schengen Member states have the right to reintroduce controls at the internal borders. The Commission does mention the temporary nature of this measure and expresses the intention to have all internal border controls within the Schengen Area lifted by mid-November 2016.

After various rounds of extension, and with the continuation of intra-Schengen border checks in a number of Schengen member states, there is an interesting shift visible in the Commission's original take on the application of Article 21 SBC by member states. Whereas the Commission initially seemed to 'promote' the temporary reintroduction of intra-Schengen border checks in case circumstances warranted such a decision, in its 2017 decision (Council of the European Union, 2017/246) the Commission shifted its focus towards the 'police checks' that are allowed under Article 21 SBC which, at the time of the decision, as a result of some amendments to the SBC now had become Article 23 SBC. The Commission wrote that, before opting for the reintroduction of intra-Schengen border controls 'member states should examine whether other measures alternative to border controls could not be used to effectively remedy the threat, such as the exercise of police powers in a manner compatible with Article 23 of the Schengen Borders Code' (provision 12). In a recommendation on proportionate police checks and police cooperation in the Schengen Area that was published three months later (European Commission, 2017/820) the Commission mentioned that 'such checks [police checks in intra-Schengen border areas] may prove more efficient than internal border controls, notably as they are more flexible than static border controls at specific border crossing points' as they can also 'be adapted more easily to evolving risks' (provision 6). In describing the nature of the risks, the recommendation lumps together terrorism, cross-border crime and the 'risk of secondary movement of persons who have irregularly crossed the external borders'. Furthermore, the Commission stated that the specific nature of borderlands as areas of high mobility makes these areas more prone to different acts of illegality thus justifying an intensification of police checks precisely in these areas.

In Section 9 of the recommendation, the Commission noted that 'it is *only* [emphasis added] in cases of police powers under national legislation which are specifically limited to border areas and imply identity checks even without concrete suspicion, that member states have to provide for a specific framework to ensure that those police checks do not amount to measures equivalent to border checks'. As will be further discussed in Chapters 5 and 6, with this observation, the Commission again directly addresses a ruling of the Court of Justice for the EU on the way in which France was conducting Article 23 SBC. Where the Court of Justice for the EU formulated some criteria that need to be met in case a country specifically designs checks to be conducted as Article 23 SBC checks, which could be seen as limiting a member state's discretion as to how to conduct these checks, the Commission seemed to highlight that these potentially limiting criteria only seem to apply to checks that are not already existing and already conducted throughout the territory of a Schengen member state. Where the Commission in February of 2017 asked Schengen Member states to 'examine' the efficiency of these Article 23 SBC checks over the temporary reintroduction, in the March Recommendation it wrote that it 'encourages' member states to better use their police powers. This is another example of the previously observed friction between the European Commission and the CJEU regarding member states' discretion on how to use the legal possibility granted to them under the SBC to perform police checks in the intra-Schengen borderlands. The European Commission seems to persuade member states to not use the most obvious obstruction of free movement at the physical but instead to shift to a less visible, more ambiguous semi-permeable and semi-permanent border membrane.

4.6 Shifting regime dynamics once again?

The amendments to the SBC in 2017, under the previously mentioned 'Back to Schengen' initiative, did not alleviate the ongoing disputes and tensions among member states regarding the operation of the Schengen zone. Despite the intended temporary application of internal border checks, since 2015, six member states have used their discretion to consistently enforce such controls due to apprehensions about the EU's external border circumstances and other perceived security risks related to the secondary movement of migrants. Austria, Germany, Denmark, Sweden, and Norway provisionally reinstated border checks for a period extending from May 2016 to October 2017. In a separate move, France started identity checks at its borders in November 2015, coinciding with the Paris Climate Conference. These checks were extended

and have persisted following a sequence of terrorist incidents within France. The advent of the COVID-19 pandemic in early 2020 triggered another round of internal border restrictions, with 18 member states implementing such measures by mid-April 2020. In some instances, these pandemic-related border restrictions were imposed in addition to those already in place due to migration and/or security concerns. These internal border measures were often paired with added limitations on individual mobility, including prohibitions on entry or exit and specific entry prerequisites, frequently serving as a mechanism to enforce these broader movement restrictions (Carrera & Luk, 2020; Thym & Bornemann, 2021; Van Eijken & Rijpma, 2021). While member states were utilising the discretion that was granted to them to protect their national borders and, in so doing, their national security and the integrity of their national structures, the protection of these national interests was not aligning with the larger interest of having an 'open' Schengen space. In an attempt to regain some control over the intra-Schengen borders, in 2020 the European Commission announced a New Pact on Migration and Asylum. Part of this New Pact on Migration and Asylum is a 'Strategy for the Schengen Area'. The Commission explained that such a new strategy was necessary because:

> "The 2015 refugee crisis exposed shortcomings in the Union's management of the external borders and of migration, leading to internal border controls being reintroduced in a number of member states. Internal border controls were also reintroduced in response to terrorist threats. More recently, the coronavirus pandemic has placed major strain on the Schengen area, with more member states reintroducing internal border controls, at times jeopardizing the proper functioning of the internal market, disrupting supply chains within the EU as well as the movement of people, especially those living and working in border regions".
>
> *(European Commission, 2021a/277, p. 1)*

The Commission explicitly mentions the economic impact and costs of reinstated border checks at the intra-Schengen borders, thereby highlighting the economic interests that lie at the core of Schengen. It emphasises that 'restoring the Schengen area without controls at internal borders is of paramount importance for the European Union as a whole' (European Commission, 2021a 277, p 3). Yet, at the same time, the Commission also acknowledges the different security and migration challenges that Schengen is facing and how these challenges need to be addressed. Besides turning its gaze to more effective external border

management and the upholstering of the governance of Schengen, the importance of alternatives to internal border checks is highlighted as the third 'focus area' where work is needed.

4.6.1 Changing the Schengen borders code

Following this new strategy for Schengen, on December 14, 2021, the European Commission issued a Proposal for a Regulation amending Regulation 2016/399 about a Union Code on the rules governing the movement of persons across borders (the SBC) (European Commission, 2021b/891). While writing this book, the proposal to update the SBC as discussed in this section, has been adopted by the European Parliament & Council (European Parliament & European Council, 2024).

The proposal, which has now entered into force, addresses both the external and the internal borders of the Schengen area but should be seen as the Commission's solution to stop the constant reintroduction of temporary internal border controls. Regarding the external border, following the Covid-19 pandemic, the Commission highlights the challenges posed to borders and border controls by pandemics. Furthermore, the Commission addresses the challenge of 'instrumentalisation' of migrants whereby state actors in third countries promote irregular migration to the European Union. As Allison et al. (2022) rightly observe, whereas the first challenge is unprecedented in the sense that the world had not previously experienced a pandemic, the latter challenge is 'new in name only' and also a direct consequence of the EU's policy of externalisation of border and migration control. Different civil society organisations, scholars and think tanks assessed the Commission's ideas on how to respond to these challenges and highlighted the problematic nature of framing the arrival of migrants as a threat *per se* in the Commission's plan, the vagueness of the Commission's use of the term instrumentalisation (ECRE, 2022; Meijers Committee, 2022; Picum, 2022; Statewatch, 2024). Although there is much more to be said about the European Commission's observations and ideas about the external borders, in light of the central focus of this book, I will turn now to a discussion of the Commission's ideas and plans for the intra-Schengen borders and in particular for the monitoring of mobility across those borders.

4.6.2 Reinstatement of internal border controls

Considering the Commission's goal to prevent member states from too easily reinstating temporary permanent border controls, the new SBC proposes some changes in the articles that allow member states to do

so. The proposal for instance amends Article 25 of SBC to include specific examples of situations creating a serious threat to public policy or internal security, namely: (a) activities relating to terrorism or organised crime; (b) large-scale public health emergencies; (c) a situation characterised by large-scale unauthorised movements of third-country nationals between the member states, putting at risk the overall functioning of the area without internal border controls; and (d) large scale or high profile international events.

The proposal furthermore also introduces a renewed procedure to assess situations where a serious threat to internal security or public policy affects most member states, putting at risk the overall functioning of the area without internal border controls. This procedure will enable the Council to authorise, based on a proposal from the Commission, the reintroduction of internal border controls in some or all member states affected by an immediate threat. No time limit is provided in this case. If the Commission considers that internal border controls are not appropriate, it must adopt a recommendation specifying the more appropriate measures to be taken. The proposal updates the safeguards applicable when internal border controls are introduced. It clarifies and expands the list of elements that must be assessed by member states when temporarily introducing permanent internal border controls, including the impact on cross-border regions. In cases of prolongation, member states also need to assess the appropriateness of alternative measures. They must also conduct a risk assessment when they intend to prolong internal border controls beyond six months. The Commission and other member states will continue to be able to issue opinions on the necessity and proportionality of controls. In cases of prolongations beyond 18 months, the Commission must issue an opinion and launch a consultation with member states. The proposal allows for the prolongation of internal border controls for up to 2 years, although member states may extend controls beyond this time limit, in which case the Commission must issue a follow-up opinion.

The proposal seems to place stricter reporting obligations on both member states and the Commission in order to prevent member states from invoking Article 25 SBC too easily by asking for risk assessments at different stages of the procedure and, as part of that, being clear and transparent about the impact on the free movement of persons. In that sense, the proposal could be seen as potentially curbing member states' discretion to – rather independently and without accountability – decide to reinstate border checks at their intra-Schengen borders. Yet, at the same time, the proposal also seems to widen this discretion by introducing two ambiguous new possible grounds for such temporary

reinstatement: 'large-scale public health emergencies' and 'the large-scale unauthorised movements of third-country nationals between the member states'. About the latter ground, the Meijers Committee, an independent standing committee of legal experts that provides technical-legal commentary on EU policy documents and legislative proposals states: 'The proposed definition of "large scale unauthorised movements" must be considered as too vague, leaving member states with too much discretion to maintain controls at their internal borders based on so-called secondary movements, even where these do not create a reasonable risk for public policy or public order' (Meijers Committee, 2022, p. 4). The same Meijers Committee is also critical about the fact that the European Commission only has the obligation to issue an opinion upon notification of a prolongation of a reinstatement of border controls, and not for every notification of reinstatement of border controls. When recommending alternative measures for intra-Schengen border controls in the member state that had temporarily reinstated said controls, The Meijers Committee urges the European Commission to only clearly stipulate *which* other suitable means to address threats to internal security and public policy than border controls it finds more fitting that border controls, but also what specific further actions should be taken by the member state in question. By clarifying and tightening up the reinstatement process and procedure as well as by emphasising the responsibility that the European Commission has in overseeing member states, the Meijers Committee makes it clear that there should be little to no room for intra-Schengen border games to be played.

4.6.3 Policing the intra-Schengen borders

Apart from changing the procedure for temporary reinstatement of border controls, the proposal also suggests several changes in Article 23 of the SBC. The European Council on Refugees and Exiles (ECRE) notes that the changes in Article 23 SBC are a further confirmation of the European Commission's 'The intention […] to give preference to police checks rather than border controls which builds on the European Commission 2017 Recommendation on proportionate use of police checks and police cooperation in the Schengen area' (ECRE, 2022, p. 11). ECRE further observes that this might be the reason why the new Article 23 SBC thus seems to list a number of circumstances under which border checks do not have an equivalent to border controls that is very broad and seems to encompass many current practices by member states.

The new Article 23 SBC looks as follows:

> Article 23 Exercise of public powers
>
> The absence of border control at internal borders shall not affect:
>
> a the exercise of police or other public powers by the competent authorities of the member states in their territory, including in their internal border areas, as conferred on them under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks. The exercise by competent authorities of their powers may not, in particular, be considered equivalent to the exercise of border checks when the measures:
>
> i do not have border control as an objective;
> ii are based on general information and experience of the competent authorities regarding possible threats to public security or public policy and aim, in particular, to:
>
> - combat cross-border crime;
> - combat irregular residence or stay, linked to irregular migration; or
> - contain the spread of an infectious disease with epidemic potential as detected by the European Centre for Disease Control;
>
> iii are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders, including where they are conducted at transport hubs or directly on board of passenger services and when they are based on risk analysis;
> iv are carried out, where appropriate, on the basis of monitoring and surveillance technologies generally used in the territory, for the purposes of addressing threats to public security or public policy as set out under ii);
>
> b the possibility for a member state to carry out security checks on persons carried out at transport hubs by the competent authorities under the law of each member state, by their competent authorities or by carriers, provided that such checks are also carried out on persons travelling within a member state;
> c the possibility for a member state to provide by law for an obligation to hold or carry papers and documents;
> d the possibility for a member state to provide by law for an obligation on third-country nationals to report their presence on its

territory pursuant to the provisions of Article 22 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders ('the Schengen Convention');

e checks for security purposes of passenger data against relevant databases on persons travelling in the area without controls at internal borders which can be carried out by the competent authorities under the applicable law.

Questions have been raised about the broadening of the scope of the existing article by speaking of the general 'exercise of public powers' and no longer just of police powers. Several NGOs and civil society organisations voice their concern about the wide discretion that is granted to the member states by widening the scope of the article and, as the Commission is also pushing for increased use of a broad variety of border surveillance technologies, are pointing at how border surveillance will most likely become less visible, but not less intrusive on the principle of free movement (see for a combination of the concerns as expressed by 89 civil society organisations, Statewatch, 2024). Another, even bigger concern, is how member states' wider discretion will result in a heightened risk of profiling by law enforcement agencies based on racial, ethnic, national or religious characteristics. The 2023 report *Being Black in the EU* from the EU Fundamental Rights Agency has shown that racialised communities are indeed subject to discriminatory and arbitrary checks (European Union Agency for Fundamental Rights, 2023), regardless of citizenship or residence status. Furthermore, as will be further discussed in Chapter 5, a recent landmark court case against the Dutch government also confirmed that ethno-racial profiling is being systematically used by the RNM while performing the Article 23 checks in the Dutch intra-Schengen borderlands. In order to counter this discretionary risk, the Meijers Committee suggested replacing the provision of 'general information and experience of' with 'specific evidence provide by'. Apart from this, the Meijers Committee also urged for the deletion of the 'combating irregular residence or stay, linked to irregular migration' as a possible aim of the checks as this would steer discretionary policing practices towards the use of ethnic profiling (Meijers Committee 2022). While echoing the various concerns of the Meijers Committee, the ECRE explains the importance of deleting the aforementioned aim as it 'is difficult to imagine how the proposed measures will be carried out without intensified racial profiling' (ECRE, 2022). Although the reform states

that all actions must fully respect the principle of non-discrimination, it does not specify how this will be monitored or enforced, nor how member states will be sanctioned if they violate it (Statewatch, 2024).

The discretionary powers of member states when it comes to the policing of intra-Schengen borders only seem to be further expanded under the new Schengen strategy. Whereas this is in line with the European Commission's wish to stimulate member states to use Article 23 SBC checks instead of temporary permanent border checks, the latter is not exactly discouraged either. This begs the question who is winning the intra-Schengen mobility control game, the Commission or the member states? What is clear, is that people on the move – and especially those coming from countries outside of the European space – are on the losing side.

4.7 The Schengen borders code as a consciously incomplete arrangement and agreement?

Although the SBC, at first sight, seems to provide a rather comprehensive and complete framework in addressing *what* signatory countries need to do in order to comply with the SBC, a closer look into the various provisions shows the *how* question is often left to the discretion of the member states. This falls in line with Huber and Shipan's (2002) observation that European statutes and regulatory frameworks, compared to statutes in the United States, in general, seem to contain less 'procedural language'. In the context of Schengen, the lack of specific procedural language is intricately connected to the fact that individual states have the ultimate and exclusive authority over what happens within their own territory. The notion of sovereignty, in other words, can be seen to prevent providing detailed and binding rules on the *how* of Schengen, and particularly the *how* of intra-Schengen border control in the form of police checks within a country's territory.

The SBC can thus – as part of the larger European legal system –be seen as a conscious *incomplete agreement* (Pollack, 2003) or an incomplete 'contract' (Williamson, 1985) to establish an area of free movement while the practicalities of how this is done are partially delegated to (lower level) bureaucracies, e.g. national legislatures or street-level bureaucracies such as police organisations, border control agencies, etc. The incompleteness of said contract is not (necessarily) to be seen as the result of inapt decision-making on the legislative/policy-making level, but, following the policy regime approach, more so as a conscious decision to make the agreement more future-proof and as a way to mitigate between conflicting interests on the European level versus those on the national level. Incomplete agreements are therefore more of a

formalisation of a certain relationship than that they anticipate regulating all possible contingencies and try to capture them in detailed procedures. As Milgrom and Roberts (1990, p. 62) put it:

> "(…)contracting parties [to incomplete agreements MW] content themselves with an agreement that *frames* their relationship—that is, one that fixes general performance expectations, provides procedures to govern decision making in situations where the contract is not explicit, and outlines how to adjudicate disputes where they arise".

The idea of the incomplete agreement thus suggests that parties benefit from having a certain level of ambiguity, or discretion, as to how certain ideas or ideals underpinning the agreement will be achieved in practice. This observation runs counter to observations of more functionalist theories of the delegation of discretion in the context of international cooperation. These theories see the existence of incomplete agreements as a point of departure to trace and explain the delegation of discretion 'down' the hierarchy of involved actors to, in so doing, limit the transaction costs of said agreement regulating international cooperation. As Pollack (2003, p. 23) explains: '(…) where uncertainty is great and future decision-making is expected to be time-consuming and complex, the parties may choose to delegate these activities to an agent, such as an executive or a court, which can impartially interpret the agreement, fill in the details of an incomplete contract, and adjudicate any disputes that might arise'. While applying that to the SBC, the attribution of discretion from the member state level in the form of executive powers to for instance the European Border and Coast Guard Agency, FRONTEX, as well as the attribution of discretion in the form of interpretative powers of the SBC to the Court of Justice for the European Union are in line with Pollack's functionalist approach. Yet, this is only part of the story, as the SBC is as much a representation of the delegation of discretion from the member state level to the EU level, as it is a representation of the delegation of discretion from the EU level to the member state level through the creation of rather 'open' (or vague) provisions that attribute a lot of autonomy – discretion – to the various member states on how to translate these provisions into national laws and practices and, in so doing, supporting their autonomy and sovereignty.

In revisiting the SBC through the lens of the apparatus, this chapter uncovers a layered narrative of governance within the European Union, especially as it pertains to intra-Schengen mobility control. Foucault's apparatus encompasses a broad array of elements, from legal frameworks to societal norms, all of which are strategically employed by authorities to guide and regulate populations. In this light, Schengen – and

particularly the SBC – can be seen as a quintessential example of how legislative mechanisms can act as conduits of governance. The code's inherent flexibility is interpreted not merely as an administrative convenience but as a deliberate strategy, enabling the European Commission and member states to exert influence over the movement within the Schengen Area. At the heart of this governance framework lies the concept of governing through discretion, whereby both the European Commission and member states exercise varying degrees of autonomy in interpreting and implementing the SBC's provisions. This discretionary power enables the Commission to shape the agenda and define the parameters within which member states work, exerting a subtle form of influence over national policies and practices. Member states, in turn, navigate this discretionary space by asserting their sovereignty and accommodating national specificities, while operating within the broader framework of EU norms and expectations (Foucault, 1991). This interplay between discretion and sovereignty reflects what has been termed as 'sovereignty games' within the European Union, where member states seek to assert their autonomy while simultaneously engaging in strategic interactions with European institutions (Adler-Nissen & Gammeltoft-Hansen, 2008; Bickerton et al., 2015).For instance, by maintaining open provisions, the SBC enables member states to justify national measures ostensibly aimed at complying with Schengen norms while addressing domestic political pressures. This dynamic can lead to selective interpretations and enforcement practices that align with nationalist agendas or cater to public fears of migration, often amplifying divisions within the EU. This way, the fear of migration, particularly in the context of broader geopolitical events, can be weaponised in domestic political discourses, with member states invoking sovereignty to reintroduce border controls or restrict mobility under the guise of security concerns. Such a possibly selective application of the SBC underscores how the incomplete agreement functions as a double-edged sword, providing both flexibility for future-proof governance and a mechanism for political manoeuvring that undermines the spirit of European unity. Consequently, this approach risks perpetuating a cycle of strategic noncompliance, thereby complicating efforts to foster solidarity and coherent governance within the Schengen Area.

Notes

1 Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.
2 Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

3 COM 2010, 13-10-2010, 554 final.
4 The countries that responded were Austria; Belgium; Croatia; Cyprus; Czech Republic; Estonia; Finland; Germany; Hungary; Italy; Latvia; Lithuania; Luxembourg; Netherlands; Poland; Slovak Republic; Slovenia; Sweden; United Kingdom; Norway.

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5

IN-BETWEEN DISCRETION AND INTRA-SCHENGEN MIGRATION CONTROL

> "If the spirit of Schengen leaves our lands and our hearts, we will lose more than Schengen".
>
> Jean Claude Juncker (former president of the European Commission), November 25, 2015

5.1 Introduction

After looking at the way in which discretion gets granted and wielded on the higher (European and national) policy levels, this chapter turns its gaze to the actors, not being street-level agents, whose actions can impact the discretion after and while it gets granted and wielded top-down and bottom-up. As this chapter will illustrate, these acts and loci of 'in-between discretion' are important to get a more holistic understanding of the larger forcefield and (the negotiations between) the many interests that together contribute to the movement of the intra-Schengen mobility control apparatus. The 'in-betweenness' of the discretionary decisions made by the actors discussed in this chapter lies in the notion that their decisions affect the way in which top-down discretionary decisions eventually get translated into actual street-level decisions. The actions of these actors as discussed in this chapter, in other words, are also affecting the decision field (Hawkins, 1992) that guides street-level discretionary decision-making in one way or another. In this chapter, two actors, and thus two loci, of in-between discretion will be discussed: border agencies (or the locus of the organisation that is tasked with intra-Schengen border control) and national and European courts (or the locus of the judiciary authorised to decide about the application of the SBC).

In illustrating the workings of in-between discretion linked to the acts of organisational and managerial discretion as wielded by and within enforcement *agencies* that are tasked with policing the intra-Schengen borderlands, this chapter will draw from the case of the Netherlands

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and the work of the Royal Netherlands Marechaussee (RNM). The case of the Netherlands also offers a natural connection to discussing the second locus of in-between discretion: the workings of the national courts and the Court of Justice for the EU (CJEU) in matters of intra-Schengen policing. One of the first cases questioning the way in which national governments were implementing the possibility of policing the intra-Schengen borders under Article 21 (later Article 23) SBC in front of the Court of Justice for the EU, was a case against the Netherlands. As will be further discussed in Section 6.3, the case of Adil versus the Netherlands (CJEU, C-278/12 PPU - Adil) can be considered one of the landmark cases for the national implementation of police checks at the intra-Schengen borders. This chapter will conclude with some broader reflections on the role of the examples of in-between discretion in relation to the overall movement of the intra-Schengen mobility control apparatus and its 'crimmigration' tendencies.

5.2 Organisational discretion and intra-Schengen policing

Within the scholarship coming out of the field known variously as border criminology or the criminology of mobility, there still seems to be room to further deepen our understanding of the daily practices and discretionary decisions of border police officials in relation to their organisational context and surroundings. In her 2015 article, Loftus already observes that: '(…) understanding border policing is not only a matter of exploring the broader social, political and legal context. It also invites examination of the culture and practices of those involved in the daily upkeep of border priorities. To date, little attention has been paid to the practices and occupational consciousness of social control professionals responsible for policing the border' (Loftus, 2015, p. 118) Although Loftus is more generally – and in line with other calls around that time to study the border *as practice* (Côté-Boucher et al., 2014) – inviting scholars of borders and border control to more actively engage with the professionals policing the border, it is clear that this would also entail studying the (inter)actions and decisions of these professionals in relation to the organisational in which they operate. In a direct response to Loftus, Achermann (2021) adopts a combined theoretical approach of structuration, street-level bureaucracy, and organisational theory in aiming to understand what rationalities structure Swiss border guards' discretionary practices when controlling the border and those intending to cross it. She concludes that: 'Conceptualising border guards as street-level bureaucrats acting within a state organisation revealed rationalities

rarely mentioned in the border-control literature but that are crucial to an understanding of how they act' (2021, p. 16). This observation is in line with the findings of Borrelli et al. (2023) who, based on their review of scholarship addressing discretion in migration control, note how the impact of organisational dynamics on discretion as it gets wielded on the ground by street-level border agents is largely understudied. So, interestingly enough, the organisational level and the power that gets exercised there still deserves greater scrutiny from border scholars. Despite calls dating back almost a decade, the organisational dynamics of border agencies remain somewhat of a black box which, as is the premise of this book, also limits our understanding of decisions made by border agents operating at the street-level.

As illustrated in the previous chapter, Schengen member states have been granted quite some discretion in determining how they translate Article 23 SBC into national practices in their intra-Schengen borderlands. The article does give criteria that need to be met, but a closer look at the actual restrictive or even 'guiding' capacity of these criteria shows that national governments in fact have quite some leeway in terms of how they would like to give shape to the checks that Article 23 SBC calls for. Whereas this makes sense in terms of their national sovereignty and the power to autonomously decide about matters concerning their internal policing practices, it is through these moments of discretionary decision-making that space is given for interests, other than those that would align with the ideal of Schengen per se, to weigh in on the decision-making. Looking at the opening quote of this chapter and following the insights presented in Chapters 3 and 4, it is in these moments that the 'spirit' of Schengen could be outweighed by non-European concerns and interests. On a national level, we have seen how especially concerns and frames about mobility connected to cross-border crime, terrorism, and national security but also about pressures on the welfare state, are impacting national decision-making regarding migration and border control. Yet, in the translation of the national legal framework on intra-Schengen border policing into concrete actions, the specific interests of the organisation(s) that are tasked with this role can also affect the spirit of Schengen. This particular moment of translating government policies and regulations into specific guidelines, tasks, and objectives as it happens on the level of the organisation can be seen as a moment of organisational or agency discretion (Goodrick & Salancik, 1996; Hambrick & Abrahamson, 1995; Jenness & Grattet, 2005) which in turn also gets determined by managerial discretion (Filstad et al., 2021; Parsons, 2015; Vaughn & Otenyo, 2007; Wangrow et al., 2015). Managerial discretion in turn can also be exercised on various levels

within an organisation: on the leadership level but also on the level of senior executives working in a hierarchical line under the leadership. These senior executives often play a crucial role in organisational policymaking based on the ideas and ambitions of the leadership. They operate as an important hinge between the leadership and the operational level, which makes them straddle the line between (organisational) politics and (operational) practice (Gortner et al., 1997). They respond to law enforcement challenges much like street-level officers, but they also have the power to determine priorities within individual departments. It goes beyond the scope of this book to further flesh out the intricacies of organisational and managerial discretion but the central point that connects the literature on managerial discretion in public agencies is the acknowledgement of the responsibility and the power that managers have in the process of policy-making, which asks for a critical reflection on Lipsky's observation of street-level officials as the 'true policymakers' (Lipsky, 1980). What studies on either one of these forms of discretion illustrate is how on the organisational level factors such as resource allocation, stakeholder relationships, (internal) politics, but also organisational interests, culture and values play a central role in the translation of laws and policies into frameworks for street-level action. Furthermore, the impact and power of top managers in making strategic choices and therewith affecting street-level decision-making cannot be overlooked as their choices can directly lead to changes in the organisation's performance and direction. The following sections will discuss the impact of organisational and managerial dynamics withing the RNM on the street-level implementation of Article 23 SBC.

5.2.1 From border control to migration control in the Dutch intra-Schengen borderlands

With the development and the ratification of the Schengen Agreement, the RNM – a gendarmerie-style military-police organisation performing both civil and military duties – was forced to re-assess its role at the now intra-Schengen borders.[1] Before 'Schengen' the RNM were, amongst other tasks, working as border guards at the different borders between the Netherlands and other countries. Whereas the permanent border checks at the Belgian – Dutch border had already disappeared after the entering into force of the BENELUX agreement in 1960, the signing of the Schengen agreement obviously meant that permanent border checks at the German-Dutch border would *also* stop. To prevent this new reality from leading to large-scale lay-offs of RNM personnel, while also being concerned about the possible risks of lifting the

permanent border checks, the government – and in particular the Ministries of Justice, Internal Affairs and Defence – reached an agreement about the relocation of the former border guards. Other than working at the border, they were now tasked with monitoring irregular migration into the Netherlands. Whereas migration control was originally the responsibility of the regular police who, on the local level, also had (and still has) special 'migration police' units, the RNM was presented as having specific knowledge and expertise of border dynamics and thus better equipped for having the independent authority to act as 'border police officials' in the internal borderlands behind the intra-Schengen borders. This led to the start of the so-called 'Mobile Aliens Monitor' (MAM) in 1994 (See: De Weger, 2006 for an in-depth description of the development of the border police task – *grenspolitietaak* – of the RNM). Despite initial deliberations between the aforementioned Ministries to also equip the RNM with crime control powers – similar to the national police – in the intra-Schengen borderlands, under the MAM the RNM initially only had the power to randomly check people entering the Netherlands for their migration status. The aim of the MAM was to combat and prevent irregular migration into the Netherlands and, with this in mind the administrative legal foundation of the MAM, the Dutch Aliens Law (*vreemdelingenwet)* and the Aliens Decree (AD) (*vreemdelingenbesluit)* stated that the MAM checks had to take place shortly, within a 3-kilometre range, after an individual crossed the border into the Netherlands to prevent the possibility of mingling with 'other inland traffic'. In so doing, the Aliens Decree tried to demarcate the difference between the checks that were exercised by the RNM under the MAM and the immigration checks that were carried out within the country by the migration police unit of the national police. The checks were conducted at the land borders by checking incoming traffic at highways and other main roads into the Netherlands, but also by checking incoming intra-Schengen trains, planes, and boats.

5.2.2 Organisational re-branding and mission push

As will be discussed in Section 5.3., based on case law by the Court of Justice for the EU, some of the parameters of the MAM changed over time but its legal foundation, rooted firmly in Dutch migration law, remained *almost* the same. Almost, because in 2006 the aim of the MAM was expanded to no longer *just* combating and preventing irregular migration but also to combating the crimes of human smuggling and identity (documentation) fraud. The RNM argued that since these crimes were encountered often during MAM checks, it would make more sense

and be more efficient if the RNM could handle these cases themselves other than having to call for back up by the National Police to hand the cases over to them. As far as it concerned other forms of cross-border crime such as money laundering, human trafficking or drug trafficking, the RNM did not have the independent authority to act against these phenomena.[2]

INTERMEZZO: WEARING TWO HATS – MIGRATION OFFICERS AND CRIMINAL INVESTIGATIVE OFFICERS

Before continuing the analysis of the organisational decision to change the name of the MAM, it is important to take a closer look at the complicated legal framework in which RNM officers had – and still must – operate. RNM officers officially are – alike police officers – so called 'investigating officers' according to Article 142 of the Code of Criminal Procedure. All investigative officers are authorised to engage in criminal investigations. Yet, following Article 4 section 1f of the Police Act, while performing Mobile Security Monitor (MSM) checks, for RNM officers the exercise of the investigative (crime control) powers is curbed by their official task according to the Aliens Act and Aliens Decree.

Put simply, as migration officers, RNM officers are allowed to use the powers attributed to them under the MSM only to combat illegal stay, identify fraud, or combat human smuggling. They are not allowed to stop a vehicle based on suspicions of any other form of cross-border crime, such as human trafficking or drug smuggling. Doing so would constitute a misuse of competence by employing the discretionary power to stop and search a vehicle under the MSM to achieve a purpose other than that for which that power was originally conferred.

Yet, to complicate things, when an RNM officer, unprompted, stumbles upon a criminal act – other than identity fraud or human smuggling – while performing the MSM check, the fact that they indeed are also investigative officers allows them to, under these circumstances, switch from an immigration officer into a police officer and start conducting a criminal investigation. The latter means that the RNM officer must notify the driver of the changed nature of the check and that he or she is now suspected of having committed a certain crime and has the right to remain silent. In Dutch, this practice is referred to as the *leer van de voortgezette toepassing*, or the "continued application of powers" doctrine.

The latter could, for instance, be the case, if an RNM officer sees a weapon or drugs in the car while asking the driver for their ID. Whereas the reasons to originally select and check the car fall under the scope of the MSM, while performing his legal powers under the MSM, the RNM officer is put in a situation where he spontaneously comes across a criminal act not falling under the scope of the MSM. Since it would be highly undesirable to ask RNM officers to ignore this, the Dutch Supreme Court has ruled that in these circumstances law enforcement officers, including the RNM, have the authority to 'switch hats' from administrative control to crime control (Luchtman, 2007; van der Woude & Brouwer, 2017).

As of 2008, an interesting shift is visible in the political and organisational discourse around the activities of the RNM in the intra-Schengen borderlands. All of a sudden, the checks are no longer referred to as the MAM, which was directly linked to the central aim of the checks as a means to capture 'illegal aliens'. The new name that was used was the 'Mobile Security Monitor' which seemed to indicate a shift away from the administrative – immigration law – focus of the checks towards a crime control and national security focus. Yet, with the legal foundation of the MSM being still the same and not being expanded, the name change *in practice* did not change a thing. Or at least, it shouldn't have. As will be illustrated in the next chapter, the discretionary decision to change the name as part of a rebranding of the RNM as a crucial actor in the field of national security, had a significant impact on the decision-making rationales of street-level RNM officers working in the intra-Schengen border areas (also see; van der Woude & Brouwer, 2017; Van der Woude & van der Leun, 2017).

Within the organisation, the name change is explained by several reasons that all seem to point to the interplay between decisions of organisational discretion and decisions of managerial discretion. Around 2006 – right after the legal foundation of the MAM was expanded – several higher placed officials within the organisation who were involved in organisational strategy and policymaking, supported the ambition for the RNM to actually become *more* than just the guardians of migration control. With, more in general, decreasing national funding for the armed forces – of which the RNM are also part – there was the urge to make clear what the importance of the RNM in the intra-Schengen borderlands was to prevent the RNM from losing this task and therewith also part of its budget. Against this background, advised by some people

in his direct staff, the Commander in Chief of the RNM at that time suggested changing the name. The 'old' name of the mobile checks, according to officials that were operating directly under the new Commander in Chief, was seen as problematic as it would imply that the RNM was there to 'control' irregular migrants and that this was something that made the street level RNM officers uncomfortable. The discomfort had nothing to do with the idea of needing to control irregular migration per se, or with the possibility of ethno-racial profiling as a result of it, but more so with the fact that the old name did not adequately 'sell' the importance of the mobile police checks in the intra-Schengen borderlands. In line with the fact that RNM officers were formally also investigative officers and thus able and allowed to engage in crime control (see intermezzo), coining the intra-Schengen checks, more in terms of (national) security than in terms of immigration and border control was seen as the way to do this. As noted by some of the senior executives of the RNM during interviews, it was necessary to be clearer about the 'identity' of the RNM. The agency's 'split' identity between the different Ministries – Internal Affairs, Justice, and Security and Defence – made it hard for national policymakers and politicians to see the added value of the RNM compared to, for instance, the National Police and the Military. Since RNM officials would neither refer to themselves as police officers nor as military officers, the leadership of the RNM came up with the division that the National Police were there to safeguard the security on the *streets* whereas the RNM was there to safeguard the security of the *state*. The slogan – that was often shared with a sense of pride – was indicative of the image of the RNM as the guardians of a nation increasingly under siege of dangerous individuals and 'crimmigrant others'.

Whereas the re-branding of the MAM to the MSM did not lead to the attribution of (new) or independent criminal investigative powers to the RNM while operating in the intra-Schengen borderlands, the RNM hoped that its new focus would illustrate their ambition and the necessity to in fact eventually trigger a legislative change that would lead to an expansion of their powers. Presenting themselves as the 'first line of defense' for 'B.V. Nederland' – the latter translates into the Private Company of the Netherlands – did not align with the limitations of the RNM's criminal investigation powers in the intra-Schengen Borderlands. Whereas an expansion of the legal mandate of RNM officers tasked with the MSM has not happened *yet*, in light of the ongoing securitisation of migration combined with rising nationalism and an overall turn to the 'right' in Europe, including in the Netherlands, it only seems to be a matter of time. What is interesting to note is that the reference to the country as a private company, a business, falls in line

with the economic underpinnings of Schengen. The country, the business, needs to be able to grow and flourish as a result of the economic benefits if the principle of free movement, but not at all costs.

In their analysis of managerial discretion in public agencies, Vaughn and Otenyo (2007) describe the urge of (newly appointed) high (elected) officials in leadership positions to choose new directions for their agencies and how this can lead to (new) opportunities for exercising discretion which, in turn, have to be further translated into actual organisational policy by senior executives (also see Aberbach & Rockman, 1976). This might be an explanation for what happened within the RNM around the reframing of the MSM. This reframing of the agency's focus away from its original mandate can be seen as an example of what has been called mission creep (cf. Gouldner, 1954; Messinger, 1955; Selznick, 1949; Zald & Denton, 1963). Such a 'displacement' of an agency's original goal(s) over time can be triggered by a variety of dynamics, amongst which the need to adapt to pressures in the (political) environment as well as internal organisational logic such as a change in leadership. Looking at the driving forces and reasoning behind the developments leading to the existence of the MSM, it seems more accurate to say that organisational and (senior) managerial discretion sparked by the possibility of losing budget led to a mission *push*. Knowing how managerial discretion plays a crucial role in shaping the organisational environment and how their actions set the tone for discretionary decision-making at lower levels, especially in hierarchically organised agencies such as the RNM, it is to be expected that decisions made in the higher leadership and management echelons of an organisation will affect discretionary decision-making at lower levels.

5.2.3 Leadership legacy & the technology creep

Another example of the impact of the wielding of organisational/managerial discretion is the implementation of a so-called 'smart camera' system called AMIGOBORAS. When starting the fieldwork in the intra-Schengen borderlands in 2013, various senior executives within the RNM were excited about the fact that we, as researchers on-site, would get to experience the further implementation of the aforementioned smart camera system. The system was said to aid the street-level RNM officers tasked with the Article 23 SBC checks in their decision-making. As described in detail by Dekkers (2019) the introduction of the camera system should be seen in conjunction with the larger reform within the RNM towards more intelligence-led policing in the intra-Schengen borderlands. Whereas this reform at large can be seen as a

form of 'in-between' discretionary decision-making with possible ramifications for street-level decision-making, this section will limit itself to the discussion of the decision to use these cameras. The introduction of the camera was only affecting the MSM checks as they were conducted on the roads in the intra-Schengen borders while the introduction of intelligence-led policing as such affected the RNM's many other operational areas as well.

5.2.3.1 Smart cameras to enhance street level decision-making

AMIGOBORAS is an acronym of what can be translated as 'intelligence led policing – border observation, registration and analysis system'. After running a pilot with smart cameras in 2007, in 2012 the camera system was officially introduced as a means to make the MSM checks more effective, efficient and objective. The cameras were installed over 15 highways that crossed between the Dutch-Belgian and Dutch-German border. The system was presented as having three functions: gathering and analysing information on passing traffic, assisting in the selection process during MSM checks and an alerting system that, in case of an emergency, could notify the RNM about the cross-border movement of (a) specifically identified vehicle(s). A lot can, and has been, said about the smart camera system (see: Dekkers, 2019), yet, in line with the central focus of this book, this section will focus on illustrating how the decision to introduce the cameras can be seen as the wielding of managerial discretion and crucial for the movement of the apparatus.

The link between discretion and the use of the cameras was explicitly made in official documentation stating that the cameras were to be seen as an 'effective addition to the professional experience of individual RNM officers'.[3] Despite being tested as a system to support migration control as well as crime control in the aforementioned pilot, the use of the system when it was eventually implemented in 2012 was rooted solely in migration control. By providing RNM officers responsible for the selection of vehicles for a check with information on whether or not a vehicle that crossed the border into the Netherlands was considered a 'hit' because it matched a profile, the idea was that the cameras would support and enhance the discretionary decision-making process of individual RNM officers. Profiles created based on factors such as vehicle size, traffic patterns and license plates would be 'uploaded' into the cameras. Given the fact that the use of the cameras was rooted in migration control, these profiles were aimed to identify interesting vehicles in light of the core task of the RNM: combating irregular migration and the

so-called 'related forms of criminal behaviour', e.g. human smuggling and ID fraud. If a car matched the profile, the camera would give off a signal to an RNM officer behind a computer. This officer, who was not physically present at the location of the checks, would then decide whether to send the 'hit' through to the RNM officers on the ground. Based on the description of the vehicle, the RNM officers in the intra-Schengen border area where the checks were conducted would find the car to then see if the vehicle was indeed worth checking. Since the camera system could, for privacy reasons, only provide information about the type of car, images of the hood of the car and the license plate and not of its occupants, the RNM officers who were positioned right behind the Dutch border to monitor incoming traffic always had the final say in whether or not to select the car for a further examination. Or, put differently, the discretion to select a car would still lie with the street-level RNM officer.

For a system that was meant to streamline and enhance the effectiveness of the MSM checks, the system thus seemed to have a rather limited range in terms of what it could do. Nevertheless, the system – which cost around €21 million (RNM, 2012) – was presented as a crucial step in the further technological development and professionalisation of the agency, and particularly the MSM. While reflecting on the decision to use this system several, at the time, senior executives working either for the RNM or the Ministry of Justice & Security, were sceptical about the decision. They all noted the dissonance between the image of the camera system as it was presented to the street-level officers and the reality of the limited capacity of the system that was due to the – at the time of implementation – already outdated software of the system.

During presentations that were held at the different brigades as part of the implementation process, the image was painted of a system that would be able to 'real time' monitor vehicles crossing the border and which, because of the rich information underpinning the profiles, would see things an individual RNM officer could not see. The system was presented as insurance for more successful MSM checks in terms of officers finding irregular migrants, (victims of) human smuggling and fraudulent ID cards. In reality, due to a very limited number of data analysts, the RNM did not have the capacity to make very detailed profiles based on the available data, which would immediately undermine the success of the system. This, as well as the limitations of the software of the system that made it not compatible with other internal systems used by the RNM, was known by several senior executives. They explained the push for using this system by the previously mentioned felt urgency of the organisation to clearly position and identify itself as a crucial player in the

intra-Schengen borderlands and in the larger realm of national security. Furthermore, a camera-system to aid the policing of the intra-Schengen borders was unique within Europe which led to a lot of attention and interest from border police agencies from other Schengen states. The latter obviously supported the framing of the RNM as a principal factor in the safeguarding of the intra-Schengen borders. Several senior executives mentioned how delegations from several Schengen countries, mostly located in Northern and Western Europe, came to the Netherlands to hear about the smart camera system and to see it 'in action'. The RNM was successful in peaking the attention not only of similar agencies in other European countries but also of different politicians who were soon to raise questions about whether the scope of the camera system could not be widened to also be used for crime control purposes. The idea would be to connect the camera system with existing databases used by national security partners such as the National Police and the Intelligence Agency. In such a scenario, 'hits' would not just be possible cases of irregular migration but also criminal cases. Whereas using the camera system this way fit in seamlessly with the rebranding of the checks in the intra-Schengen borders as *security* checks, up until the day of writing this manuscript the cameras are still not operating as such.

Understanding the movement of the intra-Schengen mobility control apparatus requires an understanding of how organisational politics – just like national and European politics – affect its movement. The decision to introduce the smart camera system can be seen as an example of a managerial discretionary decision which, in this particular case, might be linked to a shift in the higher leadership of the RNM and the known wish of newly incoming leadership to leave a permanent mark, or at least a lasting impression, on the organisation. Such marks, or legacies, are often related to the felt need by new higher placed officials to innovate and transform the organisation. Especially within military organisations, transformation has become the *process du jour*, pushed by everyone in the higher leadership echelons trying to affect fundamental changes in the organisations capability through the introduction of new doctrine, technology, new concepts, and new structures (Jablonsky, 2001; Wong et al., 2003). Although, in practice, the smart camera's did not seem to affect the discretionary decisions of street-level RNM officers much, it is important to note that decisions driven by the wish to innovate or to transform the image of the organisation can – in more or less subtle ways – influence operational processes. In so doing, these decisions can also influence the way in which the discretion granted to street-level border officials gets used and wielded. Located 'in-between' the national legislature and the street-level RNM officers the organisation as such is

thus an important locus of in-between discretion to unravel and unpack in order to fully grasp what is happening 'on the ground'.

5.3 Changing discretion through case-law?

The next form of 'in between' discretion to be discussed in relation to the intra-Schengen mobility control apparatus is the discretion exercised by the courts. In relation to the application of Article 23 SBC, this means both the discretion exercised by the Court of Justice for the European Union as guardian of the implementation of European rules on the national level, as well as the discretion exercised by national courts regarding national practices in relation to the Article 23 SBC checks. As explained in Chapter 3, there is a great amount of scholarship – especially in the fields of law, criminology, and socio-legal studies – addressing judicial discretion. These studies tend to focus on either mapping the outcomes of judicial decision-making or on trying to understand the several factors that influence judicial decision-making. This is not how judicial discretion is approached in the context of this book since discretion is taken as a given, as something that is entrenched in (in)formal rule(s) application and interpretation. In other words, I am not so much interested in unravelling the exact (legal) process(es) of judicial decision-making by either the CJEU or national judiciaries but more so in understanding if, and if so, how judicial decisions can play a role in the larger dynamics of governance through discretion and what this means for the movement of the apparatus at large.

5.3.1 Curbing discretion by nudging national legislatures[4]

As explained in the previous chapter, due to the discretion granted to the member states and policymaking bodies – there are great differences in the way in which Article 23 SBC is regulated throughout Schengen. While in some countries the agencies responsible for the 23 SBC checks act under criminal law, in other countries an administrative mandate is leading. As illustrated in the previous section, in the Netherlands, the RNM is acting on a *predominantly* administrative mandate but has criminal investigative powers as well. In some countries, specialised border guards oversee the checks, whereas in other countries, it is immigration agents, police officers, military officers or, like in the Netherlands, a combination of these categories. In an attempt to get more clarity on its interpretation, over the years cases have been brought before national courts questioning decisions made as part of a 23 SBC check. In several

instances, the national judiciary turned to the Court of Justice for the EU (CJEU) for more clarity on whether the decisions and practices by the national agency responsible for the exercise of the 23 SBC checks were in line with the SBC, or not. In this section, I will discuss cases against France, the Netherlands, and Germany to illustrate how in all these cases the decision of the CJEU functioned as a form of in-between discretion possibly directly impacting discretionary decisions made by street-level officials.

5.3.1.1 France: The combined cases of Melki & Abdeli[5]

Following the adoption of the Schengen Implementing Convention in 1990, French Interior Minister Charles Pasqua proposed a new measure to 'compensate' for the lifting of internal borders inside the Schengen Area: the creation of a 'Schengen zone' in which identity checks would be facilitated. The measure was created by Law 93-992 of 10 August 1993 and applies to every national French border inside the Schengen Area. A line was drawn inside French territory, 20 km away from the border; inside this zone, police officers from the Police Aux Frontières (PAF), the French border police, are allowed to conduct checks without any justification. As in the Netherlands, also after Schengen, the control of people's movement in France was still entrenched at the edges of the territory (Casella Colombeau, 2017). The legislative amendment essentially resulted in adding an exception to the Code of Criminal Procedure, which otherwise specifies precise cases in which identity checks may be conducted. The checks conducted inside this zone, on the other hand, were deemed 'exceptional' and legitimised by the border's proximity. Pursuant to Article 78-2, fourth paragraph, of the French Code of Criminal Procedure police authorities, within the 20 km area from the internal land border with another Schengen state, were permitted to check the identity of any person in order to ascertain whether they carry and produce papers and documents. Their purpose was to establish the identity of a person, either in order to prevent the commission of offences or disruption to public order, or to seek the perpetrators of an offence. Those controls had to be based on general information and police experience to show the particular benefit of checks in those areas. The checks were conducted based on police information – coming from previous police inquiries or from information obtained in the context of cooperation between the police forces of different member states – which were used to guide the placement and timing of the control. This was to ensure that they had the character of non-systematic spot checks. The French way of policing intra-Schengen borders was called into question in the

combined cases of Melki and Abdeli (CJEU 22 June 2010, C- 188/10 Melki & Abdeli, ECLI: C: 2101:363). On Monday, 22 March 2010, the PAF pulled over a Citroën C4 with five adult males of northern African origin in it and the officers went ahead to question everyone in the car. No weapons were found and there was no resistance to interrogation or physical inspection, but they did find that two of the men – Mr. Aziz Melki and Mr Sélim Abdeli – were unlawfully residing in France. Both men were arrested during one of the intra-Schengen checks conducted by the Police Aux Frontières near Saint-Aybert – a pre-Schengen frontier post between France and Belgium (Caruso & Geneve, 2016). Mr Melki and Mr Abdeli nevertheless challenged the legitimacy of their arrest by claiming that the PAF was performing permanent border checks and that this was a breach of the principle of free movement. When brought before the CJEU, the court stated that despite the fact that the French checks were not carried out at the border, details and limitations on the policing powers – in particular in relation to the intensity and frequency of the controls which may be carried out on that legal basis – were lacking and that this was problematic. According to the CJEU, France was not able to guarantee that the spot checks in practice were not carried out with an effect equivalent to border checks as the national legal framework authorising the controls irrespective of the behaviour of the person concerned and of specific circumstances giving rise to a risk of breach of public order – Article 78-2 of the Code of Criminal Procedure 'contains neither further details nor limitations on the power thus conferred – in particular in relation to the intensity and frequency of the controls which may be carried out on that legal basis' (section 73 of the ruling). As a result, according to the Court, it was not clear how in the application of that power by the PAF it could be prevented that *in practice* these checks would indeed be used as forbidden permanent border checks. The Court also underscores that – in the spirit of the Schengen Agreement – European legal provisions regarding the policing of intra-Schengen borders and the free movement of people across these borders precludes national legislation and that, as a result, national legislation should be formulated in a way that it aligns with the relevant European legislative frameworks.

The ruling of the CJEU, in this case, is a clear example of in-between discretion as the ruling urges member states, in this case, France, to reassess their national implementation of the discretion that has been granted to them by the European Commission in the context of Article 23 SBC. The CJEU furthermore gives direction as to what they want the French legislature to take a closer look at in its national framework. The national framework needs to be more clear on how it will be prevented

that the checks in practice will be used as a form of permanent border control by providing more clarity about the intensity and the frequency of the checks. The CJEU is thus urging the French legislature to curb the wide discretion as it could be perceived on the implementation level when performing the checks. Following the decision of the CJEU, the French legislation was changed to restrict identity checks in border areas in terms of duration, space, and purpose. Controls could only be conducted for a maximum of six consecutive hours in the same location and could not be systematic (Bernier, 2018, 56).

In a 2010 report on the functioning of title III of the SBC, which is the title on internal borders of which Article 23 SBC (at the time still Article 21 SBC) is part, the European Commission presents the results of a survey sent out to all member states. In the section discussing the use of Article 23 SBC, the Commission observes that the frequency of checks carried out in internal border zones compared to other parts of the territory confronted with a similar situation is an important element in determining whether or not the exercise of police checks in practice actually constitutes *border* checks. The Commission furthermore notes that, in response to the survey, member states were not able to give information about the frequency nor the intensity of their use of Article 23 SBC checks making it hard to assess what is really going on in the different intra-Schengen borderlands. In reaction to the Melki/Abdeli ruling the Commission furthermore states that 'A strict definition of the appropriate frequency and regularity with which checks may be carried out is not possible since this should reflect the security situation in the territory of the member state concerned' (European Commission, 2010/554, p. 6) Nevertheless, in the same section, the Commission also states that it needs more information from member states on the reasons and frequency of checks carried out in internal border zones to keep an eye on the compatibility with the EU framework. This reaction of the Commission is exemplary of the political nature of the intra-Schengen borders in relation to the sovereignty of the member states. The Commission seems to try to both acknowledge and appease the member states by reaffirming the uniqueness of each national context and specific security needs in these contexts, while at the same time also acknowledging the CJEU ruling by underlining the need to monitor these national practices.

5.3.1.2 Netherlands: The case of Adil[6]

Following the precedent set by the CJEU in the aforementioned case, the Dutch Council of State also asks the CJEU to shine its light on a case concerning the Dutch use of Article 23 SBC by the RNM. In the case,

Mr Adil, an Afghani national, was stopped on March 28, 2012, by the RNM who were carrying out MSM checks in the 20 km area around the Dutch – German border. Mr. Adil was in a vehicle with a German license plate and was urged to stop alongside the highway where the RNM were conducting their checks. Upon asking Mr. Adil for his papers, it quickly became clear that he did not have a legal permit that allowed him to travel into, or stay, in the Netherlands. Following this conclusion, Mr. Adil was apprehended and placed in immigration detention. According to information provided by the RNM, the MSM had taken place for a duration of one hour during that day, and during that period, only two vehicles were stopped. Mr. Adil argued that his detention was unlawful due to the unlawful use of the Dutch government of Article 23 SBC which, according to him, was conducted in a way that was equivalent to permanent border control and thus a breach of the SBC and the Schengen Agreement. As the Dutch way of implementing Article 23 SBC differed from the French in terms of legal foundation, the highest general administrative court in the Netherlands (the Administrative Jurisdiction Division of the Dutch Council of State) felt urged to ask the CJEU for guidance in assessing the lawfulness of the MSM in light of the SBC, but also in light of its previous ruling in the case against France. The CJEU decided that other than in the case of France, the Dutch national framework provided enough clarity on how to ensure that MSM in practice would not be used as a form of permanent border control. Following the Melki/Abdeli ruling, and the changes implemented by the French legislature, the Dutch legislature had also changed the legal foundation of the MSM. Article 4.17a(5) of the Aliens Decree 2000 stated that RNM officers could not carry out the MSM for more than six hours a week and for 90 hours a month. During the RNM checks, they are only allowed to stop a selection of vehicles crossing the border. Based on this, the Court notes that '(…)those detailed rules and limitations are capable of affecting the intensity and frequency of the checks which may be carried out in the border area by those authorities and seek to guide the discretion enjoyed by them in the practical application of their powers' (section 87 of the ruling).

The changes that had been made in the Dutch legal framework guiding the MSM in response to the Melki and Abdeli ruling were seen as sufficiently clear in providing guidance for street-level border officials on how to use the wide discretionary powers attributed to them under the SBC. The national framework was not seen as potentially at odd with the Schengen Agreement and, at least on paper, the RNM was clearly limited in the exercise of their powers to stop and check people in the intra-Schengen borderlands. Whilst the principle of free movement thus

seemed to be properly guaranteed under the Dutch legal framework and the practical application thereof, as will be discussed in the next section, about a decade later the question would be raised whether the Dutch national framework was in fact indiscriminately upholding the principle of free movement.

5.3.1.3 Germany: The case of 'A' & 'Touring Tours und Travel'[77]

Germany, like the Netherlands, has a long tradition of strictly controlling citizens and non-citizens at the border. Like the RNM, the Bundesgrenzschutz (BGS), the German Border Police, are allowed to perform checks on individuals not in a 20, but in a 30 km zone behind the borders. According to paragraph 23(1) of the 'Gesetz uber die Bundespolizei' the Bundesgrenzschutz may check the identity of a person '[…] within 30 kilometres of the border for the purpose of preventing or terminating any unauthorized entry into Federal territory or preventing criminal offences within the meaning of points (1) to (4) of Paragraph 12(1)'. The offences the article refers to are all related to border crossings and border security. In the 2017 judgment in the case of 'A', the CJEU found the German checks as conducted by the Bundesgrenzschutz not in line with Article 23 SBC (CJEU C-9/16, June 21, 2017). After crossing the bridge from Strasbourg (France) to Kehl (Germany), 'A' was stopped by the Bundesgrenzschutz for an identity check. He, according to the assessment of the Bundesgrenzschutz, aggressively resisted cooperation and was arrested under the offence of resisting an enforcement officer. According to Paragraph 113(1) of the Strafgesetzbuch (Federal Law Gazette (Bundesgesetzblatt, BGBl.), Part I, 1998, p. 3322.), a person who, by force or by threat of force, offers resistance to or attacks a public official or soldier of the German armed forces charged with the enforcement of laws, regulations, judgments, judicial decisions or orders and acting in the performance of such official duty will be liable to a sentence of imprisonment of up to three years or a fine. The Amtsgericht Kehl (Local Court, Kehl, Germany) ruled that in order to convict and punish 'A' for the offence it first needed to be established that the acts of the police officers acting in the performance of their official duties were lawful. Whereas the Amtsgericht believed the check by the Bundesgrenzschutz officers on the identity of 'A' based on paragraph 23(1) of the Law on the Federal Police was lawful, it had doubts as to the compatibility of the provisions with EU law which has priority. If those doubts were well founded, the use of force by 'A' to avoid a check on his identity would not be punishable under paragraph 113 of the German

Criminal Code. The Amtsgericht therefore referred the case to the CJEU for a preliminary ruling on the lawfulness of the intra-Schengen identity checks as performed by the Bundesgrenzschutz. According to the CJEU, a clear and precise framework 'guiding' the responsible officers in the enforcement of their task was lacking in Germany. As a result, the CJEU had no proof – and thus no reason – to rule out the possibility that the practical exercise of the police powers granted under German law would have an effect equivalent to border checks.

A year later, another German case was brought before the CJEU. In this case, known as 'Touring Tours und Travel' (CJEU C-412/17 & C-474/17, 13 December 2018), the Federal Administrative Court saw a need for clarification of the SBC. In national proceedings, several transport companies providing cross-border bus services crossing the German-Belgian and German-Dutch border brought actions against the Bundesgrenzschutz after being fined for not checking their passengers' identity documents prior to boarding following paragraph 63 of the German Residence Act. The Transporters contended that the national laws obliging the transporters to execute these checks violate the SBC's prohibition to conduct systematic border checks. The Bundesgrenzschutz argued that identity checks by transporters do not amount to border controls since the mere check of the identification documents by bus drivers is not comparable in their manner and intensity to those checks executed by public officials. The Bundesgrenzschutz further explained that checks conducted by transporters did not amount to border checks as defined in Art. 7 Regulation 562/2006 as they were not conducted by authorities who possess police powers. The Federal Administrative Court turned to the CJEU to get more clarity about the fact checks could be qualified as having an equivalent effect to border controls if they are neither carried out at the border nor on German territory, but on the territory of another member state (from which the bus would depart to Germany). Furthermore, the Federal Administrative Court asked for clarification about the claim by the Bundesgrenzschutz that checks conducted by private parties which do not possess powers conferred by public law do therefor not fall within the SBC and thus could never lead to the systematic border checks. On both accounts, the CJEU proved that the interpretation by the Bundesgrenzschutz was false (sections 44ff and 49ff of the ruling). The CJE furthermore concluded that due to the objective of permitting and prohibiting entry, the systemic execution of the checks, the lack of a legal framework sufficiently limiting the intensity and frequency and the close connection to crossing the internal border, the checks at hand did have an equivalent effect to border controls (section 54ff). The practice had to stop right away. Although the

Bundesgrenzschutz stopped asking the transporters to conduct identity checks, the national legal foundation that allowed them to do so is still intact (Stiller, 2021).

In-between discretionary dialogues

The case law of the CJEU shines light on how countries are trying to use the 'conscious incompleteness' – the discretionary space – built into the SBC (see Chapter 4) and how they play with the multi-scalar nature of Schengen in the absence of clear jurisdictional boundaries between the national and the supranational legal frameworks that govern intra-Schengen border control. Within the EU legal framework on migration, discretion awarded to national administrations is subject to the control of national courts. In all three cases, national courts saw themselves faced with questions pertaining to the application of Article 23 SBC which made them trigger the preliminary reference procedure as organised in Article 267 of the Treaty on the Functioning of the European Union (TFEU). This procedure instigates a dialogue between the CJEU and the national courts (Bornemann, 2019) to, for instance, get more clarity on the scope of the discretion attributed to the national authorities by the European legislature (Thym, 2019). Given the pluralistic nature of the EU legal system, this dialogue between national courts, the CJEU and the national legislature is central to upholding the EU's and the Schengen Area's core premises of harmonisation, solidarity and burden-sharing. Courts can have a variety of politico-strategic and non-strategic reasons to decide to refer to the CJEU or not (Krommendijk, 2019) which makes invoking Article 267 TFEU in itself also an in-between discretionary decision by the national judiciary. The latter might explain why there are only a handful of CJEU cases discussing the interpretation of Article 23 SBC whilst the European Commission observed in 2010 that there was a lot of diversity in the way in which member states used the discretion granted to them under Article 23 SBC and that it did not have a clear grasp of whether or not national legal frameworks would sufficiently prevent Article 23 SBC checks from, in practice, being used as a form of permanent intra-Schengen border control.

In the few cases interpreting the application of Article 23 SBC in the different national contexts, the CJEU seems to follow a rather clear and strict line of reasoning by consistently stating that the national framework that member states use to act in line with Article 23 SBC must 'guide the discretion that national authorities enjoy in the practical application of their powers' and prevent these checks from being a 'veiled' form of permanent border control. The CJEU states that the

checks should be conducted randomly and based on 'general police information' and 'experiences regarding possible threats to public security'. In terms of providing clarity and guidance, the usefulness of these conditions is questionable as they are still incredibly open and rather vague. While phrasing decisions in broad and abstract terms allows the CJEU to navigate the evolving landscape of EU law and the differences in legal systems between the member states, the ambiguous language simultaneously fosters uncertainty about the precise implications of its judgments. This uncertainty, in turn, may lead national actors to approach CJEU rulings with caution and interpret them through the lens of their own legal systems' specific contexts. The case-law around the application of Article 23 SBC shows that France and the Netherlands amended their national framework following the decision of the CJEU regarding the clarification of the intensity and the frequency of their national versions of the Article 23 SBC checks. It is unclear to what extent the ruling has led to concrete changes in the national legislative frameworks of other member states. Apart from its decisions about Article 23 SBC more generally speaking, the reception and implementation of CJEU rulings within member states are deeply influenced by domestic political dynamics (see, for instance, Kawar, 2023; Klaus & Szulecka, 2021). Governments grappling with domestic opposition or aiming to keep public support may be inclined to resist or downplay CJEU decisions that prove politically contentious or unpopular. In such scenarios, the enforcement of CJEU judgments may face delays, dilutions, or even circumventions through creative legal manoeuvres, thereby undercutting their practical impact (Bornemann, 2022; 2023; Goldner Lang, 2020; Stafford & Jaraczewski, 2022). While the EU Commission in theory has the authority to initiate infringement proceedings against member states failing to adhere to EU law, the process often proves prolonged and subject to political considerations and, as a result, does not seem to have a deterrent effect. Consequently, member states may weigh the benefits of non-compliance against the potential costs, particularly in cases where the CJEU's jurisdiction is contested or when its rulings lack clear precedential value. Although the European Union has the power to fine states for refusing to abide by judgments of the CJEU, or withhold critical budgetary contributions from offending states it lacks a true enforcement mechanism (Stafford & Jaraczewski, 2022). This makes the CJEU's rulings important from a symbolic point of view as they in theory do offer guidance to the national legislature (Bornemann, 2019; 2020), but somewhat questionable in light of their ability to profoundly affect the movement of intra-Schengen mobility apparatus.

5.3.2 Prohibiting ethno-racial profiling in Dutch borderlands

The previous section illustrated why, and how, decisions by the CJEU can be seen as a form of in-between discretion that can affect discretionary decisions by other 'parts' of the apparatus. By discussing a groundbreaking decision by the Appeals Court of the Hague (the Netherlands) regarding the way in which RNM officers reach their decision on whom to stop and check as part of their application of Article 23 SBC and the MSM, this section will illustrate how the decisions of national courts can have a similar effect.

5.3.2.1 Questioning ethnicity as an acceptable criterium for migration control.

Since their first use, the MSM checks had been scrutinised several times – not just for the possibility of the checks being in fact a covert form of permanent border control, but also for the possible discriminatory nature of the checks. These concerns were mostly communicated through complaints filed to the RNM directly or through complaint procedures started with the Dutch National Ombudsman. Despite some of these complaints being granted, other than in relation to the actions of the Dutch National Police a discourse of ethno-racial profiling by the RNM was lacking. In 2021, this radically changed when, following a wider shift in Dutch national discourse on institutional racism, a coalition of NGO's, human rights lawyers and two citizens filed a discrimination claim against the Dutch State. The case was based on the experiences of the two citizens with officers of the RNM while performing the MSM checks on so-called 'intra-Schengen flights' at a Dutch airport. Both Dutch citizens claimed that they were selected for a check because of their ethnicity and that this was part of an institutionalised practice of ethno-racial profiling and racial discrimination. The Dutch State was thus accused of a violation of Article 14 of the European Charter for Human Rights and Article 1 of the twelfth protocol of the Charter.

The case was first brought in front of The Hague District Court which decided in favour of the State – in the case embodied by the RNM – by stating that as long as ethnicity was not used as the *only* criterium upon which the decision to stop and check a person is based, ethnicity could definitely play a role in the discretionary decision-making process of individual RNM officers. Furthermore, the court stated that the aim of the MSM is to prevent irregular stay in the Netherlands by checking the residential status of border crossers. With that in mind, according to

the court, 'nationality can play an important role in determining who to check and ethnicity can be seen as an objective indication for someone's ethnicity'. The Court's ruling was widely scrutinised as it was seen to feed into a nationalistic perspective of the Netherlands as – still – a rather homogenous white country and, in so doing, dismissing and excluding all Dutch citizens with a migration background (NRC 2021; Terlouw, 2020). Although the Court thus allowed the RNM to continue with the MSM as before, the RNM responded in a rather surprising way to the ruling by stating that they would no longer take ethnicity into consideration as one of the criteria upon which a stop could be based (Discriminatie.nl, 2021). The explanation that was given by the Commander in Chief at the time was that the RNM was very aware of the national discourse around ethno-racial profiling by state agencies and the impact this had on people's trust in the state and state agencies. Considering the latter, societal trust in and support for the RNM, the Commander in Chief stated the necessity of reassessing the profiling practices as part of the intra-Schengen border checks (RNM, 2021, Position Paper). This public statement by the Commander in Chief about the discretionary decision-making process on the ground can also be seen as an example of the wielding of managerial discretion and thus a form of in-between discretion. The statement was not (yet) supported by any official (internal) policy, yet it was publicly shared and presented as the 'new' official course of action.

The plaintiffs successfully appealed the decision by the District Court of the Hague which in 2023 led to its judgement being overturned by the Hague Court of Appeals. The Court of Appeals concluded that the way in which the RNM was conducting the MSM checks in the intra-Schengen borderlands *should* be seen as a forbidden form of racial discrimination. The Court ruled that the border police had to change its practices with immediate effect, regardless of whether the State would appeal the ruling (Politico, 2023). The Court of Appeals emphasised that the methods of the border police lead to stigmatisation and feelings of pain and frustration among the people who are selected for border checks, including the two citizens who co-filed this lawsuit. The court also underlined the negative impact of ethnic profiling on society. By stating clearly that an individual's appearance and skin colour cannot be seen as indicative of someone's nationality or residential status, the Court of Appeals corrected the previous ruling. The decision of the Court of Appeals directly affected the way in which MSM checks were conducted as it required the RNM to immediately stop including ethnicity and race as indicators in their

profiling practices. The decision therewith echoed the statement made by the Commander in Chief in response to the first ruling, yet this second ruling created an immediate legal obligation for the State, and thus the RNM, to act accordingly.

5.3.2.2 From crimmigrant profiling to professional profiling?

The ruling by The Hague Court of Appeals is without a doubt a landmark decision in the sense that it is norm-affirming by confirming that all forms of ethnic profiling, also within the context of migration control, are to be seen as discriminatory and as serious human rights violations. It is also clearly a form of in-between discretion that will lead, and has led, to changes in the framework for action as applied by RNM officers while conducting the MSM checks. Following the National Police, the RNM adopted the so-called framework for professional controls (*handelingskader professioneel selecteren en controleren* in Dutch). This framework, that seems to be grounded in the principles of procedural justice (Tyler & Wakslak, 2004) aims to provide guidance for street-level officers in the use of their discretionary proactive powers by focusing on the implementation of four principles: a just selection, an explanation of the selection, a correct approach of and interaction with the selected individual, and lastly, being reflexive of one's own and each other's (inter)actions. The notion of ethnic profiling is captured by the principle of making a 'just' selection, which means that a selection based on race or ethnicity is out of the question according to the framework. In a position paper (RNM, 2023) the organisation acknowledges the challenges in the implementation of the framework and points at the tension between the dual nature of RNM officers as immigration officers as well as investigative officers which tension, according to the position paper, is especially problematic in the context of proactive stops that require officers to act upon something other than a reasonable suspicion of a crime. In other words, although the framework for professional controls is another example of the wielding of in-between organisational discretion triggered by the in-between discretionary decision of the national judiciary, it remains to be seen what the effect of these decisions will be on the street-level discretionary decisions made on the ground in the intra-Schengen borderlands and thus on the actual movement of the apparatus. The latter not only in light of what scholarship on street-level decision-making has shown about the extent to which street-level decision *can* actually be

impacted by (more) rules in regulations, but perhaps even more so given the seemingly racialised concerns and corresponding 'flexible' framework underpinning the intra-Schengen mobility apparatus as explored in Chapters 3 and 4.

5.4 Governing crimmigration through in-between discretionary decisions?

The understanding of the movement of the intra-Schengen mobility control apparatus is further complicated in this chapter. The slowly unfolding image of a complex interplay of discretionary practices within the Schengen Area highlights that the control and regulation of intra-Schengen migration are not merely about the enforcement of rules but about the nuanced decisions that lie between the layers of regulation and enforcement. The examples discussed illuminate how in-between discretion, exercised by both organisational entities and judicial bodies, critically shapes the enforcement landscape beyond the straightforward application of the SBC (cf. Van der Woude, 2020). Tracing the sources and dynamics of in-between discretion reveals the amorphous nature of the intra-Schengen mobility control apparatus, manifesting through the diverse practices and decisions of border agencies and courts. These entities do not merely apply laws; they interpret, bend, and sometimes subvert legal frameworks to serve specific political and organisational agendas. Through decisions regarding resource allocation, rebranding, and the interpretation of laws, these actors subtly but significantly influence how Schengen's ideals of openness and free movement are operationalised and contested on the ground.

This discretionary mapmaking carries profound implications. It underscores the extent to which Schengen's imagined map is not a static artifact but a dynamic construct, continually reshaped by the actors operating within and between levels of governance. By framing the operational and legal boundaries of mobility control, these actors contribute to a map that both facilitates and complicates the ideals of Schengen. Thus, the discretionary decisions of these maybe at first sight not-so-obvious 'cartographers' (de Sousa Santos 1987, also see Chapter 3) only further underscore the paradoxical nature of the Schengen area. While the map imagines a unified and borderless Europe, the discretion exercised by these actors ensures that its contours remain flexible, accommodating both the aspirations of unity and the realities of fragmentation. This flexibility, as Chapters 4 illustrated, is not merely a technical necessity but also an ideological statement about the balance of power and responsibility within the Schengen system. The resulting map does not merely

guide; it reflects the complex interplay between European and national dynamics and involves a continuous (re)negotiation of power and solidarity, balancing solidarity towards the national body versus the Schengen, and hence the European, body. This negotiation process is deeply intertwined with the phenomenon of crimmigration, where discretionary decisions by border agencies and judicial bodies often contribute to a further blurring of the lines between immigration enforcement and criminal law enforcement. Rooted in the larger political and societal frame of securitisation and criminalisation of migration (Chapter 3), the in-between discretionary dynamics as described in this chapter seems to only further enhance the process of crimmigration. The rebranding of the MAM to the MSM by the RNM exemplifies this. The rebranding shifted the focus from purely administrative immigration checks to broader security concerns, reflecting a strategic organisational push to expand the RNM's role in national security. Yet, as a result of this rebranding, the migration checks as carried out under Article 23 SBC were also discursively framed through this lens. This transformation is not unique to the Netherlands. Following the securitisation frame and the criminalisation frame as the leading frames through which migration is being portrayed and problematised, other scholars have also illustrated how immigration control measures are repurposed to address perceived threats to public safety, intertwining immigration enforcement with crime control (Bosworth & Guild, 2008; Stumpf, 2006). The CJEU, as a gatekeeper of the European regulatory framework which allows Schengen member states to conduct checks in the borderlands without specifying whether these checks need to be limited to migration control or crime control, does not seem and cannot seem to play a significant role in countering the blurring of the boundaries between these two 'controls' on the national level.

Notes

1 Performing both civil and military duties and falling under three different ministries – the Ministry of Defense, the Ministry of Security & Justice, and the Ministry of Internal Affairs – the RNM is a rather complicated organization with a wide range of different tasks. Besides the MSM, they also control the country's external border at airports and other ports of entry, join military missions abroad, and are responsible for security at various locations in the Netherlands, including airports, royal palaces, and other high-risk security sites.
2 Parliamentary Deliberations II 2011-12, 19637, 1526.
3 Factsheet Amigo-BORAS, Parliamentary Papers II 2011/2012, 19637, nr. 1492.
4 This section of the chapter – in particular the discussion of the case law – has partially been published against another theoretical background in Van der Woude (2020).

5 Joined Cases C-188/10 and C-189/10, Aziz Melki and Sélim Abdeli v. Préfet du Val-de-Marne and Préfet de l'Eure, Judgment of the Court (Grand Chamber) of 22 June 2010, ECLI:EU:C:2010:363.
6 Case C-278/12, PPU Adil v. Minister voor Immigratie, Integratie en Asiel. Judgment of the Court (Grand Chamber) of 19 July 2012. ECLI:EU:C:2012:508.
7 Case C-404/15, A v. Bundesrepublik Deutschland. Judgment of the Court (Grand Chamber) of 7 November 2017. ECLI:EU:C:2017:845; Case C-451/16, Touring Tours und Travel GmbH and Sociedad de Transportes SA v. Landkreis Harburg. Judgment of the Court (Second Chamber) of 8 February 2018. ECLI:EU:C:2018:128.

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6

DISCRETION AND THE INTRA-SCHENGEN MOBILITY CONTROL APPARATUS FROM BELOW

> "(…) largely unspoken racial connotations of national belonging in Europe are encoded by a cultural logic of othering that promotes either assimilation or exclusion. In this volatile terrain, European nation-states are finding themselves caught between the need to enforce sameness and the fear of absolute difference, with no middle ground."
>
> (Stuart Hall, 2000)

6.1 Introduction

This chapter goes back to where my borderland adventure initially started – studying the street-level decisions of RNM officials tasked with enforcing Article 23 SBC checks in the Dutch-German and the Dutch-Belgian borderlands. As described in Chapter 2, there is a wide array of literature discussing discretionary decision-making on the street level of various organisations. From this literature, and especially Lipsky's (1980) seminal work *Street Level Bureaucracy*, the image arises of the street-level bureaucrat as *the* locus of power and as the 'true' policy-maker. In their comparative analysis of border policing in the US and the Netherlands Vega and van der Woude (2024) illustrate how street-level decision-making by border agents is (unconsciously) racialized and exclusionary. In finding explanations for the blurring of criminal law and migration law, Stumpf (2006) argues that legal systems and procedures exclude and include individuals defined based on a decision maker's vision of who belongs. The decision-maker's vision, and their next decision based on that vision, is key in driving the 'crimmigration apparatus'. It is therefore understandable that Motomura (2011) claimed 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 funnelling immigrants into systems dealing with immigration crime or criminal violations. His assessment of the pivotal

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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 (Graebsch, 2019; Hernandez, 2013; Koulish, 2010; Miller, 2005; Reyes, 2012; Wadhia, 2015; Weber, 2003). Although the process of racial profiling by law enforcement officials is unmistakably connected with the process of crimmigration, it can be debated 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 top-down modus (Lind, 2015). In line with Motomura's assessment, the bottom-up modus attributes the greatest power to the decisions made on the street level. Yet, in their assessment of the criminalisation of migration, Provine and Doty (2011) observe that policy responses to unauthorised immigration reinforce racialised anxieties by creating new discretionary spaces of enforcement within which racial anxieties flourish and become institutionalised. In other words, although they do acknowledge the impact of racial anxiety on the enforcement level, potentially leading to racial profiling, the authors rather see this as the outcome of top-down policy-level decisions. Over the years, more attention has been drawn to the influence of the organisational factors shaping the discretionary decisions of front-line agents. Scholars have flagged that it is crucial to keep sight of the fact that the decisions and actions of these front-line, or street-level agents 'occur largely behind the closed doors of guarded government bureaucracies' (Vega, 2018, p. 2546) and the fact that their decisions are shaped by the moral economy (Fassin, 2005) of their work lives. Based on the previous chapters, it is clear that studying – or assessing – street-level decisions of border officials operating in the intra-Schengen mobility apparatus isolated from the wider political, organisational and legal context in which these decisions take shape and take place, is indeed problematic. Or at least, that studying these decisions in isolation can obscure systemic issues (Hill & Hupe, 2002). While acknowledging the agency of individual border agents, by drawing on the case of the Netherlands, this chapter aims to illustrate how the street level is the location where border games might be most directly felt, both by the street-level state agents as by those who are subjected to their decisions, but not where the rules of the game are made.

6.2 Proactively policing migration and pre-crimmigration

While sketching the larger social surround in which intra-Schengen border control has taken shape, in Chapter 3 several narratives supporting the perceived need to control mobility have been identified. Although

these narratives all address slightly distinct aspects of the perceived connection with mobility and migration, what brings these narratives together is a notion of *risk*. Migration and mobility are seen as risky and potentially dangerous. Whereas this seems to be particularly true for countries located in the Global North, it is surely the case for countries that are part of Schengen. After successfully crossing the external border of the Schengen area, movement within the larger Schengen space theoretically will be unhindered and 'free'. It is this freedom, which ironically is one of the core building blocks of Schengen, that is seen as risky and thus in need of monitoring.

While discussing the policing of migrants in Norway, one of the Schengen member states, Gundhus and Jansen (2020) emphasise the connection between anticipatory actions such as precautionary logic, pre-emption, and preparedness, and the management of migration-related threats and risks. This securitisation of mobility and the person of 'the' migrant has thus led to the adoption of a pre-crime perspective in many border control agencies (Gundhus & Jansen, 2020; McCulloch & Wilson, 2015). Norway's approach is not unique when looking at other Schengen countries. Whereas initially it was mostly countries in Northern and Western Europe that seemed to be taking an overtly risk-averse approach towards intra-Schengen mobility, it is safe to say that such an approach is now dominant throughout the Schengen area as a whole.

Preventing the potentially (undocumented) dangerous migrant from entering the country is seen to require a pre-emptive approach, necessitating border control authorities to take proactive measures to 'mitigate risks and prevent security breaches before they occur' (Weber & McCulloch, 2019, p. 507). While assessing migration and border control in the Global North and the extent to which the process of crimmigration is adequately capturing the different ways in which countries are shaping there policies, Weber and McCulloch reach the conclusion that something other crimmigration seems to be going on. Looking at the broad range of proactive measures countries are implementingwhich are all clearly geared towards anticipating and addressing potential criminal activities or security threats related to migration *before* they occur, the authors find it more accurate to understand this development as 'pre-crimmigration' (Weber & McCulloch, 2019). Similar to the crime complex (Garland, 2001), the mobility control complex as discussed in Chapter 3 revolves around the protectionist notion that 'above all the public must be protected', or, when translated to the context of mobility control, that the nation must be protected (also see Pratt & Thompson, 2008, p. 625).

While looking at the development of migration control in Italy, Campesi and Fabini (2020) state that migration and border policing

follow the logic of being a form of 'social defense'. The endangered nation-state and its (native) citizens need to be defended from *potential* harm by controlling dangerous 'crimmigrant others' which makes it necessary to allow those tasked with controlling mobility to act and intervene before *actual* harm can be done. To adequately act in the context of this social defence framework, law enforcement agencies are equipped with proactive powers to manage and control individuals on the move. The proactive nature of the different border control practices makes these practices highly discretionary on the level of enforcement, yet the narrative and decision allowing for these street-level proactive powers to exist, to begin with, is the result of the framing of migration and mobility in political and public discourse. In other words, the discretion to act proactively in response to migration and mobility on the street level is actively granted by legislatures (Schneider, 1992). What is important to note, is that proactive powers in the context of mobility, migration, or border control can be rooted in different bodies of law: criminal law, migration law and, for instance, also traffic law or labour law. Yet, when shifting our attention to the intra-Schengen borderlands, and particularly the intra-Schengen borderlands of the Netherlands, administrative (migration) law and/or criminal law form the foundation for most of the national proactive practices (European Migration Network, 2018).

Proactive powers are highly discretionary as they can be wielded against anyone based upon the individual assessment of the (border) police agent and do not require probable cause. These powers thus leave room for (border) police agents to, for instance, stop and check a person based on a 'hunch' or their own professional and personal understanding of what constitutes reasonable suspicion. In the context of Article 23 SBC, this can mean different things in different national contexts, depending on how different member states have arranged the enforcement of Article 23 SBC under their national law. When looking at the Netherlands, the enforcement of Article 23 SBC is based on the application of the Dutch Aliens Act in combination with the Dutch Aliens Decree. As noted in Chapter 4, in granting member states the discretion to exercise police powers, the European Commission admittedly came up with some criteria under Article 23 sub an SBC, but a closer look at the criteria immediately laid bare the multi-interpretable nature of these criteria. Article 23 SBC thus sets the stage for proactive policing in the intra-Schengen borderlands as it allows police actors – and under the revised SBC also other 'public' actors – to act against 'possible threats to public security' and to 'aim, in particular, to combat cross-border crime' based on general police information and experience. Considering the aforementioned rationale of border control as a means to prevent

nations against social harm, the protectionist language in Article 23 SBC speaks for itself. By adding to use the powers to combat 'irregular residence or stay, linked to irregular migration' or 'to contain the spread of an infectious disease with epidemic potential' the revised Article 23 SBC only further emphasises the image of Europe as a continent 'under siege' of an invading 'outside' and a group of 'outsiders' against whose mobility (new) obstacles must be erected. Within such a discourse, refugees and other migrants are ambivalently, and sometimes interchangeably, portrayed as victims and dangerous invaders – posing a threat to 'our' safety, economic well-being, cultural identity, language, and values (Dhaliwal & Forkert, 2015; Gilroy, 2012).

6.3 Moments of discretionary decision-making in intra-Schengen borderlands

In her work on Canada, Pratt observed how Canadian border practices are taking place in the 'dark shadow of the crime– security nexus' (Pratt, 2005) and how border agents on the US-Canadian border are also equipped with highly discretionary proactive powers '(…) enabled by protectionist and quasi-chivalrous narratives that represent frontline border officers as benign guardians of public safety, whose pre-emptive and morally charged work protects the endangered nation, local communities and innocents from harm' (Pratt & Thompson, 2008, p. 625). As already noted in previous chapters, a similar narrative seems to surround the work of the Royal Netherlands Marechaussee. Other than the Dutch National Police, whose practices – until rather recently – were more closely scrutinised and problematised by civil society organisations and scholars, the RNM was mostly associated with the military and notions of order, respect, decency, and national security. Interestingly enough, the internal narrative within the organisation plays on the protectionist narrative that is associated with national security as RNM officers always clarified their work as being there 'for the security of the state'. The Dutch National Police, according to RNM officers, has the task to protect 'the security on the streets', which clearly demarcates the role of the RNM as different, and perhaps even more serious and more dangerous, than that of the National Police. Whereas the latter are dealing with crime and criminals 'on the street' (inside the country), the RNM is protecting the country against external threats as they are the self-proclaimed 'first line of defence' against such threats. As mentioned in the previous chapter, the organisational decision to no longer speak of the Mobile *Aliens* Monitor but instead of the Mobile *Security* Monitor fits right in with this framing. When asked to specify the nature

of these external threats, the shared narrative was that the nation needed to be protected against a mixture of 'crimmigrant' phenomena as mobility as such was not necessarily problematised, but more so the way that this mobility could be used by criminals or otherwise deviant individuals. Throughout the fieldwork underpinning this book, this protectionist narrative was not just a narrative that was shared through conversation – it was an embodied narrative in the sense that it clearly guided the way in which most RNM officers perceived and enacted their tasks and roles. The latter is important considering the wielding of their proactive discretionary power.

To understand the width of the discretion that RNM officers have while enforcing Article 23 SBC it is important to underline that to enforce the MSM – so to select a person for check under the national legal framework for an Article 23 SBC check – there is no specific legal threshold that needs to be met. Being a so-called *proactive* power, according to Article 4.17a paragraph 2 of the Aliens Decree RNM officers can exercise this power 'on the basis of information or experiential data on illegal residence after crossing the border'. There is no further specification of the nature of the information or experiential data and there is also not the necessity of for instance 'proving' that there is reasonable suspicion of an irregular entry and/or stay. Although scholars have shown that the 'reasonable suspicion' standard that tends to be used for practices of risk-based/predictive policing in practice also does not seem to entail much and is thus easily met (Pratt, 2010; Stoughton et al., 2022), the fact that there is no legal threshold at all, is seen as potentially problematic in terms of accountability as it allows for decision-making based on inarticulate hunches informed by (unconscious) biases and stereotypes. To illustrate how on the one hand the aforementioned protectionist narrative as created and reinforced through higher managerial discretionary decisions informs the discretionary decisions by RNM officers while on the other hand, a plethora of other 'hunches' informed by personal and professional experience, hearsay, and processes of organisational socialisation do so as well, two key moments of discretionary decision-making during MSM checks will be described more in detail.

6.3.1 Discretionary moment I: Selecting who to check

The first moment of wielding discretion is the moment of selecting a vehicle or an individual for a check of their immigration status. In the context of MSM checks, as carried out on the roads/highways in the intra-Schengen borderlands, this means that a car needs to be selected for a stop and check. The process of selecting a vehicle can be made by an

RNM officer on a motorcycle selecting vehicles just after they cross the border into the Netherlands or by RNM officers in cars driving around in the 20 km zone behind the border. Once a vehicle has been selected and stopped for an MSM check, following Article 50 of the Dutch Aliens Act in conjunction with Article 4.21 of the Aliens Decree, RNM officers are entitled to ascertain the identity, nationality, and immigration status of the driver and passengers. This will typically be done by asking the occupants for their passports or other valid ID and/or status documentation. If the people in the car are able to show valid ID and/or status documentation (not a driver's license as that is not considered a valid ID under Art. 4.21 Aliens Decree), and there are no further irregularities such as open tickets or warrants, the stop – in principle – is finished.

If the individual(s) are not able to hand over any of the required documentation to identify themselves, RNM officers are allowed to search the person concerned by checking their clothing, their bags, or their body for any information that might shed light on their identity and/or immigration status (Art. 50, Sects. 1 & 5, Aliens Act; in relation with Sect. A2/3, Aliens Circular 2013).

6.3.2 Discretionary moment II: Search to seize

Since July 1998, RNM officers are also allowed to search vehicles, a competence laid down in Article 51 of the Dutch Aliens Act. According to this article, they are allowed to search a vehicle if, based on objectively measurable facts and circumstances, they have a reasonable suspicion that the vehicle transports persons falling under the scope of the MSM. So other than for the decision to stop and check a vehicle, the legal threshold of reasonable suspicion does apply to the decision to search a vehicle. Section A2/2 of the Aliens Circular (AC) identifies three objectively measurable sources upon which the required reasonable suspicion can be based:

- Facts or circumstances of the situation under which the person is stopped.
- Indications on the person that is stopped (with indications referring to known police information on the vehicle or the person).
- Experience of the RNM officer performing the MSM.

These criteria are rather vague and elastic. In practice, it comes down to individual officers' discretion on how and when to exercise their stop and search powers. So even despite the required 'reasonable suspicion', RNM officer enjoy a great amount of discretion in their decision-making

on whether to search a car. Nevertheless, the law is very clear on the fact that both the discretionary power to frisk a person or to search a vehicle only could be exercised when the occupant(s) of a vehicle is/are unable to hand over their documentation.

6.4 Shaping moments of discretionary decision-making

Discussing how these two moments of discretionary decision-making related to the implementation of Article 23 SBC played out in practice, it is important to bring awareness to (f)actors influencing how RNM officers enter the borderlands. In examining the wielding of discretion by Canadian border agents, particularly in how they construct reasonable suspicion, Pratt (2010) identifies various 'knowledges' that inform their decisions: Intelligence, Enforcement Culture and, closely tied to these, Indicators, Intuition, and Crimmigrant Stereotypes. The following sections will demonstrate how these different knowledges similarly influence the daily wielding of discretion by the RNM.

6.4.1 The role of 'intel' and a culture of storytelling

Intelligence in different forms, plays a significant role in informing RNM officers before they get out into their vehicles or onto their motorcycles to start the MSM. Every shift starts with an official briefing by the team leader – a higher ranked officer who oversees the team. During these briefings, information – 'intel' – on migration patterns, human trafficking, and human smuggling trends but also other forms of cross-border crime is shared. This information originates from a variety of sources including FRONTEX, the RNM's Intel Unit, the Immigration and Naturalization Service, the Dutch Repatriation and Departure Service but also Eurojust. Besides this, information from the National Police on other forms of crime that have been reported in the borderlands – so domestic forms of crime – can also be shared. Given the RNM's official task and madate in the intra-Schengen borderlands, crime control – other than documentation fraud and human smuggling – should not be the main focus of the MSM checks. Even though RNM officers legally *can* act as criminal investigative agents, they can only do so if a crime is discovered while performing the MSM. By combining 'knowlegde' on crime(s) and migration (patterns and dynamics) together in one briefing without a clear reflection on what this means for the wielding of one's discretionary powers does not seem to be conducive to prevent (further) ambiguity about the mandate upon which RNM officers can act

in the intra-Schengen borderlands. The hybrid nature of the briefing can therefore contribute to a problematic conflation of crime control and migration matters. Such a conflation is particularly problematic troubling from the a (pre) crimmigration point of view. By merging crime-related intelligence with migration-focused information, these briefings risk framing migration itself as inherently suspicious or criminal. This not only blurs the line between migration management and crime control but could potentially contribute to discriminatory practices rooted in crimmigration logics.

In addition to the official intelligence shared during briefings, significant informal information-sharing occurred on the ground. Through the telling and retelling of personal experiences, colleagues' encounters, and stories of notable enforcement 'hits,' a strong culture of 'learning on the job emerged.' This practice, which became particularly prominent due to the shortened training trajectories for new recruits, emphasised learning how to identify and select individuals – particularly who to focus on – through practical experience and guidance from more seasoned colleagues. While learning by doing is a natural and often effective approach, observations during the 2013–2015 fieldwork period (see Chapter 1) revealed that this informal mode of knowledge-sharing was no without risks for the operation.

This informal storytelling often reinforced racialised 'risk profiles,' associating certain ethnicities and nationalities with specific forms of deviant behavior. Such associations were rarely questioned or critically examined, leading to the uncritical reproduction of stereotypes in the operational practices of the RNM (see Section 6.4). The reliance on these racialised narratives for decision-making not only risked discriminatory practices but also shaped how discretion was exercised on the ground.

The power and importance of storytelling in police culture, as Van Hulst (2013) argues, lies in the multifaceted roles stories play. Stories serve as tools for learning, for building group cohesion, and for shaping organisational norms and sense-making. In the context of the RNM, the stories shared informally about previous encounters and enforcement successes were imbued with authority and were often treated as factual. These stories seemed an important input for organisational sense-making, guiding street-level decision-making and embedding themselves into the fabric of operational practice. What makes this reliance on storytelling particularly problematic is the way these narratives often bypass formal scrutiny or debate. Rather than being critically assessed for their validity or implications, they gained legitimacy through repetition and their alignment with the dominant organisational culture. It highlights how storytelling, while a cornerstone of police culture, can

perpetuate biases and reinforce discriminatory practices when left unchecked and unchallenged.

Interestingly, the notion of 'discretionary powers' and the responsibility that comes with wielding proactive discretionary powers – particularly in relation to non-discrimination and the potential illegitimate use of these powers – did not seem to feature prominently in discussions or storytelling among RNM officers. Beyond the formal training at the Academy, which introduced officers to the regulatory and legal frameworks within which they were expected to operate, there was little evidence of structured reflection on discretion or its implications. This lack of reflection extended to the informal 'training on the job,' where junior officers learned operational practices in the field. Nevertheless, when asked directly about their discretionary powers, some officers knew they had quite some leeway in enforcing the MSM and were often quick to add that they were aware of why wielding their powers they could not discriminate. Furthermore, in responding to the question, the majority of the officers were quick to emphasise the *security* aspect of their job and, in doing so, often implied that the name change (see Chapter 5, Section 5.3.1.) meant that they had even more discretion in deciding what path to pursue: a more crime control oriented path versus a more irregular migration control path. This, according to some, also corresponded with the fact that within each team there were self-proclaimed 'migration officers' and 'police officers'.

The organisational decision to transform the name into the Mobile Security Monitor not only positioned the RNM more prominently on the political and institutional map as a key player in national security but also significantly influenced how street-level RNM officers understood and approached their roles in the borderlands. Only a handful of officers recognised that the name change was merely symbolic, not accompanied by any formal expansion of discretionary crime control powers. Nonetheless, many officers emphasised their dual status as 'investigative officers' under Article 142 of the Dutch Code of Criminal Procedure. This duality allowed them to transition from migration control officers to police officers during an MSM check, provided there was reasonable suspicion of a crime.

This dual identity underscores the ambiguity created by organisational decisions aimed at reframing the RNM's role. Drawing on Pratt's (2010) insights into the entanglement of Intelligence and Enforcement Culture, we can see how these dynamics are deeply intertwined. The name change reflects a strategic move to align the RNM's narrative with a broader national security agenda – an enforcement culture shift that legitimises discretionary practices focused on crime control, even

when not explicitly mandated. Simultaneously, intelligence sharing, both formal and informal, feeds into this enforcement culture, shaping officers' perceptions of risks and their street-level decision-making.

This entanglement exacerbates the ambiguity RNM officers face in navigating their roles. On the one hand, they are formally equipped with proactive powers for migration control under the MSM, with crime control powers being reactive and contingent on reasonable suspicion. On the other hand, the name change and associated rhetoric blur these boundaries, embedding a sense of expectation or permission to engage more broadly in crime control. This dual message creates what Pratt identifies as a feedback loop: intelligence, influenced by enforcement culture, reinforces the framing of migration as inherently suspicious, while enforcement culture legitimises and amplifies the operational use of such intelligence.

The complexity of the legal framework further compounds this ambiguity. Legislative efforts to constrain the 'ad hoc instrumentalist' use of RNM powers (Sklansky 2012) clash with organisational decisions that encourage a more generalised focus on crime control. RNM officers thus find themselves in a state of in-betweenness, caught between formal legislative constraints and the informal pressures of their evolving enforcement culture. This in-betweenness manifests in two key ways. First, officers operate under a tacit understanding that their discretion extends beyond migration control, even if formally limited. Second, the entanglement of intelligence and enforcement culture subtly directs their focus toward particular individuals or groups, often through racialised risk profiles embedded in shared 'knowledges' (Pratt 2010).

As Pratt highlights, the entanglement of intelligence and enforcement culture fosters a normalisation of discretionary practices that blur the lines between migration control and crime control. For the RNM, this has created significant ambiguity about their mandate and powers, directly influencing street-level decision-making. This ambiguity not only risks overreach and discriminatory practices but also erodes clarity in officers' understanding of their tasks and the legal boundaries within which they operate. The next sections will explore two critical moments of discretionary decision-making, revealing how these are informed by intersecting 'knowledges' about what – and especially who – constitutes a risk to the nation.

6.4.2 Indicators and crimmigrant profiling while selecting a vehicle for a stop

The previous section examined how aspects of Intelligence – structured information from institutional sources – and aspects of Enforcement

Culture – shared norms and values embedded in operational practices – inform officers' understanding of their roles and guide their actions in the borderlands. Building on this, the 'knowledges' Indicators, Intuition, and Stereotypes emerge as more specific and operationalised knowledges that translate overarching frameworks into street-level decision-making (Pratt 2010). Indicators serve as formalised markers of risk, often drawn from intelligence reports, training, and organisational priorities. However, their application is far from neutral, as officers interpret these markers through the lens of their enforcement culture, and personal experiences and of course agains the background of wider political and societal discourse. This interpretative process is further influenced by intuition – a tacit knowledge celebrated within enforcement culture as a hallmark of expertise but deeply shaped by informal practices and collective narratives. Stereotypes, meanwhile, act as a pervasive undercurrent, subtly informing how indicators are prioritised and how intuition is exercised. Together, these knowledges interact, creating a discretionary framework that is both contextually adaptive and inherently subjective.

The following empirical section traces these knowledges within the RNM's discretionary practices, revealing how they converge in decision-making processes and, at times, reinforce racialised or biased patterns in operational conduct. By examining the entanglement of these knowledges, we gain a deeper understanding of how RNM officers navigate their ambiguous mandates and how discretion is wielded in the intra-Schengen borderlands. As discussed in the previous chapter, in 2023, the RNM was found guilty of using ethno-racial profiling to select individuals for an MSM check. The fieldwork that supports this book and upon which this section is based was collected between 2013 and 2015 which means that it predates the lawsuit and the implementation of the new guidelines on professional selection and profiling.

6.4.2.1 Combating irregular migration and racial profiling

A variety of indicators seemed to influence the decision to stop a vehicle such as a car's license plate as an indication of nationality, the state of the vehicle (did it have tinted windows, or was it a particularly expensive car), behaviour on the road, the number of people in the car, but also the people in the car. RNM officers were open about the fact that, if they could see inside the car, the appearance of the people in the car could be an important indicator of their possible ethnicity and thus for possibly being so-called 'third country nationals' coming from outside of the European Union. The latter meant that they would have to be in possession of a valid visa in order to travel throughout the European Union. In light of the primary aim of the MSM – preventing irregular

entry and stay – this would make these individuals interesting in terms of assuring that they indeed were carrying the right documentation while crossing the border.

In describing why and how the appearance of the individuals in the car could inform their decision to as the car to stop, RNM officers mentioned the way people were dressed, whether they looked well-groomed or not, but also whether they had a 'foreign appearance'. Skin colour was an important part of this, as officers regularly implied that being Dutch primarily meant being white.

> "Look, we are here in the context of the Aliens Act. Dutch people are by nature white – of course there are also non-white Dutch people – but you do take that into account. Belgians as well. So, if a car with a Belgian license plate passes the border here, and it has a couple of non-white people in it, it means that is an indicator".

Although most RNM officers were aware of the sensitivity of using racial or ethnic categories as a factor in their decisions and societal concerns about discrimination, they nonetheless often freely admitted that these categorisations played a role in their selection. As one of them said: 'When people ask if we select based on skin colour or perceived ethnicity, then we must readily admit that that can indeed be the case. Somebody's skin colour or ethnic features is for us the first sign of possible illegality. But because we select based on skin colour does not automatically mean that we discriminate'. With the notion of 'illegality' officers referred to the fact that they were looking for so-called third-country nationals, people from outside of the European Union whose mobility inside the European Union and the Schengen space needed to be supported by the necessary visa and paperwork.

The openness about also taking into consideration the looks – skin colour and/or ethnic features – of a person or people in a vehicle was always coupled with a resolute denial that this selection criterion was driven by any racist intentions or motives. Instead, officers argued that their specific task of preventing irregular immigration leaves left them with little choice but to base their stops at least partially on skin colour as a proxy of being a migrant. Indeed, they saw it as inherent to their work and their explicit task to enforce immigration law. Respondents emphasised their intentions rather than the outcomes. And as one officer explained:

> "It is also the fact that many of those [non-EU] countries have a visa requirement. Look, we did not invent the visa requirement for Africa. That it happens to be the case that mostly black people come from there

> is not our fault, which is then what visible in our selection. If Africa would have been populated only by white people who then would need a visa to travel to Europe we would have been checking white people".

Up until the 2023 court case based on which it is now clear that markers for ethnic categories or ethnic features are never allowed to play a role in decisions to stop, officers were under the impression that such markers could be used but only in combination with other indicators that were unrelated to the appearance of the persons in the vehicle. For example, one officer gave a detailed description of how a combination of indicators could be invoked to stop a vehicle with North-African-looking people, drawing on knowledge and ideas about illegal immigration patterns:

> "You notice that we get a lot of cars from France, Spain, Italy, those are interesting to us. There are of course a lot of people from North-Africa, Algerians and Moroccans who don't have their documents straight. It is simply known that they often come here with family members illegally so if you see something like that coming it is just interesting. When it is somebody driving alone it is less interesting, but if it is several people with North-African appearance you make sure to stop it".

The way this officer explains the logic of the combination of indicators – license plate, number of people in the car, and their appearance – leading to the selection of the vehicle illustrates the importance of knowledges. By stating that 'it is simply known' it is unclear whether he refers to formal or informal 'intel' or perhaps a combination of both. What is clear is the certainty with which he justifies the logic of his stop – 'you make sure to stop it'. The use of ethno-racial appearance in this example is presented as part of the broader logic of the work being rooted in immigration law and the goal of the MSM being to stop irregular migration. It is not seen as problematic at all, but just as part of the job. Most officers were astutely aware of the problematic nature of selections that would be based *only* on ethno-racial markers. One of our respondents voiced a widely supported view on the matter: 'Naturally we are here to find illegal immigrants, so somebody's appearance and skin colour are important factors. Of course these are not allowed to be the only factors upon which we select a car for a stop, I also know that, and I agree with that'.

The use of different legitimation narratives (Vega, 2018) by border guards to justify the legitimacy of their actions or to frame themselves as

subjects of a higher authority, such as the law, is neither unique to the Netherlands nor specific to the field of migration and border control. It reflects broader practices in regular policing, where officers rely on similar narratives to rationalize discretionary decisions and address potential accusations of bias or misconduct. As observed by Lipsky (1980) in his seminal work on street-level bureaucrats, police officers often operate in ambiguous and high-pressure contexts, necessitating the use of discretionary powers. To justify their decisions in these circumstances, they frequently construct narratives that frame their actions as objective and necessary for maintaining order. Ericson and Haggerty (1997) argue that policing relies heavily on 'risk-based narratives,' where officers justify their actions by linking them to the mitigation of perceived threats. These narratives are often rooted in institutional priorities, such as crime prevention or public safety, and serve to legitimise discretionary practices even when they involve profiling or stereotyping. Similarly, Loftus (2009) highlights how police culture fosters the development of narratives that emphasise officers' roles as protectors of the public, often framing discretionary decisions as guided by professional judgment rather than bias. Similarly, Van Maanen (1978) highlights how police officers' justifications for their actions often draw on a 'working personality' of law enforcement, where discretion is framed as a necessary and rational tool for navigating the complexities of policing. This framing, however, tends to obscure the implicit biases and institutional pressures that shape decision-making in practice. Closely connected to what has been discussed in the previous section as the sharing of 'informal intel', Waddington (1999) further explores how police officers use 'canteen culture' narratives – stories shared informally among officers – to construct and reinforce collective justifications for their actions. These narratives often draw on stereotypes and assumptions about certain social groups, perpetuating biases in decision-making. While officers may view these stories as harmless or practical, they contribute to a broader culture that normalises discriminatory practices under the guise of professionalism. Research by Reiner (2010) illustrates how police officers employ narratives to rationalise their discretionary practices, particularly in racially charged contexts. By invoking ostensibly race-neutral explanations – such as suspicious behavior or compliance with legal standards – officers construct a façade of objectivity that serves to shield both themselves and their institutions from allegations of racism or discrimination. This phenomenon mirrors what Vega and van der Woude (2024) identify as 'colorblind narratives' in the field of border policing, where racialised dynamics are masked by appeals to security, professionalism, or risk management. When examining these legitimation

narratives in the context of the RNM and their use of 'race' and/or 'ethnicity' as an important indicator guiding their decisions, it becomes evident that these narratives serve to obscure the racialised underpinnings of enforcement practices by framing officers' decisions as neutral responses to perceived risks. This tactic aligns with broader patterns in regular policing, where similar strategies are employed to deflect scrutiny, maintain institutional legitimacy, and shield discretionary actions from critical examination. What makes this particularly challenging to address is that these narratives are not always employed consciously; rather, they are often embedded within the culture and routines of policing, operating as taken-for-granted practices. This unconscious dynamic makes it harder to identify and confront the biases they perpetuate, as officers often seemed to genuinely perceive their actions as objective and justified.

6.4.2.2 Legal ambiguity and crimmigrant stereotypes

Whereas the previous section shines light on how ideas of who is an irregular migrant and who is not are informing the wielding of street-level discretion by RNM officers in deciding who to stop for a check, the legally ambiguous identity of the RNM officers as both an immigration officer as well as an investigative officer combined with changed narrative of the MSM as an instrument for Security, also influenced the selection decision. The strong infatuation of a large group of respondents with being seen more so as crime fighters than as immigration officers – they would call themselves *cowboys* – resulted in people being targeted based on an assessment RNM officers made of the connection between ethnicity and criminal behaviour.

The focus on crime resulted in different groups being targeted. While North-African-looking people were regularly stopped because of potential illegal entry or stay, especially when their car had a foreign license plate, officers indicated that a stop involving young Moroccan-looking men could also be for crime-related reasons. Especially if they were driving an expensive car that would make them fit the 'Big Shot profile': a person whose display of wealth does not align with their age. A North-African background could thus be a factor in stops both related to migration control and crime control which illustrates how the ambiguity about the exact aim of the MSM on a political and policy level translates into the targeting of groups that are not necessarily interesting in the context of what is supposed to be primarily an instrument of migration control. Although North African young men were regularly linked to various forms of crime, people from CEE countries – primarily

Bulgarians and Romanians, to a lesser extent also Hungarians and Polish – were commonly and openly associated with criminal behaviour. Such beliefs were usually said to constitute 'known facts' and be based on 'evidence'. The targeting of these groups was primarily based on the origin of the license plate, as this was an easily visible marker and the nationality of individuals from Eastern European member states is generally harder to recognise on the basis of physical characteristics. Overall, there was a common understanding among RNM officers that 'there is almost always something wrong' with members of these groups in the border areas concerned. This led to extreme statements proclaiming that nine out of 10 times Eastern European drivers have burglary tools in their trunk, or that Romanian-looking people in a vehicle with a British or Spanish license plate were nine out of 10 times thieves.

These crimmigrant 'profiles' connected to different nationalities again seemed to be based on a combination of shared knowledges and intelligence provided by the organisation. The normalcy of nationality as a proxy for risk in the daily decision-making processes of the RNM echoes the findings of Pratt and Thompson, who argued in their study on Canadian border officials that 'while race is an unacceptable basis of discretionary risk assessment at the border, nationality is continually reproduced as a legitimate consideration' (Pratt & Thompson, 2008, p. 628).

6.4.3 Searching in the name of security

After the decision to select a vehicle for a stop, a second key moment of discretionary decision-making is the moment where RNM officers decide whether they feel they have reasonable suspicion to search a vehicle. Also, in the way in which this discretionary decision was being wielded, it is clear that the organisational strategic shift to emphasise the security component of the Article 23 SBC checks impacted RNM officers' perception of how they could use their discretion to search a car.

During the fieldwork, questions were regularly asked about why a certain vehicle was stopped and/or searched, particularly in instances when no apparent reason was found under the legal framework of the MSM, as the driver and other vehicle occupants were in possession of a valid ID or passport. In response, the necessity of 'being creative' with their powers while enforcing the MSM was often referred to by respondents. It was clarified that 'being creative' did not imply abusing or overstating their power; instead, it meant being savvy about 'knowing what powers to use and when'. This strategy was exemplified when a car with a Dutch license plate and three Dutchmen were stopped. Although the father and his two sons lived nearby and were known to

some officers for their past involvement in various criminal activities, a thorough search of the vehicle was decided upon, since the driver only had a driver's license, which is not officially a valid ID. Despite knowing the men and the fact that they held Dutch citizenship which would technically mean that the MSM check was over since it was established that there is no risk of irregular stay in the country, the officers went ahead with the search of the vehicle. As explained in Section 6.3., RNM officers can search a vehicle to find documents to prove someone's identity or residence status if they have reason to believe that the people in the vehicle might be trying to enter the country irregularly. Using the fact that the driver was only carrying his licence as a reason to justify the search, without there being other indications of any criminal behaviour at that moment, is quite the creative use of this discretionary power.

In the name of protecting the security of the state, various creative ways to circumvent the legal restrictions posed by the Aliens Act were described by RNM officers, knowing they were legally allowed to search a vehicle only as a last resort to identify its occupants or when there was reason to suspect a crime had been committed. One often mentioned method involved utilising the provision to search a car under Article 9 of the Dutch Opium Act. According to Article 9, smelling marijuana or seeing a small amount of marijuana provided the necessary reasonable suspicion to 'look through' a vehicle. A complete strip search of a car and all its belongings based on this article was not permissible. Nevertheless, some officers believed the moment they saw a blunt or smelled marijuana, they could 'tear the car apart'. Officers were aware of the existence of legal powers to access a car through the presence of marijuana, but knowledge about important details, such as (1) the formal legal ground and (2) the limited scope of an Article 9 search, was sometimes lacking. Another alternative legal basis for searching a vehicle would be under the Arms and Ammunitions Act that allows a search if a person is found to be carrying an illegal weapon. At some of the brigades, the standard practice was to open the driver's car door the moment a car was pulled over, even before an ID or passport could be handed over by the driver. This practice can technically be seen as the start of a car search, although it was not viewed as such by the RNM officers. It was seen as a way to look inside the front of the car and check for the presence of illegal substances or illegal weapons. This practice was often justified by referring to the need to consider their own safety.

In defining what could be considered an illegal weapon, resourcefulness was demonstrated by RNM officers. Aside from the few actual illegal weapons (tasers and large knives) that were found over the course of the fieldwork, various tools, small knives, and baseball bats were also

considered potentially dangerous. Although the presence of these objects would not ordinarily result in an official search of the vehicle, drivers were asked to put these objects in the trunk, with the explanation that their presence was 'unnecessary' and 'somewhat suspicious'. This allowed a look in the trunk without needing an official 'legal' reason. Another tactic mentioned by some officers was to simply ask people if they wanted to open the trunk for them, reasoning that permission was given if the driver indeed opened the trunk. However, there was disagreement among officers about this tactic, as it was argued by some that this could too easily be perceived as an order instead of a question, and people might not feel they have the option to say no.

These examples illustrate that participants were clever when it came to finding their ways around the limitations of the Aliens Act to search a car when officers intuitively felt that 'something was wrong' even when the paperwork was in order (the infamous 'hunch'). Other than by spontaneously stumbling upon a crime that would allow RNM officers to officially switch hats from immigration control to crime control, officers, especially the self-proclaimed *cowboys*, were often actively searching for something allowing them to do so. Whereas respondents were reluctant to admit that being creative with their discretion to search a car could be a misuse of power, they also knew they needed to be careful about how to justify their 'creativity' when drafting a report. Yet, while flagging this as important, officers were also quick to add that it was not very difficult: referring to having acted based on 'professional knowledge and experience' would 'do the trick'. They also knew that the RNM as an organisation did not crack down on potential misuse of powers.

> "I don't understand why they're giving us such a hard time with these trunks, why don't they just change it [the Aliens Act]. Just let us check these trunks, in the end it's all about safety and security I just think we should be able to search everything. They are crossing the border; they are travelling to the Netherlands. I am of the opinion that we should be able to search through everything: dashboard, trunk, luggage and if necessary, also frisk the people inside the car".

6.4.3.1 Noble cause discretionary decision-making?

The strategies employed by respondents were regarded as a 'creative' use of their discretionary powers, thereby being seen as justified. Nevertheless, examples were also provided where these discretionary powers were knowingly and willingly overstepped. In these instances, despite the potential risk of having the illegally obtained evidence excluded from

legal proceedings, the paramount importance was placed on ensuring that certain illegal goods did not reach the consumer market. As various officers explained, the principle that the ends justified the means was adopted in these scenarios.

For example, the presentation of a driver's license was considered insufficient, as it did not reveal the individual's residence status. In such cases, the trunk was searched. A notable instance involved the inspection of garbage bags in the trunk, which led to the discovery of 10 stolen GPS systems with a total value of 15,000 euros. Despite the identity being known through the license, making the search illegal under the Aliens Circular, the GPS systems were confiscated by the state even though the prosecutor released the individuals. Vehicles were also pulled over for minor infractions, such as a malfunctioning brake light, providing a pretext for further inspection. Without additional justification, the trunk was searched, resulting in the seizure of 10 kilograms of marijuana. Although the case collapsed legally, the removal of marijuana from circulation was achieved.

The respondents expressed a keen sense of responsibility for the national security of the Netherlands, despite some internal debate about the correctness of their colleagues' actions in the aforementioned examples. Given the strong commitment to protecting the nation from all perceived threats, frustration was expressed over the legal limitations imposed on their actions especially in light of their task to monitor security in the intra-Schengen borderlands. One officer encapsulated this frustration with the statement:

> "We're based 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 fully use my crime control powers because that's not what I am here for … Well, hello, I need to know who is entering my country? I need to create a secure situation. That is my task, isn't it?"

For many years, policing scholars have analysed the problematic nature of discretion for street-level bureaucrats by focusing on the central ethical dilemma the police face in a democracy. On one hand, they are bound to the procedural law of due process. On the other hand, they are occupationally and morally committed to the 'good end' in the sense that they are responsible for arresting and removing dangerous individuals from society (Klockars, 1983; see also Alderson, 1998). Both factors do not always go together. Brown (1981) describes how police officers

tended to see their work as a game of cops and robbers, in which the police sometimes had to break the rules in order to catch the robbers. In line with Brown's findings, Skolnick (1982) shows how police officers seemed to be more concerned with the production of arrests and confessions than with truth-finding, making them resort to quite undemocratic behaviour (Skolnick, 1982; 1994). To better characterise why police officers committed to achieving good outcomes would at some point in their careers willingly and knowingly break the law to do so, Crank et al. (2007) introduced the concept of the 'noble cause'. Meese and Ortmeier (2003) defined the 'noble cause' as a commitment to do something to prevent illegal human behaviour and apprehend criminal offenders. It inspires officer values and morally justifies their actions. Caldero and Crank (2004, p. 29) similarly defined the 'noble cause' as 'a moral commitment to make the world a safer place to live. Put simply, it is getting bad guys off the street'. These two definitions share the common theme that the noble cause is a moral conviction associated with the public safety function of police work that emphasises ends-oriented action.

Within this framework of 'noble cause' policing, the decisions of the RNM officers to use MSM checks for broader law enforcement purposes aligns with the notion of the 'noble cause'. Their belief in their role as the frontline of national defence drives them to prioritise the apprehension of criminals, viewing it as a moral imperative to keep the country safe. This practice, while stretching the intended scope of MSM, reflects their deep-seated commitment to public safety and their feeling of duty as encompassing all aspects of maintaining societal order. The procedural flexibility granted by MSM, therefore, becomes a crucial tool in their arsenal, enabling them to act upon their ethical convictions to protect the public from perceived threats.

Such actions, however, are not without controversy. RNM officers are acutely aware of the need to justify their actions within the bounds of legality and often articulate these justifications meticulously in their reports. This awareness hints at an underlying recognition that their expanded use of MSM may be perceived as a questionable practice. Nevertheless, their actions are underpinned by a firm belief in the 'noble cause', suggesting that they perceive the bending of procedural rules as a necessary trade-off for achieving the greater good of societal protection.

This dynamic interplay between adhering to procedural law and pursuing the 'good end' highlights the inherent tensions in law enforcement. The RNM's application of MSM illustrates how street-level bureaucrats navigate these tensions, balancing European and national legal mandates, organisational decisions and knowledges with their often strongly felt moral commitments to public safety.

6.5 The local in between the organisational and the (supra)national

This chapter has elucidated the profound integration of street-level discretion within the intra-Schengen mobility control apparatus, revealing its pivotal role as the nexus where abstract policies and legal principles are transformed into tangible actions. Border officials operate at the intersection of diverse influences, including political and organisational narratives that define their roles, and the legal frameworks intended to guide their actions. The discretionary authority to stop, check, and search individuals and vehicles exemplifies how the intra-Schengen mobility apparatus exercises control, often under the pretext of public security.

While being bound by formal European and national legal frameworks, it is clear that while these frameworks do matter 'on the ground', the proximity of the organisation with its specific ambitions, narratives, knowledges, and dynamics has a strong pull on the wielding of discretionary powers by street-level officers as well. 'Europe' often seemed to be a far away and abstract notion and despite the fact that the city of The Hague – where the Dutch government and the Ministries are based and thus the place where national legislation is made – felt somewhat closer, many of the street-level officers still perceived the worlds of politics and policies as a world very much detached from their daily realities. This far-away world of politics and lawmaking was contrasted with the messy reality of their daily work and a shared sense that policies and rules drafted behind desks by policymakers who had never set foot in the intra-Schengen borderlands, did not always fit this reality. The organisational context – the RNM as an institution – definitely felt closer, which did not mean that people were not critical towards it. Street-level officers would question whether the organisation always had the best interest of their people – so them – in mind, or whether they were busy participating in political games on the national level.

Interestingly enough, when asked whether they would express these concerns or sometimes even frustrations to their superior(s), the dynamics of being a military organisation seemed to prevent people from doing so as they felt that they were there to follow orders not to question them. At the end of the day, the majority of RNM officers were driven by their role and their deeply felt responsibility of protecting 'the State', no matter how far away 'the State' felt. This image resonates with what Pratt (2010) calls the 'in-betweenness' of border control institutions and how this also affects the decision-making of border agents:

> "The legal and quasi-legal coupling of reason and suspicion that enables and shapes the decision-making of border officers, manifests the awkward yet pervasive forms of low level administrative risk

> knowledges that are produced and transmitted in border work and is also indicative of the very 'in between-ness' that has long characterized virtually every aspect of the organization, culture and decision-making of frontline officers at the liminal space of the border. Indeed, it is this very 'in between-ness' that makes border control such a rich and interesting site for research: in between nation states; in between inspectors and officers; in between immigration and customs; in between facilitation and security; in between regulation and enforcement. The discretionary power of frontline border officers is similarly compelling".
>
> *(Pratt, 2010, pp. 463–4634)*

Pratt's analysis highlights the liminal space of border work, where discretion operates in the tension between legal frameworks, administrative knowledges, and the practical realities of enforcement. This in-betweenness was evident in the eclectic suspicion formation among RNM officers, who relied on a blend of formal administrative insights, quasi-scientific methodologies, and practical, experiential knowledge.

Reflecting on the implications of these discretionary practices is critical, particularly given the racialised structures within which these powers are exercised. As Reiner (2010) notes, institutional frameworks and policing cultures often prioritise operational efficiency and enforcement objectives over critical self-reflection. Within the RNM, this tendency is further reinforced by its hierarchical military structure, where the chain of command discourages open dissent or critical questioning of organisational norms (Chan 1997; Huntington 1957; Janowitz, 1960). The emphasis on order and discipline inherent in a military framework can limit opportunities for officers to engage in reflexive practices or challenge the racialised narratives embedded in formal and informal knowledges. While this structure fosters cohesion and operational efficiency, it also allows systemic biases to persist, shaping who is perceived as a risk and reinforcing the practices of crimmigration at the street level.

Pratt's insights also underscore the visibility of street-level decision-making, where crimmigration becomes most apparent. While the discretionary decisions of policymakers, courts, and organisational leaders set the broader stage for these practices, it is the decisions of officers in the intra-Schengen borderlands that are most directly visible to the public and have immediate consequences for those who are stopped and searched. Yet, as this chapter has argued, these visible actions are just one link in a long chain of discretionary decisions. Determining whose discretion matters most in facilitating crimmigration is not

straightforward. Perhaps the most fitting answer lies in recognizing that it is the sum of all parts – each decision, at every level – that collectively allows crimmigration to take place.

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7

DEUS EX MACHINA?

> "The resolutions of stories must happen out of the story itself, and not from the machine."
>
> (Aristotle, Cf. Poetics 1454a34-b8. Thesaurus Linguae Graecae)

7.1 Introduction

The previous chapters have painted a rather grim story of a machine that is programmed to monitor, limit and prevent the mobility of mostly, but not exclusively, non-European and racialized bodies that are met with great suspicion. Despite harping ideals of solidarity and uniformity, when it comes to secondary movement within the Schengen territory, the design of the apparatus and the movement of its different parts allows for national and local differentiation as well as for decision-making driven by national interests while losing sight of these European ideals. Given what in Chapter 3 has been described as the development of the intra-Schengen mobility complex which is fuelled by a public and political discourse in which there are some strong and dominant criminalising and exclusionary frames around migration and secondary movement, combined with consistently high numbers of first-time asylum applications in Europe (Eurostat, 2024) an ongoing pressure on the external borders in the form of irregular entries, it is hard to imagine how some of the dynamics that have been highlighted in this book could be changed. In line with Hampshire's (2013) analysis of migration policies in representative democracies, border policies in the Schengen Area are subject to a multitude of interests and influences, including constitutionalism, national identity, as well as capitalist interests. These interests and influences can direct member states' responses to (different forms of) migration in opposing directions. Despite commitments to human rights and the rule of law, Schengen member states retain authority over their borders, allowing

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for the securitisation and criminalisation of mobility through selective openness and exclusion based on national interests and identity considerations (Wolff, 2017). Moreover, as the previous chapters have shown the Schengen Area's foundational commitment to facilitating the free movement of labour aligns with capitalist imperatives, yet this openness at the same time is often tempered by concerns over economic competition, national security and social cohesion (Boswell, 2021).

Despite the professed values of economic opportunity and freedom within liberal democracies, the borders of Schengen countries serve as sites of violence leading to a tragic loss of life for migrants in search of better prospects (Bommes & Geddes, 2000). Whereas the human costs of border control in Europe are perhaps most visible at its external borders, this book has illustrated how the intra-Schengen mobility control apparatus – as inextricably connected to what is happening at the external borders of Europe – is also geared towards discouraging, hindering and interfering with the (secondary) movement of those whose mobility is viewed with suspicion. The sum of the decisions by European actors, national authorities and local border agents addressing the mobility through intra-Schengen borderlands create real-life consequences for the (mental) health, well-being and dignity of individuals particularly those from non-European countries who, throughout their migration journey, have been subjected to violence, exclusion, neglect and harm (MSF, 2024), or those who are otherwise met with a suspicious gaze. This paradox of selective, capitalist-driven, openness at the expense of human dignity and the human lives of those on the move has generated moral outrage amongst scholars, NGOs, grassroots organisations and the like, sparking vivid and compelling arguments for borderless societies (Anderson et al., 2009; Bhambra, 2021; Burridge, 2014; Hayter, 2000). An important premise of this no-border debate is that only through a radical approach that directly challenges the existing geopolitical order of global capitalism by disrupting its reliance on territorial nation-states and border controls for capital accumulation and labour exploitation, the costs of bordering practices can be made undone (Bauder, 2012).

Despite being very sympathetic to these arguments and sharing the clear wish to limit the aforementioned human costs of borders and bordering practices, borders are very real. Even in places where you wouldn't expect them, where you don't see them and even in spaces where they are supposed to be 'open'. If there is anything this book has shown, it is that intra-Schengen borders have never disappeared and neither has the

control of the mobility across these borders. Following Wonders' observation of how borders tend to get reconstructed to 'keep borders open for capital, cheap labour, and the free movement of the wealthy' while at the same time closing the border 'for those who might make citizenship demands or rights claims on the declining welfare state' (Wonders, 2007, pp. 35–36), it is easy to see how the intra-Schengen mobility apparatus is geared to achieving exactly that. While awaiting the moment for a more radical transformation of the economic and political structures that are supporting the current state of affairs regarding the management of mobility within the Schengen area and the EU, following Bauböck (2015), this book, for now, takes the necessity of borders as a given.

> "States need borders, since there would be no states without them. States have territories within which they claim jurisdiction. Without borders there would be land, but no territory. So unless we commit ourselves to an anarchist utopia in which there is no more political authority within demarcated territories, we need to re-imagine borders instead of imagining their absence".
>
> *(Bauböck, 2015, p. 170)*

While Bauböck calls for a reimagining of borders, I would like to use this last chapter to explore the possibility of rerouting – or perhaps even derailing – the intra-Schengen mobility control apparatus from *within*. One could perhaps say that it is a call to reimagine the management of mobility across borders (also see Rumford, 2006). After, in the next paragraph, reflecting on the insights this book provides around border control, discretion, and crimmigration, this chapter will explore the various loci of discretion and the actors operating within these loci as spaces of possible resistance against the (movement of) the apparatus (see for examples of resistance from within: Cheliotis, 2006; Nou, 2019; Shinar, 2013). Rather than being reductionist and not acknowledging the agency that the human beings working within the machine have it is crucial to see how they can be included in these critical debates on reimagining bordering practices at the intra-Schengen borders (also see Taylor, 2016 on reductionism and the silencing of certain voices). In so doing, this might eventually lead to more radical and larger scale transformations of border control and border politics.

7.2 Discretion and crimmigration

The analysis underpinning this book has illustrated how, through discretionary governance on different levels and involving different European, national and local actors (Garsten & Sörbom, 2021), a regime of social

ordering in a precarious but specific way, is crafted. The granting and wielding of discretion in this context is used to discern who are part of the Schengen community and who are not. These acts of discretion – whether we focus on the national, organisation, judicial or enforcement level – can be seen as distinguishers used to mark who are deserving of the privilege of moving freely throughout the Schengen area and their existence – and thus the necessity for discretion – is a precondition for the existence of the Schengen area. Discretion has proven to be a key instrument to negotiate between conflicting interests and needs, and, as part of that negotiation, an instrument to create an apparatus that would work for all the different member states involved. Bibler Coutin et al. (2017) speak of the power of the 'discretionary state' in the context of migration control in the United States. This discretionary state is omnipresent, brought into being through the exercise of discretion and fragmented due to potential internal dissension among state actors. Its programs can be suspended or ignored, leading to instability in the system of migration control. The image of an omnipresent, multi-scalared, discretionary state also comes to mind when thinking about the way in which intra-Schengen mobility control is organised and managed. Discretion is used as a valuable currency as part of, often, asymmetrical negotiations between different actors that together are involved in and responsible for the governance of the intra-Schengen borders (Eule et al., 2018). Discretion, in other words, is not only necessary for the movement of the intra-Schengen mobility control apparatus, but it has also become normalised and fully embedded within its every moment. Other than the dominant image that it is particularly the discretion of street-level agents or frontline border officials that is problematic (Fischer, 2013; Spire, 2020), the previous chapters illustrate how the interplay between the granting and the wielding of discretion by different European and national actors and institutions creates a *trompe-l'oeil* mobility control regime (Spire, 2020). A regime that on the one hand creates an illusion of compliance with European principles, fundamental human rights and (European and national) legal standards while actually allowing for significant discretionary power and arbitrary decision-making by different actors (also see Weber & Marmo, 2024). In this regime, the ambivalence of European and national law is maximised to allow for the intra-Schengen mobility control apparatus to keep moving despite conflicting interests on these different jurisdictional levels. Governing through discretion thus allows for national, supranational and humanitarian actors to use legal and regulatory ambiguity to engage in jurisdictional or sovereignty games in the European intra-Schengen borderlands (Franko, 2022; Gammeltoft-Hansen, 2017; Moffette, 2018). This is problematic not only because it can lead to the obfuscation and

avoidance of responsibility these individual actors might have but also to the acceptance of rights violations as for instance illustrated by the pushbacks conducted by the national authorities of EU transit states such as Greece and Croatia. Despite widely documented evidence that pushbacks are routinely being carried out, government officials of the countries engaging in these pushbacks claim to protect the external border of the EU in compliance with international law and in full respect of the EU Charter of Fundamental Rights (Fallon, 2023). At the intra-Schengen borders, especially in the context of the Article 23 SBC checks, the right of non-discrimination has been under a great amount of pressure in light of the practical application of these checks on the ground.

7.2.1 Where discretion and crimmigration meet

The framing of migration and migrants as a potential risk or threat is crucial to these games and also plays an important role in the granting and wielding of discretion as part of these games. This is where the discretionary state, or governing through discretion, and crimmigration meet each other. The tracing of discretion beyond a single actor or a single locus shows the inextricable connection between the political decisions that set up and shape legal and regulatory responses as well as the way in which these responses then get implemented on the ground. Discretion allows actors within the mobility control apparatus to interpret and apply rules and regulations flexibly, often based on subjective assessments of individuals' identities, backgrounds, and perceived risks. This discretionary power is not exercised in a vacuum but is shaped by broader discourses, ideologies, and social norms concerning migration, security, and national identity. As a crucial part of state crafting and, in the context of this book, Euro-crafting (see Borg, 2014), the relationship between crimmigration and discretion thus goes deeper and can be seen as more all-encompassing than merely being located with one, or some, actors operating within the realm crime control and/or migration control.

Exploring the developments at the intra-Schengen borders through the lens of the apparatus helps illuminate how discretion within this mobility control apparatus operates as a technology of power, enabling the exercise of sovereign authority over individuals' movement and status. It reveals how the normalisation and regulation of mobility intersect with broader systems of domination and control, perpetuating inequalities and reinforcing social hierarchies within the Schengen Area and beyond. Crimmigration is both produced by and part of this broader apparatus of power. For example, the normalisation of migration-related offences as criminal acts, the deployment of surveillance technologies at borders, and

the construction of migrants as threats to national security are all processes facilitated by the apparatus. These mechanisms contribute to the production of crimmigration by framing migration control as a matter of criminal law enforcement. At the same time, crimmigration becomes a part of the apparatus itself, as it represents a specific configuration of power relations and governance strategies within contemporary societies. Crimmigration policies, practices, and laws thus become integrated into the broader apparatus of power, shaping the ways in which states regulate and control migrant populations. This integration involves the deployment of disciplinary mechanisms, biopolitical techniques, and technologies of power to manage migration flows and enforce immigration laws.

Given this intimate connection between discretion, crimmigration, and the movement of the intra-Schengen mobility control apparatus, attempting to reimagine this reality might appear futile. Nevertheless, while shifting gaze from the loci of discretion that are shot through with high politics and turning to the street level, the next section will embark on a thought experiment.

7.3 Rage against the machine – from within?

Most literature that looks at the notion of resistance in relation to migration and border control, in Europe and beyond, discusses acts of resistance from migrants and NGOs or other organisations that represent and support them (Coutin et al., 2017; Hess, 2017; Szczepanik, 2018). There is little to no literature that explicitly discusses acts of resistance by state agents or representatives such as, for instance, border officials (for exceptions see Nou, 2019; Shinar, 2013). Given the connection between discretion, crimmigration and the movement of the apparatus, looking for spaces of resistance from within seems both an urgent and an unattainable task. The question is also whether resistance is the right word, or whether this would be asking for too much given the complexities of the power structure and the struggle individuals working within the machine are part of and have to operate within. Especially against the background of widespread racial denial in Europe which is maintained by a strong colourblind language that entrenches not just state bureaucracies but social reality as well (Vega & van der Woude, 2024), it can be hard to imagine how actors within the intra-Schengen mobility regime might be able to break away from the definite relative motions of the apparatus. Bureaucratic structures inherently harbour elements that can marginalise certain groups, including racial minorities. This is evident in the work of Byron and Roscigno (2019), who illuminate how bureaucracy contributes to the racialised character of organisational life,

perpetuating discrimination through its standardisation and hierarchical nature. Additionally, Gordon (2024) highlights the phenomenon of bureaucratic dissociation of race in policing, where bureaucratic norms obscure the racial implications of policies and practices, perpetuating systemic injustices (also see Jones, 2019). Moreover, Marie Borrelli et al. (2022) shed light on the suspicious gaze entrenched within border control systems, including the intra-Schengen mobility control regime, emphasising how institutionalised disbelief shapes migration control regimes, further entrenching discriminatory structures.

Despite this reality in which bureaucratic structures often serve as conduits for perpetuating systemic oppression, actors operating within these structures can have a variety of reasons to, for instance, resist the laws and policies they are supposed to uphold. Divergent policy preferences or disagreement with the law(s) and policy due to, for example, perceived injustices or experienced role conflict can all contribute to what Shinar (2013) calls 'dissent from within'. One of the examples that Nou (2019) gives to illustrate 'civil servant disobedience' is that of ICE officials openly refusing to implement the Department of Homeland Security (DHS) directive deferring deportations of certain young, undocumented immigrants because they believed that compliance would require them to engage in illegal behaviour that violated their oaths of office. This act of resistance by the ICE officials was thus based on their conviction that following the directive would go against their professional ethics and legal obligations. By openly refusing to carry out the directive, the ICE officials were exercising their discretion and acting in accordance with their principles, demonstrating a form of civil servant disobedience in response to what they perceived as an unjust or unlawful order. Nou's example illustrates Cheliotis' (2006) argument against what he calls the seeming 'iron cage' of new penology. Although one could argue that, when looking at the development of criminal justice systems across the globe, the new penological train of thought and approach has proven to be rather pervasive, I want to echo Cheliotis' call to focus on what he calls 'the banality the of good'. The banality of the good aims to highlight the power of individuals to uphold ethical standards and resist negative trends within bureaucracies and bureaucratic organisations. Even in the face of wider political and institutional pressures and managerial control, the concepts underline the capacity – the agency – of individuals to engage in acts of resistance to promote (more) positive values and principles. The concept challenges the notion that resistance is solely the domain of dramatic or revolutionary actions, highlighting instead the significance of everyday acts of integrity and ethical behaviour in shaping organisational cultures and promoting positive

change within the state bureaucracies. Moving beyond a 'caring control' narrative and matching practices (Vega, 2018) towards the resistance of dehumanising practices and advocacy for just and humane policies by actors who are operating as part of the apparatus, is a matter for the long haul. Besides this, it also requires a critical reflection on the (public) role of scholars working on matters of borders, migration and mobility.

7.3.1 Moral pains, moral dissonance and the (im)possibility of change from within?

In finding loci of discretion that could be suitable to serve (also) as spaces for resistance, I have greater faith in the loci – and thus the actors – that are most distanced from the heat of the political arena. That means staying away from elected officials on the European and national level but instead focusing on civil servants, but also border agents. This is not to say that there are no politics involved on those levels (see Coslovsky et al., 2011), but since these positions are (generally speaking) not dependent on public campaigning and elections, the link to the political arena is not as prevalent. At the same time, as observed by Borrelli, street-level agents can even feel frustrated for being 'caught' between the different narratives and expectations regarding migration and border control: 'Securitisation and the criminalisation of migrants often result in heated and often emotional debates in migration offices and border police units, who have to implement political expectations and deal with public sentiments and the reactions of their clients – migrants with precarious legal status. Startled by some cases, where personal beliefs and emotions do not match the legal or administrative expectations, the question remains open: Who is "a criminal?"' (Borrelli, 2021, p. 205).

The notion of border agents experiencing a certain level of unease – moral pain, or (moral) dissonance – towards certain aspects of their jobs and the decisions they have to make, has been explored in the literature. Part of that discussion focuses on questioning the so-called humanitarian turn in various coercive state practices or, as Fassin (2012, p. 1) puts it 'the deployment of moral sentiments in contemporary politics… to manage, regulate, and support the existence of human beings'. Scholars have criticised this humanitarian turn as a shallow attempt to achieve social justice and equality at best and, at worst, as a tool to legitimise problematic practices and appease critique (Bosworth; Lohne; Vega, 2018). Aliverti (2020) observes that within a discourse of compassion and 'controlling care', violence and coercion are presented as more palatable whereas the externalisation of border control gets presented in terms of humanitarian intervention (Aas & Gundhus, 2015; Bosworth, 2017).

While acknowledging the constant oscillation between compassion and repression that underpins the operation of humanitarian governance (Fassin, 2005) and the problematic use of humanitarian discourse by politicians and politicians, several scholars have called attention to the implications of such a discourse and approach on the daily practices and decisions of street-level agents (Aitken, 2024; Aliverti, 2020; Franko & Gundhus, 2019; Vega, 2018). As street-level state agents are 'interpretative actors in their own right', whose accounts and actions can reveal 'the intermissions and tensions between rationalities and actions, discourse and practice'(Côté-Boucher et al., 2014, p. 199), it is to be expected that they are affected by a shift in the rationalities underpinning the operation of state power. In her research on how the humanitarian turn has affected border police agents in the United Kingdom, Aliverti (2020) illustrates how the challenges caused by this new moral climate in policing contribute to what she calls the 'moral pains' of border work. Officers feel torn between the rhetoric of compassion and the rhetoric of control that both have become part of their job. Franko and Gundhus (2019) also call attention to the effects of the humanitarian turn on the performance of border control on the street level such as experiencing moral discomfort and ambivalent feelings. While, in the light of the punitiveness that has long characterised the politics of crime and immigration worldwide, acknowledging more cynical readings of the humanitarian turn in border work as largely instrumental to validate and warrant problematic institutions and practices is warranted (see for instance Pallister-Wilkins, 2015; Rivera, 2015; Ugelvik, 2016), the authors also observe that 'By seeing humanitarian rationalities primarily as a way of cementing and legitimizing the status quo, we may be operating with a rather one-dimensional understanding of humanitarianism and failing to differentiate between different aspects and actors' (Franko & Gundhus, 2019).

It is hard to see, and to believe in, the positive use of human agency in the context of the impersonal nature of sovereign power and the reality of coercive border practices. Especially in parts of the apparatus that are organised in a strictly hierarchical and perhaps even militarised way. Although agents might feel moral dissonance, for numerous reasons it might seem impossible to see how to turn this moral dissonance into dissent, let alone acts of resistance (see Reiner, 1992 and Weitzer, 1993 on the general resilience to change in police organisations). Organisational socialisation, a sense of powerlessness due to institutional power dynamics, perceived limited autonomy due to the chain of command and perceived lack of alternatives due to a mission-centric focus are, amongst other factors, important obstacles to pushing back in situations

where there is a moral conflict or, more in general, against certain policies (Kennedy & Anderson, 2017; Marks, 2000).

Despite these very real and hard to 'overcome' obstacles, I do remain hopeful that the locus of discretion at the street level is where change from within could be sparked and fostered. This hope comes partially from my own fieldwork in the Netherlands with the Royal Netherlands Marechaussee and the fact that even after writing – both in Dutch and in English – very critical pieces about the way in which the RNM is operating in the enforcement of intra-Schengen borders, not only do I still have research access, I also see the organisation (slowly) changing. A higher awareness of the racialised dimension of their work, a more open debate about ethno-racial profiling at the intra-Schengen borders, internal organising around the matter while linking it also to racism within the organisation and a more critical stance towards what the European Commission and the national government 'wants' the intra-Schengen borders to look like. Many of my respondents throughout the years were very aware of the fact that the intra-Schengen police checks were highly performative, symbolic and political. Yet, because they were never asked about their opinion and their insights and, because of the strong hierarchical and military structure of the organisation, did not feel the 'space' to step up or to speak up, a lot of these reflections and criticisms were 'stuck' at the level of the individual. And, for many of my respondents, it was through conversations we had that they were voicing these thoughts 'out loud' for the first time. Although these examples from my own fieldwork might seem like insignificant developments and not leading to the immediate big changes that are needed, they are still important as I believe in the power of the ripple effect.

Such an effect can be triggered already by one, or a small group of individuals. Shahinpoor and Matt (2007) speak in this context of 'the power of one'. Although the authors do not focus on migration or border control bureaucracies, they emphasise the necessity of encouraging and supporting individuals inclined to, or already engaged in, principled dissent within these bureaucratic structures. In her analysis of changing police organisations from within, Marks (2000) highlights the importance of the formation of dissident police groups, 'both at the level of rank and file' and the management level to challenge not only aspects of the culture but also decision-making processes and specific practices. These dissent groups can know different forms, while Marks gives the example of unions or informal internal (management) networks, one could also think of dissent groups forming alliances with other – external – stakeholders or actors.

While looking at the institutionalisation of pro-environmental values in, amongst others, governmental bodies and state agencies, Everard et al. (2016) argue that processes of organisational socialisation can be used for the 'good' in the sense that through the same processes that, as discussed in Chapter 6, contribute to institutionalised racism and suspicion, also more ethical values can be internalised. Of course, as already mentioned before, a complicating factor is the nature of the migration and borders agencies. Agencies that are more organised according to a strict 'rank' structure are known to be more resilient against principled dissent from within (see Couto, 2023; Kennedy & Anderson, 2017). Nevertheless, the UK Border Force has shown that it is not impossible. Following Marks (2000) in this case, there was a clear dissent group in the form of the trade union. In 2021, the union representing eight in ten Border Force frontline workers (PCS) announced it would be taking part in a legal challenge against a plan by Home Secretary Priti Patel to push back small boats in the Channel. With dozens of people losing their lives in the Channel while trying to make it into the United Kingdom from France, the union representing the Border Force stated that the Secretary's pushback policy was 'unlawful, unworkable and above all morally reprehensible'. Furthermore, the PCS mentioned that border force members were '(…)aghast at the thought they will be forced to implement such a cruel and inhumane policy' and that there was no other solution for the government to 'abandon this appalling approach'. If the pushbacks would continue, border force officials announced to strike (The Guardian, 2021). In April 2022, a week before it was due to be challenged in the High Court for the unlawfulness of the policy as well as the infringement the policy made on migrant's human rights the UK government withdrew its migrant pushback policy (Independent, 2022). What this example of the United Kingdom shows is an interesting and successful collaboration between strange bedpartners: NGO's and the Border Force Union joined forces with Care4Calais, Channel Rescue and Freedom from Torture in bringing this case to court.

Other than giving rise to the question of why exactly dissent, in this case, was possible and what it took for this coalition between state agents and NGOs to form, the answers to which could play an important role in perhaps sparking dissent in other national contexts as well, it also gives rise to a reflection on the role of migration and border control scholars. In the ongoing debates around the question of what the 'public' role of various social sciences is, or could or should be, the most lively debates around the matter currently seem to be happening within the field of criminology (Loader & Sparks, 2010).

7.3.2 Public border criminologists as facilitators for resistance from within?

In questioning the 'public' part of public criminology, various contributors to the 2020 Handbook on Public Criminologies (Henne & Shah, 2020) show that the meaning of this label – of being 'public' – can mean different things to different scholars, depending on personal preferences, ideologies and also capacities. The baseline of being more 'public' should be to address problematic state practices, by, analysing and challenging the actions of state actors in the areas of migration and border control. From there, many (critical) criminologists shift to the importance of informing the general public about this while others emphasise the necessity for criminologists to support movements for social justice and human rights (Chancer & McLaughlin, 2020). Whereas it is very important to draw attention to public-facing work that does not privilege the conversation with the state and its crime-control (or migration and border control) agencies (Hughes, 2017, p. 369), it is crucial to also see the people working within state-agencies as a possible 'public'. As mentioned in the introduction, 'the state' nor its agencies are to be seen as monolithic entities void of human beings and therefore void of human agency. By not seeing the humans within the state as an important 'public' to engage with – in a critical way – would be missing out on an important chance for change from within. While speaking directly to criminologists, Henry (2020, p. 40) observes:

> "So public criminology is fraught with all kinds of challenges, threats, and dangers, not just in relation to the community of academic criminologists but also from an alliance of the law, order and control ideology that prevails over law enforcement agencies. But, is public criminology necessarily compromised by collaborating with government and public agencies? If not, is that the threat conservative alliances fear? Is part of the problem actually public criminologies' limited conception of its publics and indeed those publics' perception of it?

Following Marks' (2000) observation on the potential power of forming dissent groups within state agencies, I see a role for public border criminologists in enabling this. By educating state agents about their role in the bigger regimes that they are operating within, by enhancing their reflexivity on the implications of their actions, by showing them that their discretionary power also gives them agency to act different, and by empowering them to organise, public border criminologist could play a crucial role in fostering change. Creating this awareness and stimulating

critical thinking 'on the inside' could lead to state agents utilising (in)formal networks and alliances to challenge bureaucratic norms and practices (Hogg & Terry, 2000) or engage in what Scott (1990) calls strategic compliance, outwardly adhering to bureaucratic protocols while internally subverting them. Through leveraging institutional knowledge and authority, these individuals can influence decision-making processes and perhaps even trigger (internal) reform and policy change.

In order to get our concerns about how the different crimmigration control apparatuses continue to churn up migrants in the name of national security, the economy, housing, national identity etc. to be embodied in the political arena, scholars of migration and border control thus need to seek out the individuals within these apparatuses who are ready to act, but might not know it yet, or who might feel isolated or who might not know how. In other words, other than making sure that public criminology is 'audible and visible' it also needs to be strategically targeted through collaborative partnerships with its multiple publics to bring about positive social change (Henry 2020: 46 while referencing Rock, 2014). One of these audiences is street-level border agents as wielders of discretion and as most visible agents of 'the' state. While it is understandable that many scholars of migration and border control are sceptical about dissent from within and wary of the capacity of systems, states, and capital to incorporate critique, it should inform but not mean the rejection of calls for change (also see Carrabine et al., 2020, p. 28).

7.4 The end of a borderland adventure?

This book aims to show the complexity of the intra-Schengen mobility control apparatus by highlighting how this apparatus moves not just because of the actions of one of its cog-wheels, but because of the joint actions of several cog-wheels. These cog-wheels can be found on the European level, on the level of member states in the form of national governments, courts and enforcement agencies, but also on the local level in the capacity of specific border policing units and individuals.

Yet, despite the attempt to approach the machine in a holistic way, paying attention to different levels of governance, different actors and the complex socio-political context within the intra-Schengen mobility control apparatus was developed and continues to develop, the story this book tells about this apparatus is also consciously incomplete. Due to a conscious choice to focus on the role of state agencies and institutions, several cog wheels that do play a significant role in the workings of the apparatus have not received attention: NGO's and other grassroots humanitarian organisations (see Bosworth, 2017; Pallister-Wilkins,

2022), the people that cross (the intra-Schengen) borders (Mainwaring & Brigden, 2016; Triandafyllidou, 2017) and those researching (the policing of) mobility and migration (Bloemraad & Menjívar, 2022; Stierl, 2022). Furthermore, the role of technology within the apparatus has also only been addressed limitedly while scholars have shown the immense importance of various technologies as part of the larger border reconstruction project that is Schengen (Broeders & Hampshire, 2013; Dijstelbloem, 2021; Feldman, 2011) and, more generally, as part of mobility control on a global scale (Côté-Boucher, 2020; Milivojevic, 2021). In this literature, the interaction between these new technologies and discretion has been addressed and problematised as well (Côté-Boucher, 2016; Eklund, 2023; Hall, 2017; Leese et al., 2022). In light of the national security creep (Goldner Lang, 2024) in the area of migration and border control, technology might be(come) one of the devices that keeps the apparatus going as well.

As this chapter has illustrated, this is not – this cannot be – the end of my borderland adventure. Not only are there more cog-wheels to consider and factor into the dynamics as presented in the previous chapters, following the call for a specific approach to what it could also mean to be a public border scholar, there is also work to be done in trying to foster change from within. Furthermore, following the opening quote to this chapter, in order to change the story this book has told, it is crucial to – as part of this attempt to change the machine from within – work towards a new narrative of what Schengen, and thus Europe, can and ought to be, to ensure to continue to debunk myths around mobility and migration and to, grounded in these new narratives, help dissenters from within to find ways to use their discretion to speak truth *with* power (Gerken, 2004) by using the apparatus of governance. Only by changing the narratives underpinning the apparatus and by forming dissent groups from within the machine might shift gear, change direction or come to a halt.

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