

Meijers Committee

Standing committee of experts on international immigration, refugee and criminal law

Secretariat

p.o. box 201, 3500 AE Utrecht/The Netherlands
phone 0031 30 297 43 28/43 21
fax 0031 30 296 00 50
e-mail cie.meijers@forum.nl
http://www.commissie-meijers.nl

To (by email) Mr Henrik Nielsen
Head of Unit for Border Management and Return Policy
DG Home Affairs
European Commission
B-1049 BRUSSELS

Reference CM1208
Regarding The Dutch surveillance system @migoboras
Date 2 April 2012

Dear Mr. Nielsen,

The Meijers Committee would like to react to the letters of the Dutch Minister for Immigration, Integration and Asylum Policy of 23 December 2011 and 7 February 2012 to the Dutch House of representatives concerning the use and purpose of the surveillance system @migoboras. In order to support its Mobile Supervision Operations under Article 4.17a Aliens Decree 2000, the Royal Military and Border Police (further: KMAR) has developed a camera system that is known as @migoboras (a Dutch/English acronym standing for 'Mobile Information-Driven Action – Better Operational Results and Advanced Security'). The Dutch Ministry of Interior replied to the letter of the European Commission of January 27 2012 with several questions on @migoboras. The answers to the European Commission were reproduced in Dutch in the letter to the Second Chamber of the Dutch Parliament of 7 February 2012.

Below the Meijers Committee would like to draw your attention to a number of aspects of the @migoboras system which have been underexposed in the replies by the Dutch minister.

a. The purpose of Mobile Supervision Operations

It is important to differentiate between the precisely formulated purpose of Mobile Supervision Operations and the potential, more elaborate, purposes of the use of the @migoboras system. In his letter the Minister mentions three functions of the @migoboras system: 1) collecting and analysing anonymous data for profiling; 2) observing vehicles and selecting those to be stopped and examined and 3) providing assistance when a quick alert is issued. Hence, the @migoboras system may potentially be used to counter migration criminality. However, the purpose of the Mobile Supervision Operations performed by the KMAR in areas of the Netherlands close to the internal borders with Belgium and Germany is exclusively to combat illegal stay after the crossing of borders.

The rules governing these operations are laid down in Article 4.17a Aliens decree 2000 (Vreemdelingenbesluit 2000)¹. In an unofficial translation this provision reads:

1. The competence meant in Article 50, first section, of the Act, to stop persons for the purpose of combating illegal stay after crossing the borders in order to establish their identity, nationality and residence position, is exclusively exercised in the framework of aliens control:

a. at airports in relation to arrivals of flights from the Schengen area;

¹ The Dutch version of the text of Article 4.17a Aliens decree 2000 is to be found in annex 1 to this note.

b. in trains during at most thirty minutes after passing the common border with Belgium or Germany or, if the second train station is not yet reached within this period since the border was passed, not further than the second train station after the border;

c. on roads and waterways in an area till twenty kilometres from the common border with Belgium or Germany.

2. The controls, meant in the first section are exercised on the basis of information or experiences about illegal stay after crossing borders. The controls may in addition to a limited extent be exerted with the purpose of obtaining information concerning such illegal stay.

3. The controls, meant in the first section, under a, are exercised at most seven times a week with respect to flights on the same flight route, with a maximum of one third of the total number of scheduled flights on that flight route. Within the scope of these controls only part of the passengers of one flight is addressed.

4. The controls, meant in the first section, under b, are exercised in at most two trains per day per route and at most eight trains in total, and per train at most two compartments.

5. The controls, meant in the first section, under c, are exercised on the same road or waterway at most ninety hours per month and at most six hours per day. Within the scope of these controls only part of the passing vehicles is stopped.

b. The use of @MIGOBORAS for the purpose of Mobile Supervision Operations: an effect equivalent to border checks ?

According to our information the cameras of the @migoboras system are placed at the main motorway border crossings immediately behind or at a very short distance from the internal border with the other Member State. One of the core matters is the question whether controls under Article 4.17a Aliens Decree 2000 with the @migoboras system will have “an effect equivalent to border checks” as meant by the Court of Justice in the cases of Aziz Melki (C-188/10) and Sélim Abdeli (C-189/10). In these cases, the Court had to judge a French surveillance practice under the French Code of Criminal Procedure. In its judgment, point 74, the Court specified “that national legislation granting a power to police authorities to carry out identity checks – a power which, first, is restricted to the border area of the Member State with other Member States and, second, does not depend upon the behaviour of the person checked or on specific circumstances giving rise to a risk of breach of public order – must provide the necessary framework for the power granted to those authorities in order, inter alia, to guide the discretion which those authorities enjoy in the practical application of that power. That framework must guarantee that the practical exercise of that power, consisting in carrying out identity controls, cannot have an effect equivalent to border checks (...)”.

What is the precise meaning of “border checks”? According to Article 2(10) Schengen Borders Code, ‘border checks’ means the checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or may be authorised to leave it. Persons entering the territory without complying with the conditions of the Schengen Borders Code are staying “illegally” in the sense of Article 3(2) Returns Directive². The Meijers Committee is of the opinion that controls behind the borders will have an effect equivalent to border checks if the following elements are present:

- a. the surveillance aims expressly at controlling persons who just crossed the internal borders;
- b. the surveillance aims at controlling whether these persons are complying with the conditions for entry and stay in the country (which is equivalent to “combating illegal stay after the crossing of borders”);
- c. the surveillance is exercised on a systematic basis.

² Article 3(2) Returns Directive: “illegal stay” means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State.

The purpose of combating illegal stay after crossing the borders laid down in the first section of Article 4.17a Aliens Decree clearly encompasses the abovementioned elements a and b. Although this provision was drafted in order to comply with the Melki and Abdeli judgment the only element added to avoid an effect equivalent to border checks is lowering the intensity and frequency of the controls. The Meijers Committee is not convinced that this element alone is sufficient to take away the systematic character of the surveillance (c). The Meijers Committee would like to underline that border checks carried out during only a few hours at a certain border control post per day do not lose their character of border checks just by the fact that the intensity and frequency is lowered. The fact that the border police during its Mobile Supervision Operations stops only part of the passing vehicles does not justify the conclusion that no systematic surveillance is at stake. The introduction of the @migoboras surveillance by cameras just behind the internal borders shows that – in stead of control exercised by persons – a systematic surveillance exercised by cameras is introduced. That Article 4.17a Aliens Decree does not permit the border police to exercise controls for 24 hours seven days a week, does not reduce the systematic character of the observation by the cameras of the @migoboras system. Moreover, Article 4.17a allows the border police to perform controls on the basis of those systematic observations during six hours a day on every other day of the month. Apparently, the observations leading to the selection of the limited number of vehicles to be stopped are performed on a systematic basis and immediately behind the internal border.

c. The use of @MIGOBORAS for the purpose of Mobile Supervision Operations: a sufficient framework to guide the discretion?

Another prominent question is how the KMAR selects the persons to be stopped in the framework of post-border controls. The Meijers Committee is of the opinion that the requirement of legal certainty invoked by the Court of Justice in the above mentioned judgment, point 74, is irreconcilable with arbitrary arrests. Article 4.17a Aliens Decree is extremely vague in this respect: controls are exercised “on the basis of information or experiences about illegal stay after crossing borders”.

More information is to be found in the Tender document of June 25 2009, of the KMAR with regard to @migoboras (see annex 2 to this letter, only available in Dutch). In this document it is, amongst other things, stated that the KMAR aims to stop persons on the basis of previously gathered information. The @migoboras system collects vehicle and passenger data from the main roads at the borders which is compared with profiles (“doelgroepdefinities”).

This is consistent with the letter of 7 February 2012 of the Minister to the Second Chamber. In this letter, the Minister explains that such profiles select on certain combinations of digits, letters and colors. The stopping of a vehicle will always take place immediately after the system gave a “hit”. It appears that the system provides the KMAR agent with the picture of the vehicle to be stopped made by the camera and with information concerning date, time and location.

Thus, the system will provide a more or less reasoned selection of vehicles to be stopped by the KMAR which is obtained by a systematic observation by cameras of border crossing vehicles in the neighbourhood of common borders and by subsequent computer analysis of these observations.

It remains unclear to what extent the profiles relate to the purpose of combating illegal stay after crossing the borders.

d. Questions

Taking into account the previous comments, the Meijers Committee would suggest that the European Commission asks the Dutch Government the following questions:

1. What is the actual distance between the location of the cameras of the @migoboras system and the internal border between the Netherlands and its neighbouring Member States?

2. Will the camera surveillance at the main border crossing roads register all vehicles passing the road where @migoboras is installed and will it register passing vehicles also at times when no Mobile Supervision Operations are performed or when such controls are not permitted by Article 4.17a Aliens Decree?
3. Why are the checks on persons who just crossed the internal borders on the basis of the information provided by the @migoboras system not exercised on a systematic basis? Apparently, those controls are not performed at random but on the basis of the information produced by the system.
4. The use of cameras focussed on passing vehicles makes it possible to collect and analyse anonymous data such as the types and numbers of vehicles and the origin of number plates. Is the registration of the origin of number plates compatible with the prohibition of (indirect) discrimination on the grounds of nationality in Article 18 Treaty of the Functioning of the EU?
5. The KMAR observes vehicles and selects those to be stopped and examined using general profiles constructed on the basis of the collection and analysis of data. According to a report by Wilmer Heck in the *NRC Handelsblad* of 31 October 2011 the @migoboras system does not only take photos of the number plate but also of the drivers side of the car. Would photographs of the drivers side of the car constitute personal data that falls under the Data Protection Directive 94/46/EC?
6. What is the number of cars with a Dutch number plate, cars with a number plate of another Member State and cars with the number plate of a third country checked by the border police (KMAR) on the basis of information in the @migoboras system during the period in which the system was tested?

We hope you will find these comments useful. Should any questions arise, the Meijers Committee is prepared to provide you with further information on this subject.

Yours sincerely,



Prof. dr. C.A. Groenendijk
Chairman

Annex 1:

Artikel 4.17a Vreemdelingenwet 2000

1. De bevoegdheid, bedoeld in artikel 50, eerste lid, van de Wet, om ter bestrijding van illegaal verblijf na grensoverschrijding personen staande te houden ter vaststelling van hun identiteit, nationaliteit en verblijfsrechtelijke positie, wordt uitsluitend uitgeoefend in het kader van toezicht op vreemdelingen:
 - a. op luchthavens bij de aankomst van vluchten vanuit het Schengengebied;
 - b. in treinen gedurende ten hoogste dertig minuten na het passeren van de gemeenschappelijke landgrens met België of Duitsland of, als binnen deze periode het tweede station na het passeren van de grens nog niet is bereikt, tot uiterlijk het tweede station na het passeren van de grens;
 - c. op wegen en vaarwegen in een gebied tot twintig kilometer vanaf de gemeenschappelijke landgrens met België of Duitsland.
2. Het toezicht, bedoeld in het eerste lid, wordt uitgevoerd op basis van informatie of ervaringsgegevens over illegaal verblijf na grensoverschrijding. Het toezicht kan daarnaast in beperkte mate worden uitgevoerd met het oog op het verkrijgen van informatie over dergelijk illegaal verblijf.
3. Het toezicht, bedoeld in het eerste lid, onderdeel a, wordt ten hoogste zeven keer per week uitgevoerd ten aanzien van vluchten op eenzelfde vliegroute, met een maximum van eenderde van het totale aantal geplande vluchten per maand op die vliegroute. In het kader van dit toezicht wordt slechts een deel van de passagiers op een vlucht staande gehouden.
4. Het toezicht, bedoeld in het eerste lid, onderdeel b, wordt per dag in ten hoogste twee treinen per traject en ten hoogste acht treinen in totaal uitgevoerd, en per trein in ten hoogste twee treincoups.
5. Het toezicht, bedoeld in het eerste lid, onderdeel c, wordt op eenzelfde weg of vaarweg ten hoogste negentig uur per maand en ten hoogste zes uur per dag uitgevoerd. In het kader van dit toezicht wordt slechts een deel van de passerende vervoermiddelen stilgehouden.

Annex 2:

@ migoboras aanbestedingsdocument- see document attached to the email.