



rijksuniversiteit
groningen

faculteit
rechtsgeleerdheid

vakgroep staatsrecht,
bestuursrecht en
bestuurskunde

Vervolgevaluatie van de Wet biometrie vreemdelingenketen

GRONINGEN, 25 JUNI 2019

Colofon

Het onderzoek is – in opdracht van het Wetenschappelijk Onderzoek- en Documentatiecentrum – uitgevoerd door de Rijksuniversiteit Groningen, vakgroep Staatsrecht, Bestuursrecht en Bestuurskunde van de faculteit Rechtsgeleerdheid in samenwerking met Pro Facto, bureau voor bestuurskundig en juridisch onderzoek, advies en onderwijs.

Onderzoeksteam:

Prof. dr. Heinrich Winter (projectleider)

Mr. dr. Viola Bex-Reimert

Dr. ir. Bieuwe Geertsema

Mr dr. Stephan Hollenberg

Mr. Erwin Krol

Begeleidingscommissie:

Dr. D.W.J. Broeders (voorzitter)

Mr. S.G. Kok

Prof. dr. D. Meuwly

Prof. mr. G.J. Veerman

Drs. J.J. Verboom

Dr. J. Diehle

© 2019 WODC. Auteursrechten voorbehouden.

English Summary

Introduction and research method

The entry, admission, deportation and supervision of foreign nationals in the Netherlands is regulated in the Foreign Nationals Act 2000 (Vw 2000). With the *Act of 11 December 2013 amending the Foreign Nationals Act 2000 in connection with the expansion of the use of biometrics in the immigration process in connection with improving the identification of the foreign nationals* (Act on Biometrics in the Immigration Process (Wbvk) the Foreign Nationals Act 2000 was amended on 1 March 2014.

The Act on Biometrics in the Immigration Process makes it possible to increase the use of biometrics in the immigration process. It is now possible to collect a facial image and ten fingerprints from in principle every foreign national in all legal proceedings involving immigrants. These biometric data can also be stored centrally and consulted in the administration of foreign nationals (the Basic Facility for Immigrants, BVV). This act is the subject of this research.

The research question has two components:

1. To what extent has the Act on Biometrics in the Immigration Process achieved its objectives?
2. How does the act relate to European developments regarding the implementation of information systems in which biometrics are stored?

For the research, documents were studied, interviews were conducted with partners in the process and other stakeholders, data was requested from these parties, and an analysis was carried out based on the data obtained. A sample of files from the Basic Facility for Immigrants (BVV) was also studied.

This research is the continuation of an earlier evaluation of which the results were published in 2017. The follow-up of the recommendations from that research has been included in this research.

Policy reconstruction and legal framework

The policy reconstruction and the legal framework are, in principle, the same as in the earlier research. This is, after all, a reconstruction of (the objectives of) the act, the resources to be used and the considerations that have been taken into account. It is made clear in a target tree that the ultimate objective of the Act on Biometrics in the Immigration Process is to increase the efficiency and effectiveness of the implementation of the immigration policy, and that to this end it is essential that the collection of biometric data and its storage in the BVV increases the reliability of processes for identifying foreign nationals, while at the same time smoothing out irregularities in the identifying

processes. The assessment of the policy theory is that not all the estimates and assumptions are well-founded. We do, however, see that the choices for specific resources is in line with practical reality. Objectives are not SMART formulated or operationalized properly.

Process evaluation

In the context of process evaluation we looked into what changes have taken place among the partners in the immigration process with regard to the use of biometrics within the scope of the Act on Biometrics in the Immigration Process. Some partners have started to use new systems to assist with registering biometric data or verification using these data. The KMar has introduced a new registration column and plans to roll this out further. The diplomatic missions of the Foreign Office can now have data registered directly in the BVV (instead of going through the Immigration and Naturalisation Service, IND). In the short term the IND will start to use equipment from one supplier (instead of two). The Central Agency for the Reception of Asylum Seekers, COA has rolled out the use of biometrics across all locations, so that processes for in-house registration and reporting obligations are faster. Finally, the BVV itself has introduced a new system making it possible to measure the quality of all fingerprints based on international open standards, for instance.

An analysis of the new version of the Protocol Identification and Labeling (PIL) shows that all changes made in the process are also included in the new version of this document.

Assessment of the effectiveness of the Act on Biometrics in the Immigration Process

This research is a second attempt to get an answer to the question regarding the extent to which the objectives of the Act on Biometrics in the Immigration Process have been achieved. It has to be said that even now this question cannot be answered. This is partly due to how the objectives of the act are described. These have not been properly operationalized, making it difficult to establish whether and when these goals would be achieved if at all. A major barrier in evaluating the effects of the act lies in the fact that there was no baseline measurement of the nature and extent of so-called 'identity irregularities' prior to the introduction of the act. In fact, only after the previous evaluation in 2017 was work done on a uniform categorization of which irregularities could occur in the migration process and how these materialize at each of the process partners. There was no insight into this and certainly not any qualitative information available about the problem when the Act on Biometrics in the Immigration Process was introduced.

When assessing the usefulness and effects of the Act on Biometrics in the Immigration Process, the partners in the immigration process often refer to the so-called *dark number* problem: some of the irregularities cannot be measured because, by definition, these occur out of the sight of the partners in the process. In the opinion of the researchers, this problem should become less and less important over time, as structural and

coordinated efforts are directed to that part of the irregularities that actually does come into the picture.

The researchers note that neither a good picture of the current state of affairs regarding identity irregularities in the immigration process nor of the extent to which this situation has improved as a result of the entry into force of the Act on Biometrics in the Immigration Process can be formed for this research. The partners in the process were asked to provide as much quantitative data as possible showing they have an idea about what irregularities occur and how frequently. The truth of the matter is that such information was not forthcoming. The researchers suspect that this is mainly a consequence of the fact that management reports are still not being used to get a grip on the problems that the Act on Biometrics in the Immigration Process is intended to combat. If information about this has been collected, then it is not used in aggregate form by the management of the process partners, let alone in an overarching report by the immigration process as a whole.

Steps have, however, been taken towards creating such reports, but these have not yet led to uniform, process-wide registrations. This was formulated as the first recommendation in our previous report from 2017. In any case, it has once again become clear that an effective evaluation of the effects of the Act on Biometrics in the Immigration Process on the basis of analysis of quantitative data is and will remain impossible. This is because a statistical reconstruction of the situation before the entry into force of the Act on Biometrics in the Immigration Process is apparently not possible.

Policymakers will have to be content with qualitative images and observations from within the immigration process.

The second and third recommendations in the previous report concerned the establishment of a quality system for monitoring and focusing on the quality of biometric data. Here too we note that with regard to this steps have been taken. All fingerprints in the BVV are provided with quality scores, making it possible to monitor quality. We note that improvements in the quality of registered fingerprints have been made by putting new systems into use, but we also note that after implementation of the systems the quality does not improve further, but instead appears to decrease slightly. This raises the question of the extent to which people have a grip on the quality of processes in this area.

When the quality system is developed further, it is advisable not to designate the users of the biometrics (the process partners) as the party that assesses the quality. For this, benchmarks must be set by technical experts, after which technical guidelines must be drawn up to ensure that focus on the quality of collecting processes can also be enforced at the partners in the process. At administrative level, this requires an investment in sound quality management with clear roles and powers.

Part II: Developments in European law

The European Commission is currently focusing heavily on better management of the external borders of the Schengen area, partly in response to the so-called 'migration crisis' in 2015. As a result, new legislation has been initiated that should lead to an Entry/Exit system (EES) and an authorization system (ETIAS). In addition, changes have been proposed to already existing European regulations, whereby changes will be implemented in the Visa Information System (VIS), the Schengen Information System (SIS) and in Eurodac. These changes also have consequences for the scope of the Act on Biometrics in the Immigration Process.

The introduction of ETIAS will not affect the Act on Biometrics in the Immigration Process since this system does not work with biometric data. This does not apply to the introduction of the EES (registration system for *all* third-country nationals coming to the Schengen area for short stays). This system is relevant for border control but also for surveillance and return. Under the Regulation, four fingerprints are collected and a facial image is made for a personal file unless the data have already been entered into the VIS or the person has already entered the area. This means that biometric data can only be partially collected from these persons on the basis of Article 106a of the Foreign Nationals Act, since four fingerprints are collected under the EES and ten fingerprints can be collected under Article 106a of the Foreign Nationals Act. In addition, the question arises as to whether the regulation contains an implicit authority to make an on-site facial image before or during verification.

In addition, changes are proposed to the Visa Information System (VIS). This system registers all third-country nationals who are subject to the visa requirement who come to the Schengen area for a short stay. It has been proposed that the age at which fingerprints can be collected should be lowered to six years. A digital photograph is also taken. The consequences these changes have for the Act on Biometrics in the Immigration Process are unclear. Article 106a of the Foreign Nationals Act only refers to the collection of fingerprints and the making of a facial image without specifying age or how the facial images are made. More interestingly, when the changes are introduced, visas for long stay, in the case of the Netherlands the authorization for temporary stay, are also entered in the VIS. The residence permit is also entered. Article 22bis paragraph 1 of the VIS amendment proposal refers to the introduction of longer-term visas and residence permits. It seems that residence permits without an authorization for temporary stay should also be entered. This has no consequences for the scope of the Act on Biometrics in the Immigration Process since these data are provided from the national registers.

Amendments to the SIS II have also been proposed. First of all, it must be stated that SIS II only contains the authority to issue an alert and not the authority to collect biometric data. The proposed changes relate to the inclusion of a return decision and an entry ban in SIS II. In the latter case, this prohibition can only be included if the person is not present in the Schengen area. It is striking that SIS II includes the possibility of including a palmprint, while this authorization is not included in Article 106a of the Foreign Nationals Act 2000. It would therefore seem that these biometric data cannot be

entered in SIS II, since there is no national power to collect them here. The SIS II does not provide authority to collect the data but to enter the data in the system.

Finally, the proposed amendments to Eurodac are relevant. While currently Eurodac refers to the registration of persons requesting international protection, this will be extended to include persons who have irregularly crossed the external border into the Schengen area. A facial image and ten fingerprints will be collected from this group of people. This means that in those cases, Article 106a no longer applies. These data are also entered in Eurodac.

We would also like to point out the following: the conclusions described above regard the collection of biometric data. But Article 106a of the Foreign Nationals Act also provides an authorization to process these data. The data are processed in the BVV. The question is what role the BVV will play when data are stored at European level due to changing European legislation. The answer to this is closely related to the extent to which national files can also be created and the extent of the authorization to enter biometric data into these files. Part of the answer seems to lie in the answer to the question of who is authorized to collect biometric data. When it comes to issuing national visas and residence permits, while it can be argued that although these data should be entered into European systems, the source of these data is a national file, since this is about the exercise of national powers. Another question facing us is how to deal with the additional effect of the Act on Biometrics in the Immigration Process. If additional data may only be entered in the BVV, and this does seem to be the case since national files are not allowed to be created, then the question is how functional is the BVV in this type of situation. To get a complete picture, the data in the BVV should be combined with the data in the relevant European system. But how interoperable are these systems? In addition, the European regulations lay down precisely which officials have access to the European systems. The question is whether this corresponds to the access conditions applied by the BVV.

The motion submitted by Strik et al and the sunset clause

When the act was debated the Upper House of the Netherlands Parliament adopted the motion submitted by Strik et al¹ requesting that at the very least, the following should be researched:

1. the extent to which the legislative amendment was in fact needed for and actually resulted in the prevention of identity fraud;
2. the extent to which the legislative amendment has resulted in the use of biometric data in other criminal proceedings;
3. the extent to which the data in the central databank are indeed reliable and of sufficiently high quality.

The researchers conclude that during the interviews it was generally stated that the biometrics used in the scope of the Act on Biometrics in the Immigration Process have helped to prevent identity fraud, but that it is not possible to substantiate this statement

—

¹ EK 2013/14, 33,192, G.

with statistics. Due to the absence of a clear picture of the situation before the Act on Biometrics in the Immigration Process came into force (baseline measurement), it is impossible to measure the effect of the act on the prevention of identity fraud.

Regarding point 2, the researchers have to conclude that an accurate picture has not been obtained of the use of biometric data in other criminal proceedings, but that, based on the previous evaluation and the statement that the situation has not changed drastically, this use is very limited. With regard to the third question in the motion, it can be concluded that the data in the BVV are reliable, but that 'sufficient quality' has not been established. Steps have, however, been taken since the previous study to improve quality.

The Act on Biometrics in the Immigration Process has a sunset clause: the legal provisions introduced by the Act on Biometrics in the Immigration Process will be automatically repealed after seven years. Policymakers are now faced with the crucial question of whether the act should be continued. Although a clear, quantitative picture of the problems to be tackled and the extent to which the Act on Biometrics in the Immigration Process offers support in this regard cannot be obtained, it must also be established that parties in the immigration process unanimously endorse the importance of the Act on Biometrics in the Immigration Process. The use of the BVV and the (biometric) data registered in it is an integral part of all processes. Furthermore, links have been forged with various European developments and use is being made of European systems.

The researchers note that if continuation of the act is opted for, the recommendations in the first evaluation remain in full force and should even be set as a precondition. The partners in the process must set up uniformly categorized registrations of irregularities as quickly as possible and must report on this periodically. And intensive efforts must be made with regard to integrated quality management in the process. We recommend that instead of user experiences, the desired quality levels are determined based on dactyloscopic expertise.

The analysis of European developments still does not yet provide a definitive answer regarding the necessity of the Act on Biometrics in the Immigration Process. A number of questions remain to be answered before the impact of these developments becomes clear. These questions cannot yet be answered.