

IDENTITY FRAUD: A DEMARCATION

*An international comparison of terminology and
an analysis of national criminal offences*

SUMMARY

MAIN THESIS AND RESEARCH QUESTIONS

Identity fraud is a type of fraud that attracts increasing attention over the last few years, both in the Netherlands and elsewhere. However, it remains unclear what the word 'identity fraud' refers to. One could think of a situation where a person with bad intentions knowingly assumes an identity which is not his or hers. This report clarifies the meaning of identity fraud, serving two goals. The first is that it seeks to contribute to the development of a policy framework for the purpose of combating identity fraud. The second is to enable the minister of Justice to consider the desirability and necessity of a separate identity fraud crime to be included in the Dutch criminal code. The main thesis of the report is:-

What is a workable demarcation of the term identity fraud, considering nationally and internationally used terminology as well as existing criminal offences related to it?

The main thesis is addressed on the basis of two categories of research questions:-

A. Inventory and analysis of terminology related to identity fraud

1. Which terminology is used nationally and internationally?
2. What quantitative data exist about identity fraud and its impact?
3. What measures have been or will be taken to combat identity fraud?
4. How does the terminology used nationally and internationally interrelate?

B. Identity fraud and criminal offences

5. What is the relation between the terminology and identity fraud related crimes?
6. What elements make identity fraud unique vis-à-vis identity fraud related crimes?
7. To what extent do gaps exist in existing identity fraud related crimes?

The inventory and analysis are based on research done on the academic and policy literature in six jurisdictions: the Netherlands, the United States of America, the United Kingdom of Great Britain and Northern Ireland, France, Belgium and the European Union. The research is further limited in that we look at identity fraud committed by natural persons (as opposed to legal persons). Furthermore, we assume that identity fraud is used as a means to commit other crimes.

THEORETICAL FRAMEWORK

An answer to the first category of questions is preceded by a theoretical analysis of the term identity fraud and its constituent elements: ‘identity’ and ‘fraud’. This is a first demarcation of the term. This analysis shows that the meaning of identity is context-bound and that it has a particular function: that of identification. With this we mean to convey the idea that the concrete situation determines which elements belong to a person’s identity, considering the function of identification, which is to identify a person as unique within a certain group. Identification takes place on the basis of so-called ‘means of identification’. We distinguish three types of means: data (name, address, etc.), documents (a passport) and other data carriers (a credit card or RFID tag).

The other constituent element, ‘fraud’, is not a statutory term in the Netherlands; it is not defined or used in Dutch (criminal) legislation. It is generally associated with falsehood and deceit. In the context of identity fraud, it means that a falsehood is committed in respect of the means of identification for the purpose of deceit in some form. Although the theoretical analysis focuses on identity fraud, it does not mean that other terminology exists in the literature of the respective jurisdictions. One of them is identity theft. It is used to express in particular that there is a person who is the victim of a falsehood in respect of his or her means of identification. Identity fraud seeks to emphasize the deceit as a goal or result.

RESULTS FROM THE JURISDICTIONAL ANALYSIS

For the purpose of the inventory and analysis a framework of analysis has been developed. It exists of six items against which the definitions of identity fraud in the jurisdictions are ‘scored’. It enables us to analyse how these definitions interrelate and to determine which elements fall outside the scope of the term and which elements are deemed necessary and possible. These items are presented as questions and sub questions, of which the former are presented below. It is followed by the main conclusions drawn from the comparative analysis for the purpose of demarcating the term identity fraud.

1. Is a person mentioned in the definitions whose identity is compromised?

The jurisdictions differ on this matter. If a person is referred to, it is also mentioned that the means of identification are obtained and/or used against that person’s will. The person need not necessarily be a natural person but can also be a legal person or some other entity. Some definitions exclude the use of a fictitious identity. Manipulating one’s own means of identification is not included, at least not explicitly, in the definitions. However, one must bear mind that it can lead to the creation of a fictitious identity. The conclusion is that referring to a person in a definition of identity fraud is not relevant for the demarcation of the term but that referring to the involuntary nature of obtaining and using

means of identification is, unless it concerns the fabrication of a fictitious identity. Furthermore, it is irrelevant whether the means of identification that are obtained or used, are means of identification of an existing person, a deceased or totally fictitious person. Manipulating one's own identity falls outside the scope of identity fraud unless it aids in developing a fictitious identity.

2. Are means of identification mentioned in the definitions?

The extent to which means of identification are referred to differs per jurisdiction. In the US data are emphasized, whereas France seems to prefer referring to specific documents, such as an identity card or passport. In other jurisdictions definitions show that data, documents or other data carriers are means of identification and used as object of identity fraud. In the end, it can be concluded that *naming* a particular type of means of identification is not necessary to demarcate identity fraud. However, it may be relevant in respect to policy development.

3. Does the definition show what it means with 'identity'?

What exactly is understood with 'identity' remains unclear in most, if not all, definitions. Usually the meaning of identity is context-bound. Nevertheless, it seems that most definitions convey with identity the idea that it concerns some form of bureaucratic identity rather than, for example, a biographical identity. Bureaucratic identity, here, refers to elements of identity information that are employed by public and private organisations, such as name and address, date and place of birth, credit card details, tax number, social security number, etc. The USA seems most complete in respect of legislative definitions, which refer to whole lists of types of means of identification. The general conclusion is that the exact meaning of identity differs per definition: usually this is context-bound. Thus, no conclusion can be reached, *in abstract terms*, about the meaning of identity. Furthermore, creating a false identity, without using any of the means of identification but solely on the basis of false appearance, falls outside the scope of identity fraud.

4. Do the definitions refer to (intentional/deliberate) unlawful actions in respect of the means of identification, which have an intentional character?

In many definitions a distinction can be observed between actions existing in *obtaining, taking, possessing, creating or handing over* means of identification and actions existing in *using* them for unlawful purposes. This item refers to the first type of actions, which we consider to be an initial phase of identity fraud. Often, definitions refer to explicit actions, such as forgery, theft and fraudulently obtaining means of identification. Sometimes though means of identification can be obtained lawfully (for example through 'shoulder surfing' and 'dumpster diving'), but the subsequent behaviour of *using* them to adopt a false identity, is unlawful. Actions in relation to means of identification are usually of an intentional nature; they are deliberately sought after. Obtaining means of identification through omission is possible but this is not encountered in any of the definitions. We conclude that referring to actions relating to means of identification contributes to demarcating the term identity fraud. However, demarcating does not require specifying the particular type of action. Generally, these actions are unlawful and intentional.

5. To what extent do the definitions refer to subsequent behaviour?

Almost all definitions refer to some form of subsequent behaviour: different means of fraud, benefiting, withdrawing from legal obligations or doing things unnoticed. This subsequent behaviour is unlawful and usually intentional: the subsequent behaviour is wanted in some shape or form but 'oblique intention' could suffice also (the perpetrator may not want to cause the consequences but foresees that it is most certain that they will result from his conduct.¹ The sole (unlawful) possession of a collection of means of identification does not suffice to speak of identity fraud. Carrying out the subsequent behaviour (and finishing it) is usually what the definitions refer to but an attempt may be included also. Furthermore, it may even suffice to merely have the intention to carry out the unlawful subsequent behaviour without there being any initial behaviour or attempt.

6. Do the definitions aim at a particular relation in which id takes place?

Most definitions are not specifically aimed at either a horizontal or vertical relation. The former refers to a relation between private parties in which identity fraud can take place; the latter refers to a relation between a private party and a public body. In the Netherlands, the context seems to suggest that a vertical relation is emphasized, whereas in the USA, as well as the EU, a horizontal relation seems to take precedence. However, the relation within which identity fraud takes place has not been proven to be a practical criterion for demarcating identity fraud, as in both relations similar means of identification are or can be used.

WORKING DEFINITION

Considering the terminology used in the six jurisdictions subject of analysis, we have reached a demarcation of the term identity fraud. (It must be observed that we speak of *false* means of identification when they do not truthfully identify the person who uses it.) The demarcation has given rise to the following definition:-

Identity fraud is obtaining, taking, possessing or creating false means of identification intentionally (and) (unlawfully or without permission) and to commit with them unlawful behaviour or: to have the intention to commit unlawful behaviour.

MEASURES AND QUANTITATIVE DATA

The contexts in which definitions are formulated in the respective jurisdictions occasionally refer to measures to combat identity fraud. It suggests that there is a direct relation between definition and these measures as that is the type of identity fraud the measures seek to remedy or combat. However, this correlation remains often unclear. This is not to say that we cannot comment upon these measures. The report distinguishes six categories: (1) preventative measures of an informative and coordinating nature, (2) preventative measures of a technological nature, (3) policy and enforcement measures; and legal measures of a (4) preventative, (5) remedial and (6) repressive nature. The analysis of the six jurisdictions shows a picture of a fragmented range of (proposed) measures. Although many studies in the jurisdictions emphasize the need for a structural and integrated approach, practice shows that such an approach is as of yet not realized.

In respect of quantitative data a similar comment holds, which is that there is no direct correlation between the definitions and quantitative data about the extent and incidents of

¹ Cf. G. Slapper & D. Kelly *English Law*. London: Cavendish, 2000, p. 217.

identity fraud, financial damage and costs of combating it. Nevertheless, what can be observed is that the available data show that identity fraud is a structural problem in the six jurisdictions. The data show that there is a steady increase in the incidents of identity fraud and its various forms. It is not possible, however, to give a quantitative overview. The available data are too varied and hence insufficiently reliable to provide such an overview. It may be that the pluriformity of the meaning of identity fraud shows itself (as well as the absence of an adequate registration system in the respective jurisdictions).

IDENTITY FRAUD AND DUTCH CRIMINAL OFFENCES

The next part of the report exists of answering the question to what extent identity fraud is covered by existing Dutch criminal offences. To this end, an inventory is made of relevant existing Dutch criminal offences that can be related to identity fraud. These criminal offences consist of so-called ‘falsehood offences’ (such as written falsehoods in documents, fraud with travel documents and payment cards), ‘active and passive fraud’, computer crimes, human trafficking and smuggling as well as theft, buying and selling stolen goods (‘fencing’), embezzlement, general fraud (*‘oplichting’*), and money laundering offences.

These offences are then analysed against the background of the working definition of identity fraud. This analysis shows that the constituent elements of the working definition correspond to a large extent with the wording of the criminal offences. Thus, all types of means of identification cover the whole range of the criminal offences together. In addition, actions relating to means of identification (obtaining, taking, possessing, etc.) are covered by the wording of the criminal offences. Furthermore, carrying out subsequent unlawful behaviour with the aid of false means of identification is also covered, such as in the wording of the so called falsehood offences, computer crimes, money laundering offences, and the active and passive fraud offences as well as the ‘general fraud offence’. Many other offences can be carried out that do not necessitate the use of false means of identification but where these are a helpful instrument, such as in theft but also in drugs and arms related offences.

Some offences cover the whole range of identity fraud (the initial phase of actions relating to obtaining means of identification and the subsequent phase of unlawful behaviour with the aid of the means of identification). These offences are the falsehood offences, ‘computer trespassing’, active and passive fraud and ‘general fraud’. These offences approach in their wording the constituent elements of the working definition and include all sorts of false means of identification. Sometimes the working definition is broader in its scope and sometimes more limited. These differences do not appear problematic though. Two comments suffice. The first is that the working definition is too broad in respect of criminally combating incidents of identity fraud where means of identification are lawfully obtained and there is merely the intention to want to carry out subsequent unlawful behaviour (without having started the behaviour). It would amount to the criminalisation of intention alone, which fits ill with the nature of Dutch criminal law, aimed at behaviour rather than intention. The second is that offences in respect of travel documents are formulated more broadly than the working definition: here it is not necessary to prove intention (as in the will to commit the crime); here culpability as in recklessness or even negligence may suffice.

What makes identity fraud unique? A first unique trait is that identity fraud involves fraud with means of identification. Whether or not such a means of identification can be worded specifically, referring to 'good' or 'information', which is the case in the wording of the criminal offences, is not important. A subsequent unique trait is that one description is able to pinpoint what is at stake, contrary to existing criminal offences: identity fraud consists often of a range of unlawful behaviour, found in different criminal offences. A third trait is that identity fraud makes clear that it describes subsequent behaviour as unlawful behaviour without having to resort to special conditions of unlawfulness common in the criminal offences discussed here.

This final trait leads to pinpointing to a possible gap in the special conditions for unlawfulness in certain criminal offences, in particular the active and passive fraud offence and certainly to a gap in respect of the general fraud offence. In respect of active and passive fraud, it is unclear whether it covers all contracts relating to goods and services. In respect of the general fraud offence, it excludes fraud in respect of services when the means of identification consists merely of data. The gaps, thus, refer to the use of false identification *data* within horizontal relations and, more specifically, in respect of obtaining *services*.