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Describing Identity Fraud: Towards a Common Definition

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Abstract

Incidents of identity fraud are increasing in scope and variety and can be regarded as a global problem. Understanding the problem properly demands a general description of identity fraud. An extensive review of the literature shows that there is no such general description, although it would contribute to the development of a structural and cooperative approach among relevant stakeholders (states, IGOs, private enterprises, NGOs) in Europe and elsewhere to combat identity fraud. This article reports on a research project that has been carried out by Dutch authors. It consisted of an analysis of literature in the Netherlands, the USA, the UK, France, Belgium and the European Union. Some 30 definitions were analysed with an aim to formulate a general definition of identity fraud. Formulating such a definition enabled a subsequent analysis into the extent to which identity fraud is covered by existing legislative measures and the necessity or desirability of introducing new legislative measures.

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1. Introduction

Identity fraud is an increasingly recurrent phenomenon in policy documents and other publications in many jurisdictions. These publications report on the increasing number of cases of identity fraud and the financial and other types of loss it causes to individuals, enterprises, public organisations and society in general. These publications also set out what measures are taken or are proposed to combat identity fraud. In many jurisdictions identity fraud is not, by itself, a criminal offence.

A critical analysis of the literature shows that identity fraud is hardly defined or described. It seems that there is some general understanding as to what identity fraud is, what it does and what it causes. Indeed, this general understanding seems to imply that identity fraud is a species of fraud involving the use of an identity – false or otherwise – with the aim of doing something unlawful. It may be to defraud credit card companies (and hence other credit card holders), to obtain public services to which one is not entitled, to gain entrance into another country, etc. When identity fraud is defined or described, the definition seems, generally, to be specifically goal or function oriented. Thus, in their descriptions, publications stemming from consumer protection agencies emphasise the use of the financial information of another in order to defraud, whereas immigration agencies point to different aspects of means of identification. Nevertheless, the descriptions that do exist have one aspect in common: identity fraud involves the use or misuse of identity.

To formulate a general description of identity fraud to capture the variety of incidents (and descriptions) of it, would contribute, in the view of the authors, to the development of policy (national, European and international), both to combat identity fraud and to deal with the problems caused by cases of successful identity fraud. Indeed, for the proper formulation of policy and its effective execution, it is useful to first have a general understanding of the phenomenon, which, at the same time, demarcates identity fraud from other phenomena. In doing so, the authors use data they have gathered as part of a research project on identity fraud. It enables them to formulate a framework of analysis as a basis for a general description of identity fraud.¹ This framework allowed the authors to identify unique aspects that characterise and demarcate the phenomenon and to formulate questions that demand answers before devising a general description. The general description subsequently allows the formulation of other, more fundamental questions. One question that is specifically addressed in this article is whether identity fraud should be a criminal offence in its own right, or whether it suffices to capture cases of identity fraud by existing criminal offences. For the answer, we limit ourselves to an analysis of the existing Dutch Penal code. However, our analysis will no doubt be of interest to other jurisdictions that are considering or have introduced legislation pertaining to the general criminalisation of identity fraud.

¹B de Vries, J Tigchelaar, T van der Linden and T Hol “*Identiteitsfraude, een afbakening (Identity fraud: a demarcation)*” (2007) available at: <http://www.wodc.nl/onderzoeksdatabase/identiteitsfraude.aspx?cp=44&cs=6796> (accessed 21 May 2008).

The rising attention paid to identity fraud and its consequences is due, amongst other things, to the digitalisation of society. Against this background the meaning of ‘identity’ must first be analysed. It implies an understanding of the process of identification. In addition, the meaning ‘fraud’ seems to be rather specific and relates to two aspects: (i) the identity used and (ii) that for which the (false) identity is used. The analysis of these key terms is carried out in section two. In section three, the article reports on the framework of analysis used in the research project and describes six items that characterise the definitions found in the literature in the Netherlands, the United States of America (USA), the United Kingdom (UK), France, Belgium and the European Union (EU). Subsequently, it reports on the findings of this analysis: what can be concluded from the analyses of these jurisdictions with respect to these items? Based on this, a general definition of identity fraud is presented in section four. The article concludes in section five on the relevance of the general definition and suggests the need for further research. This research should consist, amongst other things, of an analysis of existing criminal offences against the background of the definition. The authors point, to this end, to Dutch legislation in order to develop certain tentative conclusions in respect of Dutch criminal law.

2. Identity and Fraud in Techno-society

It is suggested that the growing attention given to the phenomenon of identity fraud relates, among other things, to the changing perception of the function of identity and the means of identification. From a social-theoretical perspective, it can be observed that there is a growing need for information, including information about persons, and that, at the same time, the digitalisation of this information has led to this information becoming more standardised and processed in standardised ways (through the use of numbers, codes, etc). It has an impact on the meaning of ‘identity’ and on the need for protecting identity and identity details. This is not only a national issue but also a global one. As Solove puts it:

*We are increasingly living with what I call ‘digital dossiers’ about our lives and these dossiers are not controlled by us but by various entities, such as private-sector companies and the government. These dossiers play a profound role in our lives in modern society.*²

He continues stating that these “digital dossiers” are insufficiently protected from misuse as a result of “an architecture that does not [...] afford us with a sufficient degree of participation in the collection, dissemination, and use of that information”.³ It is an architecture of vulnerability: persons, whose information is kept, have no power of control over the information. The result is that a victim of identity fraud has no means of addressing the situation. A major dilemma, subsequently, for developing an architecture that addresses this vulnerability is that, on the one hand, information needs to be protected to prevent misuse while, on the other hand, this information is

² D J Solove “Identity Theft, Privacy, and the Architecture of Vulnerability” (2003) 54 *Hastings Law Journal*, 24.

³ *Ibid.*

not kept as secret information but is meant to enable efficient service provision.⁴ In this vein, the societal context of identity fraud is partly the result of side effects of scientific and technological developments: the digitalisation of information does not only lead to efficient service provision but also to the standardisation of identity resulting in a greater sensitivity to misuse.

2.1. Identity

‘Identity’ in the context of identity fraud enjoys a specific meaning. We prefer to refer in the context of this article to ‘bureaucratic’ identity (digitally or otherwise stored) rather than our biographical identity or life story, although the two may of course overlap. Indeed, bureaucratic identity necessarily refers to certain aspects of our life story, like name, address, date and place of birth, but is now extended to include a wider variety of other personal details with which a person may be identified by others in a functional way. Often this information is represented by a mere number.⁵ It adds to the standardisation of the process of identification and the use of services, which are becoming more and more digitalised. In many cases, it is the social context that establishes one’s identity and determines the necessary information required.⁶ As Leenes, *et al* state:

*By adopting roles compatible with the adopted social system, such as customer in an economic (shopping) system, and by using the communication patterns associated with these roles, the identity of a person is defined. The relevant characteristics or partial identity that makes up a person’s identity therefore depends on the social context.*⁷

It is important, then, to clarify which type of details belong to a person’s identity and are relevant to that person’s identification. These details can be regarded as *means* of identification and can be categorised, roughly, into four categories. The first category consists of physical and biometric identification details. The second category consists of what we would like to call ‘formal functional’ details. These details can be of either a descriptive nature or attributed to a person. They function formally as they may enjoy a legal status. These details allow one to draw functional distinctions between persons to bestow rights, obligations or discretionary powers upon them or recognising and affording them a particular status or authority. This can be vertical, characterising the relationship between a person and the state (for example through

⁴ L LoPucki “Human Identification Theory and the Identity Theft Problem”, (2001) 80 *Texas Law Review*, 94 also available at: <http://ssrn.com/abstract=263213> (accessed 21 May 2008).

⁵ A Pfitzmann and M Hansen “Anonymity, Unlinkability, Undetectability, Unobservability, Pseudonymity, and Identity Management – A Consolidated Proposal for Terminology” available at http://dud.inf.tu-dresden.de/literatur/Anon_Terminology_v0.31.pdf. (accessed 21 May 2008). Identity is defined at 29 as: “any subset of attributes of an individual person which sufficiently distinguishes this individual person from all other persons within any set of persons”.

⁶ *Ibid* at 29. Cf. Pfitzmann and Hansen, who call this a ‘partial’ identity, representing the person in a specific context or role.

⁷ R E Leenes *et al* “ID-related Crime: Towards a Common Ground for Interdisciplinary Research” (2006) *Fidis Deliverable* 44.

the attribution of a social security number), or horizontal, characterising a person's contractual relationship with a private body (such as a bank account number).

In the context of this article, these two categories are important. However, it is worthwhile to point to two other categories. The first consists of those found online, where a person identifies himself towards another – a provider, online shop or the virtual world of chat sites – with a username and password.⁸ Here, the 'real' identity of the person has in some cases become irrelevant. The final category consists of details that are usually not known to the person to whom they relate. These are referred to as details to make up 'profiles' of, in particular, consumers. On the basis of factual information such as marital status, job, preferences for types of food, postal code area, etc., persons are profiled into different categories for the purpose of marketing strategies. Thus, supermarkets identify their customers by virtue of what they buy rather than who they are.

2.2. Identification

These details so categorised help others to identify a person who presents him or herself at the digital desk. Details used for that purpose are referred to here as 'identifiers'. As set out above, the context determines which details are used as identifiers. Identification serves different purposes. It either identifies a person as unique within a certain group (the customers of a bank for example) and/or it serves the purpose of recognising the status that a person may have, particularly when this status comes with rights, obligations or discretionary powers (authorisation). Here, it is not important who someone is but what someone is. The two purposes will sometimes coincide and the same details could be used for both purposes. Often though, they do not coincide.

There is a particular correlation between identity and identifying details. Usually a particular set of details belongs to a particular person. But, and this is the point, sometimes there is a mismatch,⁹ either intentionally or mistakenly, between the person and the details. This mismatch can occur when identities clash (two identities are confused), or details are deleted, restored or changed. We consider the change of identity the most relevant occurrence in the context of identity fraud, as this would usually occur intentionally. The change of identity can, subsequently, be lawful (such as the use of pseudonym by an artist or of a nickname on the internet) or unlawful. Depending on the context, such changes can be regarded as part of identity fraud. In respect of some of these changes, it is obvious that they amount to unlawful behaviour. At least four types of changes can be distinguished: identity theft (the use of another's identity without consent), identity delegation (the person who the details belong to delegates their use to another), swapping identities (this form seems to imply mutual consent) or creating an identity (referred to as a fictitious identity).¹⁰

⁸ The standard text exploring this issue is S Turkle, *Life on the Screen: Identity in the Age of the Internet* (1995).

⁹ Leenes, note 7 at 56.

¹⁰ *Ibid.*

2.3. Fraud

Understanding the meaning of identity helps us to clarify the type of fraudulent activity at stake in the process of identity fraud. In the first instance, the fraud pertains to how identifying details are obtained; the subsequent (unlawful) behaviour *could* consist of fraudulent activity but can also be something else, such as theft, illegal entry or human trafficking.

But what is fraud in general? The word fraud is often used in policy and academic literature but a precise definition is usually avoided. Indeed, in many jurisdictions, ‘fraud’ lacks any description in law or penal codes although one considers it a criminal offence when referring to the activity. One description, found in the Dutch literature, refers to fraud as:

*Deception, through misrepresentation or ignoring of factual details; abuse of the public trust minimally necessary for the functioning of society. This abuse is used to illegally profit at the cost of one’s fellow legal subject.*¹¹

In the UK, reference is made to dishonesty. The House of Lords describes fraud as “to deprive a person dishonestly of something which is his or of something he is or would or might but for the perpetration of the fraud be entitled”.¹²

When studying the literature, reference is made to falsehood, dishonesty and deception. These are the central notions. Where falsehood/dishonesty relates to an abuse of trust, deception refers to what is gained from the fraud, usually resulting in financial loss.¹³ It appears that an identity fraudster commits a falsehood in respect of identity with the purpose of deception, consisting in profit at the cost of others.

2.4. Two preliminary conclusions

Before reporting on the framework of analysis, we can draw two general preliminary conclusions. The first refers to fraud as part of the temporal dimension of identity fraud. The second refers to identity.

In respect of the first conclusion, two general observations have been made. Fraud consists of falsehood/dishonesty and deception. These two elements seem appropriate elements to describe the double nature of identity fraud as they capture the temporal dimension (the second observation). Identity fraud consists of roughly two phases: (i) obtaining identifying details and subsequently (ii) using them for an unlawful activity. Both phases are fraudulent in nature or, alternatively, the two phases combined express the fraudulent character of identity fraud. It leads to a first, general, conclusion which is that identity fraud is a species of the general concept of fraud, as it is described and conceptualised in the academic and popular literature.

¹¹ T K 1984-1985, 17050, cited in H J B Sackers and P A M Mevis (eds), *Fraudedelicten* (2000), 2 (authors’ translation).

¹² *Scott v Metropolitan Police Commissioner* [1975] AC 819 at 839, per Dilhorne VC, cited in Report on Fraud (Law Com No. 276, 2002), 5.

¹³ J H Verheul *Fraude en misbruik in de sociale zekerheid, Aspecten van strafrechtelijke handhaving* (1989), 33.

In respect of identity, the conclusion is that the context determines what identity details are required and hence determines how identity is construed. The authors exclude mere representation, where a person does not use any identifying details to pass off as someone else,¹⁴ from a definition of identity fraud. We consider the use of identifying details to determine an identity or a status/authority as a necessary factor in identity fraud, considering the first phase: obtaining or otherwise being in possession of details with which an identity can be created.

3. Framework of Analysis

The framework of analysis derives from an initial analysis of the literature. It allowed for the identification of six recurring items or aspects in examples of identity fraud. It allowed a further analysis of definitions of identity fraud against these items. The first is that definitions of identity fraud refer to a person (natural, legal or fictional) whose identity is used. The second is that descriptions often refer to the means of identification or identifying details, such as documents, credit cards or other data carriers and the means by which they are obtained. The third is a reference to what is meant by identity, which is context-dependent. The fourth is that many definitions refer to the fact that the identity obtained is used for an ulterior goal, such as obtaining goods and services. The fifth is that descriptions refer to subsequent unlawful behaviour, such as fraud or theft, to achieve this ulterior goal. Sometimes the intention or an attempt suffices to speak of identity fraud. Finally, definitions make reference, implicitly or explicitly, to who is subsequently defrauded and a distinction can be made between horizontal and vertical identity fraud.

3.1 Definitions

Here, a flavour is given of the definitions, each of them representing one or more of the six items.¹⁵ In the UK, an influential study on identity fraud has formulated the following definition:

Identity fraud arises when a person pretends to be someone else in order to obtain goods and services through the use of a totally fictitious name (sometimes referred to as a false identity); or the adoption of a real person's name (alive or dead) with or without their permission (sometimes referred to as a hijacked identity).¹⁶

One aspect of this definition is that it excludes fraud carried out with a person's own identity details. This is regarded as the "misrepresentation of circumstances",¹⁷ or

¹⁴ An example would be to pass oneself off as a doctor or dentist, without producing a badge or diploma.

¹⁵ For a full analysis, the authors refer to the research report (B de Vries, J Tigchelaar, T van der Linden and T Hol "*Identiteitsfraude, een afbakening (Identity fraud: a demarcation)*" (2007), of which a summary in English is available at:

<http://www.wodc.nl/onderzoeksdatabase/identiteitsfraude.aspx?cp=44&cs=6796>, click on "1496, Summary (accessed: 18 November 2008).

¹⁶ Cabinet Office, *Identity Fraud: A Study* (2002), 9.

¹⁷ *Ibid* at 10.

persons giving “incorrect details about one or more aspects of their identity”.¹⁸ Identity fraud concerns the identity of another person or a totally fictitious identity. Harmless cases of delegations (e.g. the use of another person’s bank card to obtain money with his or her consent) also fall within the scope of this definition. Another aspect of the definition is that identity fraud is not a goal in itself but geared towards something else, namely “to obtain goods or services”. This has two consequences: the first is that the person intentionally pretends to be someone else for an ulterior purpose and, second, that to commit identity fraud enables the commission of other unlawful activity. This is illustrative for the temporal dimension as concluded above.

Obtaining an identity need not necessarily be unlawful behaviour. It is unlawful only insofar as there is the intention to commit subsequent acts for which the identity is necessary, or so it seems. Although legally speaking it is not correct to speak of identity theft, the use of the term is quite common:

*Identity theft is generally defined as the misappropriation of the identity (such as the name, date of birth, current address or previous addresses) of another person, without their knowledge or consent. These identity details are then used to obtain goods and services in that person’s name.*¹⁹

Use of the term “theft” suggests that the object being stolen is no longer in the possession of the original owner. In cases of identity theft this is generally not the case.

Many definitions on identity fraud refer to subsequent behaviour as being geared towards obtaining goods and services. They do not distinguish between providers of these goods and services. In some definitions, though, a distinction is made between so-called vertical identity fraud and horizontal identity fraud. The former refers to a situation where identity fraud is geared towards defrauding a public body, whereas horizontal fraud refers to defrauding a private institution or citizen. Or, when taking the damage caused by identity fraud as a point of departure, in cases of horizontal identity fraud some form of direct, mostly financial,²⁰ loss is suffered, whereas in cases of vertical identity fraud some form of loss is incurred directly to a public body and indirectly to society as a whole. In the Netherlands, the focus in describing identity fraud seems to be on vertical identity fraud, although horizontal fraud is not excluded. In an extensive policy document on identity fraud, vertical identity fraud is defined as:

[f]orms of misuse or fraud in respect of identity and identity details with which a person or a group of persons has the intention to make

¹⁸ *Ibid* at 10.

¹⁹ See http://ec.europa.eu/internal_market/fpeg/card-fraud_en.htm (accessed 21 May 2008). This definition, used by the European Union, has originally been formulated by the UK Fraud Prevention Service (CIFAS), a non-profit organization set up to combat financial crime. See http://www.cifas.org.uk/what_is_cifas.asp (accessed 21 May 2008).

²⁰ There may be other than financial losses, such as the time and energy needed to try to put things right. But also, e.g. in cases of medical identity theft, damage consisting in inaccurate medical records (with potentially disastrous consequences). Here, a person ‘borrows’ a health insurance pass or medical card from someone else in order to obtain health services (based on the records of the other person).

use unlawfully of government services or to profit unlawfully in another way.

Many other definitions are concerned with a specific instance of horizontal identity fraud – mostly identity fraud in respect of the financial details of another person. This is also referred to as credit card or payment card fraud or, more generally, financial identity fraud or payment fraud. Particularly in Community policy documents it is this type of identity fraud that is referred to.²¹ The European Commission refers to “the use of personal identifying information, e.g. credit card number, as an instrument to commit other crimes”.²² Payment card fraud is described in these words:

*Payment card fraud (payment fraud) is committed when thieves steal payment cards or the account numbers (i.e. credit or debit card account numbers) of existing financial accounts and use them to purchase goods and services.*²³

In respect of the means of obtaining an identity and the nature of identity details, the explanatory notes to the Dutch definition discussed above refer to at least eight methods or appearances of identity fraud:²⁴ the use of false, counterfeit or illegally obtained documents; the use of legally valid documents with details that correspond with details of the fraudster (this is also referred to as ‘look alike’ fraud); failing to register changes of personal details and using false copies of identity documents, the unlawful use of social security number or the use of a non-existent social security number.²⁵ A Belgian definition narrows the scope down and seems to limit identity fraud to “the use of false identities and false or counterfeit documents when committing a crime”.²⁶ Other definitions refer to the theft of identity details, misrepresentation, counterfeiting or simply the collection, possession, obtaining or use of identity details. It may be that in certain specific instances the means by which details are obtained is unlawful, such as in the case of stealing credit cards or skimming credit card details. In other instances this is less certain, such as is the case with ‘shoulder surfing’, in lost-and-found situations or in ‘dumpster-diving’.

In some descriptions attention is given as to how an identity is obtained, either from an existing person or through establishing a fictitious identity. Usually, one deems identity fraud the use of another person’s identity without his knowledge or consent. Thus, the *US Fair and Accurate Credit Transaction Act 2003* refers to identity theft as “a fraud committed or attempted using the identifying information of another person without authority”. However, it is possible that it involves the cooperation or consent

²¹ One reason is that the European Union cites the free transfer of goods, services and capital as an area where identity fraud poses a threat, undermining “user’s confidence in payment systems, in particular in relation to new payment technologies”. See http://ec.europa.eu/internal_market/fpeg/index_en.htm. (accessed 21 May 2008).

²² COM (2007) 267 final (*Towards general policy on the fight against cyber crime*).

²³ LoPucki, note 4 at 7.

²⁴ See note 6 above.

²⁵ H J B Sackers and P A M Mevis, note 11 at 32 (authors’ translation).

²⁶ Belgium report (yet unpublished): Dienst voor het Strafrechtelijk Beleid, *Identiteitsfraude: Een Beleidmatige aanpak* (2006), 9.

of that person. In the UK definition discussed above, this is specifically referred to: “the adoption of a real person’s name (alive or dead) with or without their permission”.²⁷ On the whole, definitions do not seem to emphasise that identity fraud implies more than one victim: in addition to the person or entity that is defrauded through subsequent behaviour, identity fraud also victimises the person whose identity has been used. This person may be required to prove his or her innocence and, indeed, it is always difficult to show that one has *not* done something.²⁸

Finally, other definitions specifically include the type of subsequent behaviour facilitated by the false identity. They often refer to a particular criminal offence facilitated by the use of a (false) identity. Thus not merely referring to the ulterior goal – obtaining goods and services – but also to *how* these are obtained. Reference is made to theft, fraud, illegal immigration, terrorist activity, illegal and fraudulent activity, organised crime, human trafficking and drug related crimes. One particular aspect that features in this category is whether the behaviour must have been carried out or whether the intention to carry it out or an attempt to do so is sufficient. The Dutch definition, mentioned above, refers to “the intention to make unlawful use”.²⁹ In one definition found in the Belgian parliamentary literature, reference is made to use the identity “with the intention to commit fraud or other criminal activities”.³⁰ In the *US Fair and Accurate Credit Transaction Act 2003* an attempt is sufficient.

3.2. Framework of analysis

The six items that were identified above provided the building blocks of the framework of analysis. Within this framework, the research project analysed each of the thirty definitions (by referring to them). The framework is set out in table 1.

Table 1: Framework of analysis – set up

Characteristics:		Definitions:	[\$] [‘definition’]
1. Person mentioned?	Yes?	‘Without consent’ is a criterion?	
	No?	Fictitious identity?	
		Manipulating ‘own’ details?	
2. Means of identification?	Yes?	Data (general)?	

²⁷ *Ibid.*

²⁸ It is this aspect that has prompted public authorities to prioritise the combat against identity fraud, in respect of the Dutch situation; see: TK 2003-2004, 29200 VI, 166, p 2.

²⁹ H J B Sackers and P A M Mevis, note 11 at 32 (authors’ translation).

³⁰ Belgium parliamentary debates ‘Vragen en antwoorden Belgische Senaat’, Bulletin 3-45, Zitting 2004-2005, vraag nr 3-2371 van mevrouw Hermans dd 21 maart 2005; see also <http://www.senate.be/www/?MIval=/publications/viewPubDoc&TID=50344709&LANG=nl> (accessed 21 May 2008).

		Documents?	
		Other data carriers?	
3. What is identity?	Yes?	Identifiers mentioned?	
		One detail sufficient?	
		Status/authorities?	
4. (Intentional and unlawful) activity with means of identification	Yes?	Which?	
5. Subsequent behaviour?	Yes? Named?	Fraud?	
		Particular area?	
		General?	
		Intention, attempt, carried out?	
	No?	(Unlawful) possession of means of identification sufficient?	
6. Relationship?	Which: horizontal and/or vertical?		

3.3. The framework explained

Each item poses some questions that demand answering in order to come up with a general description of identity fraud that allows us to distinguish identity fraud as a unique activity.

In respect of the first item, ‘person’, relevant questions relate to the (mis)use of the identity of another (legal) person, whether it is relevant if that person knows of the abuse or even consented to it, and, also, whether there has been a swapping of identities. Another question is whether the creation of a totally fictitious identity amounts to identity fraud. Finally, does manipulating one’s own identity details amount to identity fraud and, if so, when: if one detail is manipulated, absent or unclear?

As identity fraud implies the obtaining and using of identification details, an important question is whether the nature of the details is relevant to the general description. In other words, is reference made to ‘means of identification’ and the use of identifiers? If so, is it limited to documents or are other specified types of identification details mentioned that can serve as identifiers (such as a credit card or a membership pass), or is a mere reference to obtaining details (of any type, such as numbers) sufficient?

As to ‘identity’, the question is whether the definitions imply an understanding about the meaning of identity or whether this can be interpreted from the means of identification used. This is relevant as identity fraud usually does not refer to a person’s whole identity. Indeed, sometimes it is relevant to know who someone is and

in other instances it is relevant exactly what someone is in terms of status or authority (i.e. what he or she is entitled or obliged to). When they concern the determination of status or authority, identification details may be of help, but it is also possible that the mere presence of – or representation by – that person is sufficient.³¹

In respect of identification details, the question is whether it is relevant how these details are obtained. Is the manner in which details are obtained relevant to a general description of identity fraud? And if so, is it relevant that reference is made to the intention or particular mindset of the person? Concerning the latter remark, we suggested that, in general, identification details are obtained intentionally – demanding an act rather than an omission – although it is possible that such details are, for example, obtained unintentionally. Finally, the question is whether or not the details must have been obtained unlawfully in order to speak of identity fraud.

On the whole, two phases are distinguished in the process of identity fraud. When considering the possible criminalisation of identity fraud, the relevant question is at what point one could speak of the commission of a criminal act. Is it when details or means of identification are collected or obtained (for example, when a collection of (counterfeit) passports is discovered)? Of course, this is, in itself, a criminal act. This may not be the case when a list of bank details is in the possession of a person, found in a paper bin or on a computer. The point is whether these activities can be considered as identity fraud (i.e. that they can be considered as a preparatory act to commit financial fraud). It would make the burden of proof less onerous. Indeed, this seems to be implied in the idea that identity fraud refers to the use of identity for an ulterior purpose. The relevant questions are to what extent definitions of identity fraud refer to subsequent criminal behaviour, whether such behaviour must have been committed and whether intention or attempt is sufficient. If no reference is made, the relevant question is whether the (unlawful) possession of details is already considered to be identity fraud or whether it is required that the person knows (or should know) that these details will (or could) be used for an ulterior purpose.

Finally, considering the two phases, identity fraud implies different victims: the person or persons whose identity is used and the person or persons who are the subject of subsequent criminal behaviour. In respect of the latter, these persons can be private or public. The question is whether it is relevant for a general description of identity fraud that such a distinction is made, considering that many definitions seem to emphasise either horizontal or vertical identity fraud. Should it be limited to one or the other?

3.4. Conclusions concerning the items

Below, the conclusions from the analysis in the research project on each item are formulated, allowing for the drafting of a general description of identity fraud in the next section.

In respect of ‘person’, it could be that referring to this item in a general description of identity fraud contributes to narrowing the somewhat abstract notion of identity fraud.

³¹ As stated above, the situation of misrepresentation (without identification details), then, is excluded by the authors from a general description of identity fraud. (In the end, the challenge, here, is to formulate a hard criterion).

One could refer to a person as victim (of both phases), or as he or she who is partly responsible. Indeed, as it is custom to lock your car when you leave it unattended, you should be careful when sharing or disseminating identifying details about yourself. We concluded that *for the purpose of demarcating* identity fraud it is not relevant to refer to a person (natural, legal or otherwise). Another issue is whether a general description should refer to any knowledge or lack thereof on the part of the person whose details are used. If a person consents to have his or her details used, or has knowledge of their use, the question of who has committed (the first phase of) identity fraud arises. What does this mean for demarcating identity fraud? It is probably a matter of context: to lend a person your supermarket bonus card differs, arguably, from lending a person your badge in order that he or she may gain access to a secure area in a building. On the basis of the findings of the research project, it is concluded here that it is important to refer to whether details are obtained with or without consent.

Referring to specific ‘means of identification’ or identifying details carries the danger that it limits a description of identity fraud to a particular context (referring to bank account numbers limits identity fraud to the context of non-cash payment transactions). It does not contribute to a general understanding, but merely indicates a particular understanding about identity. The conclusion is that referring to or naming a particular means of identification is not relevant for a general description of identity fraud, but is, instead, informative as to how to combat (that type) of identity fraud or to deal with its consequences.

It is inevitable that any description of identity fraud includes reference to ‘activities’; to how identifying details are obtained. However, it is not necessary to refer to particular types of activity, for two reasons. First, it is not the aim of a general description to limit the activity to the use of certain techniques and, second, it is the result that matters: to create the appearance of a true identity. Furthermore, some types of activity are already regarded as threats, causing them to be categorised as separate criminal offences, such as counterfeiting passports, stealing (in the legal sense of the word) documents and other detail carriers and a host of cyber crimes with which details could be obtained. Indeed, these activities are generally intentional in nature as well as unlawful. But the latter is not a necessary element in a general description of identity fraud because details can be obtained through lawful means, such as is the case of ‘shoulder surfing’ and ‘dumpster diving’ as well as with the consent or knowledge of the other person. One may argue that including intentional (but lawful) activity in a general description would render the notion of identity fraud too broad. This is, however, countered by the fact that subsequent behaviour entails an unlawful element as a necessary criterion (see below).

In many, if not all, descriptions of identity fraud reference was made, either implicitly or explicitly, to subsequent behaviour. The descriptions vary and refer to types of fraud, profiteering, renegeing on promises and obligations but also to theft, drug-related offences and human trafficking, etc. In most of these the behaviour implies an act rather than an omission. Nevertheless, the choice has been made to refer to behaviour so as to include incidents of omission within the ambit of identity fraud. A reason for this is that a general description should not exclude, pre-emptively, the unwanted use (actively or passively) of means of identification for an unlawful purpose. Thus, for example, intentionally omitting to mention relevant changes in identity details (such as a change of address or getting a job) for the continuation of a social security benefit, can still be considered as an incident of identity fraud.

When referring to unlawful behaviour, the basic premise is that the behaviour has been completed but that an attempt or, even, the intention to carry out subsequent unlawful behaviour is not excluded. To conclude: identity fraud refers, in addition to activity in respect of identifying details, to (attempted) unlawful subsequent behaviour or, alternatively, to the intention to carry out such behaviour.

Finally, although a distinction can be made between horizontal and vertical identity fraud, on the basis of who is defrauded, or what details are used, in the end it is not relevant to refer to such a distinction. One reason is that, in both cases, the same means of identification can be used for an unlawful purpose. The distinction may be relevant when formulating targeted policies to combat specific cases of identity fraud such as non-cash payment fraud or illegal immigration. Nevertheless, referring to such a distinction is not a practical consideration in formulating a general description of identity fraud.

4. A general description

On the basis of the findings of the analysis and the conclusions drawn from it, the following definition of identity fraud has been formulated:

*Identity fraud is to obtain, to possess or to create intentionally, (and) (unlawfully or without consent) false means of identification in order to commit unlawful behaviour, or to have the intention to commit unlawful behaviour.*³²

This description contains necessary elements, facultative elements and alternative elements. Facultative elements are elements that can be left out. These are, in this description, the elements ‘unlawfully’ and ‘without consent’. Alternative elements are those elements that demand a choice. In the description, these are the activities ‘to obtain’, ‘to possess’ or ‘to create’ as well as ‘in order to commit unlawful behaviour’ or ‘in order to have the intention to commit unlawful behaviour’.

A description that refers to the bare minimum of what identity fraud could mean, according to the options that are possible, would be:

Identity fraud is to obtain, to possess or to create intentionally false means of identification in order to commit unlawful behaviour.

An alternative could be:

Identity fraud is to commit unlawful behaviour or to have the intention to do so with false means of identification.

We have opted for the main definition and the first minimal version. The elements appear in a particular sequence which, by reference to the temporal dimension, reflects the way the analysis of identity fraud has been structured: to obtain means of

³² It must be noted that ‘false’ in the description refers to the idea that the means of identification do not identify the person who uses them truthfully.

identification for subsequent unlawful behaviour. However, one could prefer the latter one which emphasises the need for undesirable behaviour or intentions. Often, this phase forms the incentive for policy measures.

5. Criminalisation

One of the original goals of the research project was to contribute to the formulation of policy to combat identity fraud as well as to allow a discussion about the need to formulate a separate crime of 'identity fraud'. Based on the definition above, it would be possible to come up with a legal definition of identity fraud and thereby criminalise it. However, such a step cannot be taken lightly. Rather than promoting such a step, the research project sought to compare identity fraud with existing criminal offences or at least, with offences found in the Dutch jurisdiction. It would allow for the identification of elements (if any) which would make identity fraud unique with respect to other identity fraud-related crimes. Furthermore, it would also allow the discovery of possible gaps in existing criminal offences which would make them ineffective in combating identity fraud. Some seventeen offences were analysed.

5.1. Three categories

These crimes can be divided into three categories. The first category consists of those crimes that capture the first phase of identity fraud: obtaining the means of identification for the purpose of creating a false identity. The second category includes offences that cover the second phase: the carrying out of an unlawful activity. Of course, the list is endless here. Many crimes, such as a simple theft can be facilitated by means of a false identity, for example to provide access to a building. The third category consists of offences that cover both phases. Although they do cover both phases they do not capture the full dimension of identity fraud. Nevertheless, the offences in this category are of particular importance, as they provide the background against which two important questions can be addressed: (i) what makes identity fraud unique, and (ii), what gaps, if any, exist in existing offences? Four types of offences were analysed: the so-called 'falsehood' offences; computer trespassing; the general fraud offences and deceit.

By way of illustration, falsehood offences include intentionally obtaining, possessing or creating a false identification document (such as a passport) with the intention to use it, or have it used by someone else.³³ An example of a computer-related offence is article 138a of the Penal Code which makes it an offence to intentionally and unlawfully gain access to a digital database by means of a false identity and subsequently take possession of the data. Article 227a refers to general fraud and states that:

He who, other than through a written falsehood, intentionally and untruthfully provides information to another who may grant that person a benefit will, if this advantages that person or another while that person knows or reasonably ought to have known that the information

³³ Article 231 Penal Code.

is relevant for determining the right to such a benefit or its extent, be punished [...] ³⁴

Finally, deceit is described in article 326 as:

He who, with the intention to unlawfully advantage himself or others through the adoption of a false name or through misrepresentation [...], moves someone to the handing over of a good [...] will be punished [....] ³⁵

These examples show that there are a number of offences, at least in Dutch criminal law, that come close to the essence of identity fraud. Nevertheless, none of them cover all of the elements that make identity fraud unique. Hence, the critical question is what makes identity fraud unique?

5.2. *What makes identity fraud unique?*

The question concerning the similarities and differences between the constitutive elements of identity fraud and elements in the variety of existing criminal offences subject to analysis, leads to the conclusion that all elements in the definition are covered by the different offences. It is no surprise that there is not one offence that covers all of the elements. In some cases, the offences are broader than the definition. One example is found in offences relating to travel documents. The definition refers to the intentional possession of means of identification, such as a passport, whereas article 225 of the Penal Code renders a person guilty if he or she is in the culpable possession of false travel documents. Considering the importance of travel documents as a means of international identification, it is understandable that the prevention of abuse and misuse goes further than suggested in the definition. In other cases, offences covering the two phases of identity fraud seem more limited. Offences relating to fraud include criteria relating to subsequent criminal behaviour which limits their extent in comparison to the definition of identity fraud. This will be addressed below.

Although there is an overlap between identity fraud and a variety of criminal offences, there are certain features of identity fraud that make it unique. It is clear that identity fraud concerns fraud in respect of means of identification. This aspect is the central element of identity fraud, contrary to other offences that may or may not refer to means of identification (or, if they do, that refer only to a specific type, such as travel documents). It is consequently irrelevant to refer to the specific means of identification or the method by which they are obtained, possessed, came into possession or were created.

The second unique feature follows from this and refers to the fact that in one general description the essence of identity fraud is expressed as covering the two phases of identity fraud. Descriptions of the analysed offences were unable to capture both phases. Identity fraud may imply the type of criminal behaviour found in a variety of offences. Theft is an example: identity fraud may exist in the theft of identifying financial information used to subsequently defraud a bank. Deceit is another: a person

³⁴ Authors' translation.

³⁵ Authors' translation.

comes into the possession of means of identification giving access to a building allowing him or her to steal, for instance, computer equipment. In both examples, identity fraud captures theft as well as a fraud-related offence: the sequential combination – together with the obtaining and using of means of identification – make it unique as identity fraud.

Finally, and contrary to, for example, deceit and other fraud-related offences, a third unique feature is that identity fraud deems the unwanted, subsequent behaviour as unlawful, criminal behaviour in a general way, *without* referring to any special conditions for successful prosecution. Identity fraud encapsulates a combination of a variety of offences. What is critical is whether subsequent unlawful behaviour of any kind has been engaged in whilst employing a means of identification obtained in a previous phase.

5.3. Gaps?

The analysis of Dutch criminal law allowed the researchers not only to identify certain unique features of identity fraud but also to discover gaps in the existing law, which could hinder the effective combating of identity fraud. These gaps are apparent in at least two offences, each of which covers both phases of identity fraud. The first offence is that of deceit (*‘oplichting’*), contained in article 326 of the Dutch Penal Code.³⁶ The gap here refers to the unlawful obtaining of or benefiting from services (or, as it refers to them, “goods”) and, more specifically, when these are obtained through false means of identification other than documents (as the use of false documents in order to benefit from services from public bodies may be covered by other offences relating to the use and possession of false identification documents). The researchers believe that this is a significant gap. This is because reference has often been made in the literature to the appropriation of ‘goods *and* services’ as the ulterior motive of an identity fraudster.

Another gap was found in two fraud-related offences, each of which requires additional criteria for successful prosecution. One of these is article 227a of the Dutch Criminal Code.³⁷ Here, the meaning of “benefit” is problematic.³⁸ It is unclear whether this refers to all contracts relating to a right to a benefit, such as the delivery of goods, monies and services. It means that it is also unclear whether verbal or digital deceit with the aid of a means of identification in a horizontal relationship can be combated effectively with this criminal offence. Thus, it reveals a gap insofar as it is not yet clear how the judiciary will interpret (the extent of) “benefit”. It could be that deceit may cover this, but, as was shown above, the gap exists where the delivery of services on the basis of false means of identification is not included.

It is by no means suggested that these gaps lead to the conclusion that it is undesirable that these penal instruments have limited impact in terms of combating identity fraud. One reason for this is that the limitations should not merely be considered from the perspective of (repressively) criminalising the failure to provide information truthfully on the part of a potential identity fraudster. The perspective could be broadened to

³⁶ See above, par. 5.1.

³⁷ See above, par. 5.1.

³⁸ In Dutch, *‘enige verstrekking of tegemoetkoming’*.

include a preventive, civil law perspective which implies a duty on the part of the other party to inquire adequately into the truthfulness of the information provided. In other words, not every failure to provide information truthfully should be brought within the sphere of the criminal justice system. The nature of criminal law as an *ultimum remedium* demands prudence.

6. Conclusion

This article reported on the findings of an extensive research project into the legal meaning of identity fraud in contemporary society. The research project was carried out with the aim of contributing to the development of policy to combat the increasing problem of identity fraud as well as to open up the debate about the desirability of introducing the act of identity fraud as a separate crime. To this end, the project carried out an extensive review of examples, descriptions and definitions of identity fraud in the literature of the USA, the UK, the Netherlands, France, Belgium and the EU. It found that the examples referred to contained at least six recurring items. These formed the basis of a framework of analysis. This, in turn led to a general definition of identity fraud, consisting of necessary, alternative and facultative elements, allowing policy makers an element of discretion as to the possible scope of identity fraud.

Subsequently, this definition formed the background against which a detailed analysis of the Dutch criminal law was carried out, with the aim of identifying any overlap between the definition and existing criminal offences that relate to either or both of the two phases of identity fraud. It also enabled the researchers to show what makes identity fraud unique. Three features were identified. The first was that identity fraud concerns fraud with means of identification – it is about obtaining, possessing or coming into possession of, or creating these means with an aim to use them fraudulently for an ulterior motive. The second feature is that one description suffices to capture the essence of identity fraud. The third feature is that it formulates the unwanted subsequent behaviour in a general way as unlawful behaviour. The analysis also revealed a number of gaps in the existing legislation, referring to the provision of services and benefits in horizontal, private relationships.

This article reported on the main findings of the project. We hope to have captured the essence of the meaning of identity fraud and its place within the law. In this respect, the article seeks to contribute to the debate about how to combat identity fraud in an ever-increasing, complex society, appropriately termed the “information” or “Techno” society, in which information is both needed and made sensitive through its standardised processing. As identity fraud is a structural problem within this context, choices must be made; particularly political choices. These choices are not to be made here by the researchers and authors of this article, but rather in the usual legal and political forums. These should not be limited to mere national forums. As the problem is structural it is also global and any real effective policy must be internationally or globally-oriented. It must include all relevant stakeholders, while at the same time seriously taking into account the demands of the rule of law, the general founding principles of criminal responsibility and its nature as *ultimum remedium*. Indeed, in their recent article on identity theft and systems theory, we agree with Anne Savirimuthu and Joseph Savirimuthu that, whereas law may be a necessary element in

combating identity fraud, it is not a sufficient element.³⁹ This is not only due to considerations of legality but also due to how we ought to start conceptualising the flow of information and the manner in which information is obtained, processed and disseminated.

³⁹ A Savirimuthu and J Savirimuthu “Identity Theft and Systems Theory: the Fraud Act 2006 in Perspective”, (2007) 4:4 *SCRIPT-ed* 436, available at <http://www.law.ed.ac.uk/ahrc/script-ed/vol4-4/savirimuthu.asp> (accessed 21 May 2008).