Issues surrounding a financial forensic investigation[1]
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1 Introduction

'Evidence is the basis of justice'[2] and '*an efficient, effective and accurate process of fact-finding may deter citizens from breaching the law*'.[3] It is also for these two reasons that the importance of professional expert financial advice is important[4] for a just, civilised society and a professional rule of law. The problems regularly faced by the business world range from differences of opinion on commercial issues to complex forms of financial crime, such as money laundering, bribery, corruption, embezzlement and non-compliance with trade and financial sanctions. The extent of financial crime in the Netherlands is estimated at tens of billions of euros each year, but the chance of discovering this conduct and depriving culprits of their illegally obtained benefit is minimal.[5]

Complex forms of financial crime almost always involve a range of individuals, legal entities, contracts, bank accounts, assets and transactions and are almost by definition international in nature. In order to understand the problems, to determine legal strategies and to estimate the chances of the process, it is important to gain early access to and an understanding of relevant internal and external data.[6] However, obtaining external data from banks, trust companies, accountants and other parties in order to gain an insight into the nature and extent of the possible harm and to be able to act against unlawful acts is often difficult, if not impossible, for many an injured party via civil and criminal law channels. Whilst in some cases the facts of a case are available to the parties involved, in most cases, however, it is completely unclear what has happened, where relevant information is located, who is involved internally and externally and is responsible for the possible irregularities, where the (disappeared) financial assets are, and whether future cooperation with business partners or staff is still desirable or possible.

This essay discusses from a Dutch and Continental law perspective the various issues involved in the conduct of a financial forensic investigation into financial crime, based on a case study. The issues include the choice between civil or criminal law remedies, the scope and positioning of the investigation and the role of the lawyer in the conduct of a financial forensic investigation.

2 Case study

2.1 General

In 2003, an investment fund was granted a licence by the Dutch Authority for the Financial Markets (the 'AFM') to raise funds from investors and to invest in futures transactions in tulip bulbs. A specialist broker played an important role in bringing the investment fund, other investors and suppliers and buyers of the tulip bulbs together, ensuring the legal establishment and registration of the transactions, as well as collecting and paying out the associated funds. In 2003, the investment fund and some other investors invested a total of approximately €110 million in future transactions in tulip bulbs. At the end of the trading year, however, the broker appears to have a considerable financial shortfall, as a result of which the financial obligations arising from the agreed trading transactions towards the investment fund, the investors and various traders cannot be met. The broker goes bankrupt, and the court appoints a receiver who is charged with conducting the bankruptcy proceedings. The investment fund has commissioned an expert to establish the facts and find out where the money has disappeared to.

At this stage, it is completely unclear what has actually happened, who is responsible, and where the invested money has gone. In addition, at the time of the bankruptcy many parties are involved who have

[1] This article is based on a study first reported in the Dutch journal Expertise & Recht [*Expertise & Law]* in 2017.
[2] W. Twining, *Rethinking evidence*, 2006, which refers to J. Bentham, *An Introductory View of the Rationale of Judicial Evidence*, 1843, page 42.
[3] R.R. Verkerk, *Fact-finding in Civil Litigation*, A Comparative Perspective, 2010, Intersentia, page 338.
[4] In this context also called 'fact-finding' or 'forensic investigation'.
[5] B. Unger, G. Rawlings, M. Busuioc, J. Ferwerda, M. Siegel, W. de Kruijf and K. Wokke, *The amounts and the effects of money laundering*, The Hague, Ministry of Finance, 2006, Scientific Research and Documentation Centre, Crime and Law Enforcement, 2015, page 83; Europol, *Report on criminal asset recovery in the EU; Does crime still pay?*, 1 July 2016.
[6] The internal data are available at the client.

an interest in establishing the events. The interested parties can be taken to include the investment fund, the investors and traders; however, the Dutch AFM, the tax authorities and the Product Board for Horticulture also have a direct interest in finding out what has happened. All parties have their own interests, which sometimes coincide with, but may conflict with, the interests of others.

2.2 Conduct of the financial forensic investigation

Following the broker's bankruptcy, the expert agreed terms with the receiver for the conduct of the joint investigation into the circumstances surrounding the bankruptcy. As a result, for example, the internal data concerning the investment and trading of tulip bulbs was clarified on the basis of the financial administration and the trade database of the broker, with attention being paid to the individuals and legal entities directly and indirectly involved in investing and trading in tulip bulbs; the registered contracts and transactions; the nature, origin and quality of the tulip bulbs traded; the incoming and outgoing payments; and the communication between the broker and those involved. This has made it possible to obtain a good understanding of the broker's internal data.

However, important external data are missing, such as the identity of the beneficial owners of some thirty foreign legal entities that played an important role in the trade in tulip bulbs. The broker has registered future transactions in the name of these foreign legal entities for many hundreds of millions of euros, without these companies having provided the required financial guarantees for the purchase commitments they have entered into.

Other important external data requested and obtained concerns the inspection reports of the Flower Bulb Inspection Service with regard to the traded tulip bulbs, and data from government agencies, such as land registry and other registers in the Netherlands, Switzerland and other countries, pertaining to the assets and businesses of those involved. Discussions were also held with experts from Euronext about the design and structure of commodity markets, a description that can be applied to the trade in tulip bulbs.

On the basis of the established facts, the board of the investment fund notified the AFM and reported various possible criminal offences to the public prosecutor in the Netherlands. Subsequent consultations were also held with the public prosecutor in Switzerland, because some of the investors and traders are resident in Switzerland. A director of the investment fund gave testimony on the basis of the provisional facts in Switzerland, after which the public prosecutor responsible decided, on the basis of the relevant Swiss criminal procedure, to comply with the injured party's request to disclose relevant information.

On the basis of this widening scope of provisional facts, the investment fund subsequently initiated a discovery proceeding in England, in which the court was requested, inter alia, to order a trust company to provide relevant information by means of a so-called '*Norwich Pharmacal order*'. One of the purposes of the information requested is to identify the beneficial owners of the foreign legal entities.

During the discovery proceeding, it appeared that the English trust office did not have access to the information about the beneficial owners of the foreign legal entities. The Swiss lawyer who had supervised the establishment of these foreign companies for his clients did have the information in his possession but invoked his right to refuse to give evidence in the proceedings. Finally, the English court indicated that the Swiss lawyer could not invoke his legal professional privilege, because he did not establish the foreign legal entities in his capacity as a lawyer, but as a director of a Swiss trust office. The judge indicated that he would consider the Swiss lawyer's refusal to make the information available as a contempt of court. The Swiss lawyer eventually complied with the disclosure order and made the documents available.

Thus, the information from the financial investigation and the various legal proceedings in the Netherlands, Switzerland, England and other jurisdictions have been combined to form a more complete factual matrix. Based on agreements and statutory obligations, the information was also shared with the receiver, the Dutch Tax Authority, the AFM, the Fiscal Intelligence and Investigation Service (FIOD) and the Public Prosecution Service (OM).

2.3 Observations

As the case above shows, at the start of the investigation it is completely unclear what the facts and the context will reveal, in which countries information must be obtained, how certain facts can be qualified and along which legal routes the injured parties can establish the facts and, if necessary, subsequently hold the responsible parties liable for any irregularities found and recover their financial loss. Only in the course of the investigation does an understanding of the preliminary findings begin to emerge, on the basis of which carefully considered choices can be made for additional investigative acts, possible legal routes and violated legal norms.

The case study also shows that various legal and other investigative resources are required in the pre-trial phase in order to obtain the relevant data needed to understand the entire international context. The importance of early gathering and investigation of information, particularly from third parties, is considerable. These days a lot of information, including contracts, financial data and communications from parties, is held by third parties, such as banks, trust companies, accountancy firms, data centres and other service providers. In addition, the knowledge, skills and technical tools to localise, make available and analyse this data have increased significantly.

Finally, this case shows that there is a single set of facts (built up in stages) which can be intersected in different ways according to the various legal proceedings.

3 Issues

3.1 General

One can assume from various developments that the work involved in the drawing up and carrying out of fact-finding investigations needs to be further developed and professionalised. The sobering figures on the nature and extent of crime in Europe and the minimal recovery of these illegally acquired assets point to this need. Several studies on the nature and scale of financial crime in Europe show that only 1.1% of the €110 billion gained from this form of crime is recovered from the criminals involved. The scandals, including those involving listed companies and investment funds in teak and real estate, for example, show that the number of directly or indirectly disadvantaged shareholders and investors is so large that one could deduce that the problem of financial crime is shifting from an ad hoc private-law problem affecting a few individuals to a systemic public-law problem. In the following sections, I will discuss in more detail the various issues closely related to a financial forensic investigation.

3.2 The civil or criminal route in financial forensic investigations

As the case study reveals, in order to provide the fullest possible understanding of the facts, which are often international in nature, it is necessary to have recourse to various legal and other investigative means to obtain relevant data.[7] In view of the differences in effectiveness and efficiency in the use of the various investigative means, it is important to work closely with government agencies, such as the Public Prosecution Service and the police, and other professionals, such as the receiver, within the legally-prescribed scope, and to make use of the legal possibilities in the various jurisdictions in order to provide insight into the entirety of the facts. Unfortunately, this still happens too little in practice, and on an ad hoc, fragmented and uncoordinated basis. Given the many formal and practical preconditions associated with legal investigative resources in the various jurisdictions in the Netherlands and other countries, obtaining important investigative information, such as the identity of the beneficial owners of foreign legal entities or data on financial transactions and assets of individuals or legal entities, is often a complex search that requires the necessary knowledge and experience in various narrower fields. For example, requests to certain countries for judicial assistance in the context of a criminal investigation may take the public prosecutor months, if not years, whereas in the case described above the relevant information was obtained by the injured party from the Swiss prosecutor within a few days. As the discovery procedure in the case study shows, it is also possible to obtain data through civil-law proceedings within a reasonable

[7] In this context, '*legal investigation*' means (provisional) steps in obtaining evidence through legal remedies and filing a criminal complaint. '*Other means of investigation*' refers to the means of investigation used in other disciplines to collect, analyse and provide an understanding of data.

period of time in countries with a common law legal system, provided that the required conditions are met. Practice shows that both the civil and criminal law routes have great added value, but that the deployment and effectiveness of either route depends on different circumstances.

In practice, it appears that in civil law in Continental law jurisdictions, unlike criminal and administrative law in these jurisdictions, fact-finding is carried out more in the trial phase than the pre-trial phase. This raises the question whether there is a less, or indeed no, adequate separation of functions in civil law in Continental law jurisdictions between establishing the truth and making findings of law. The investigation of facts is part of the lawyer's litigation strategy because of its use in the proceedings. An independent, interdisciplinary approach to fact-finding in the pre-trial phase in the context of civil proceedings should, for reasons of material truth-finding, be aimed at collecting and analysing information in the context of the case. Unfortunately, this is still not happening enough.[8] The authors (the Expert Group) of the Dutch report *Modernisation of civil evidence law* note that despite the legal obligations upon parties and the powers of the court, the conduct of civil litigation in the Netherlands (and maybe also in other Continental law jurisdictions) is still characterised by a traditionally determined, reserved and wait-and-see attitude of litigants.[9] The existing civil-law sanction of procedural disadvantage ('*soft option*') in the Netherlands in response to a passive, reluctant attitude of – usually - the party causing problems in the field of financial crime, makes no impression on such a party.[10] Its sole interest is to deny the other party any disclosure of the facts, so that this other party is unable to initiate legal proceedings or provide the necessary evidence. The Expert Group notes that society needs dynamic and effective civil proceedings[11] but also recognises that parties deliberately withhold information.[12] It will therefore '*be necessary to consider how, prior to the procedure, parties will be given greater opportunity than at present to collect information themselves*'.[13]

It can be concluded that there is a great need for injured parties to be able to eliminate or at least reduce the existing information asymmetry by means, for example, of different legal means of investigation. Both civil and criminal law jurisdictions can play an important role in reducing information asymmetries, but existing resources in both jurisdictions are not yet sufficiently used to make an effective contribution to financial forensic investigation.

3.2 The scope of financial forensic investigation

The case study shows that obtaining information about the internal problems of the broker will lead to answering many questions about who traded, what was traded and for what amounts. However, if the investigation were limited only to the internal affairs of the broker, the core of the potentially unlawful conduct - namely the shareholder relations between the various traders and the foreign companies - would not have been revealed. It would not have become apparent that some traders had sold the tulip bulbs they had just purchased to their own foreign companies for much higher amounts without these companies fulfilling their financial obligations. In many cases, this relevant data is not available internally from the party investigated, but is often available externally from other parties involved, professional service providers or third parties, often in other countries.

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[8] C.J.M. Klaassen, 'Het burgerlijk procesrecht en de waarheidsvinding' *[Civil-procedure law and the establishment of the truth]*, points 7 to 10 on pages 49 to 52, in *Het procesrecht en de waarheidsvinding [Procedural law and the establishment of the truth]*, C.P.M. Cleiren, R.H. De Bock and C.J.M. Klaassen, Nederlandse Vereniging van Procesrecht *[Dutch Association of Procedural Law]*, Boom juridische uitgevers, 2001; A. Hammerstein, W.D.H. Asser and R.H. de Bock, *Advies van de Expertgroep Modernisering burgerlijk bewijsrecht [Advice of the Expert Group on Modernisation of Civil Evidence]*, April 2017, footnotes 18 and 19 on page 17.

[9] Expert Group (2017), page 10.

[10] N. Trocker, 'From ALI-Unidroit Principles to common European rules on access to information and evidence? A preliminary outlook and some suggestions', Univ. L. Rev., Volume 19, 2014, page 260.

[11] Expert Group (2017), page 10.

[12] Expert group (2017), page 15.

[13] Expert group (2017), page 22.

Jennen and Biemond noted with regard to the scope of a forensic investigation: '*(....) the company usually benefits from an investigation with a clear focus and limited scope (...)'*.[14] From the point of view of the partisan lawyer, this position of Jennen and Biemond is very understandable, but from the point of view of truth-finding (in the specific case), problem-solving and process improvement for the company (in the longer term), practice shows that the limited scope of an investigation in many cases provides no insight into the entirety of the facts, justice is not done to the interests of the other parties involved, and a lot of money is often spent with little added value to solving the actual problem.

From the above case study and many other cases it can be concluded that the scope of a financial forensic investigator's opinion should not be limited to the internal course of events. Unfortunately, this happens frequently in practice for various reasons. The determination of the scope of an investigation depends on several factors, including the nature and extent of the possible problems, the differing interests of the various parties involved, the context of the case and the expertise and risk perception of the investigator. The conscious and early application of so-called subjective restrictions in, inter alia, the investigation period, the possible problems, the circle of those involved and the necessary internal and external information will not contribute to material truth-finding, but rather lead to availability bias, other bias, tunnel vision and the avoidance of potential risks in the conduct of investigations. When assessing the quality of an expert report, it is more important to establish what has *not* been investigated than what has been investigated. Verschuren notes this: '*The way in which research is carried out is often seen as determining the quality of research. But it is a simple observation that not only* ***a proper investigation*** *is decisive, but so too* ***is an investigation of the right things***'.[15] The introduction of subjective limitations and the reasons for them say something about the scope of the investigation, but also about the expertise and the degree of bias of the investigator. Williams observes that the ultimate quality of investigation is determined by care, thoroughness, completeness and critical ability, which he describes as '*the passion for getting it right*'.[16]

The investigator's lack of expertise in collecting externally the necessary information through different investigative resources is a subjective and not an objective limitation. As the judgment below shows, the expert has his own responsibility for determining the scope, collecting the necessary data and drawing up a report that does justice to the context and the problems. In a recent ruling, the Dutch Disciplinary Court for Auditors has indicated that the auditor: '*should avoid being associated with reports and other information which in his opinion contain a claim that (...) is not complete (...) as a result of which the claim may be perceived as misleading*'.[17] In my opinion, this principle applies not only to auditors, but to all professionals who investigate and report.

3.3 The positioning of a financial forensic investigation

As the above case study shows, although the investigation involved a great deal of work and took a great deal of time, it also provided an important insight into the facts. Given the objective of expeditious and effective civil proceedings, it is impossible, however, to carry out the described work within a reasonable time frame after the commencement of civil proceedings.

As indicated in various essays, the majority of all legal disputes are about disputed facts and not disputed law.[18] *'Without facts there is no justice and the judge who does not do justice to the facts of the case does not do justice*'.[19] The notions '*findings of fact*' and '*findings of law*', as well as the notions of '*presentation of facts*', '*providing evidence*' and '*evaluating evidence*', are inextricably linked. One should precede the other, but in practice it often turns out that they are interwoven. Giard makes a strict distinction between findings of fact (the investigation

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[14] B.C.G. Jennen and H.J.Th. Biemond, 'Het interne fraudeonderzoek, Enkele juridische overwegingen' *[The internal fraud investigation, Some legal considerations]*, Tijdschrift voor de Ondernemingsrechtpraktijk *[Journal for Commercial Law Practice]* , March 2009, page 61.

[15] P.J.M. Verschuren, *De probleemstelling voor een onderzoek [Defining the issue for an investigation]*, 2011, page 10.

[16] B.A.O. Williams, *Truth and truthfulness*, Princeton University Press, 2002, page 11.

[17] ECLI:NL:TACAKN:2016:102.

[18] H.J.R. Kaptein, 'Hermetische of historische waarheid (en recht): remedies tegen opsluiting van feiten in processualisering en partijautonomie' *[Hermetic or historical truth (and law): remedies against the withholding of facts in litigation and party autonomy]*, in E.T. Feteris, H. Kloosterhuis, H.J. Plug and J.A. Porteir ed, 'Alles afwegende …' *['Weighing everything up ...']*: Contributions to the Fifth Legal Argumentation Symposium, 22 June 2007, Rotterdam. Ars Aegui Libri, 2007, pages 375-383; W. Blackstone, *Commentaries on the Laws of England*, Oxford, Clarendon Press, 1768.

[19] Kaptein (2007), page 375.

into facts and circumstances) and findings of law (the legal normative opinion), because the open question of investigation into the causes is a substantially different question from the closed question of guilt.[20] The investigation into the facts and circumstances should also first be concluded before a judgment is passed, because otherwise, to use accountancy terms, the sound basis is lacking.

In computer science, the expression '*garbage in, garbage out*' is used to emphasize the importance of reliable (complete and correct) input from an automated process.[21] This importance of reliable input applies equally to legal proceedings. It is necessary to prevent a possible legal norm being identified without a thorough understanding of the entirety of facts, as a result of which a presumed outcome is wrongly pre-selected. This creates a risk of tunnel vision, fails to do justice to material truth-finding and the interests of the injured parties, and problems cannot be properly solved, which might not only reduce confidence in the legal system, but also increase the risk of repetition. To secure the reliability of input, it is necessary to consider, inter alia, the separation of important functions in the process of factual presentation, the provision of evidence and the evaluation of evidence.

The separation of functions creates a division of tasks or powers, but at the same time an inter-dependence and mutual cooperation between the different functions. One function or power cannot exist without another. They each have their own role, their own rules and their own function in a constitutional system, in a company, but also in legal proceedings. The Netherlands Scientific Council for Government Policy (WRR) considers the prevention of a concentration of power with a view to its corrupting effect, the separation of powers, the distribution of power, or the pursuit of a balance of power to be the basic idea behind the rule of law itself.[22] The separation of functions is identified in accountancy as an important, irreplaceable internal control measure to ensure that tasks with conflicting interests within organizations are performed by different officials or units. If important functions are performed or looked after by one and the same person (or unit), it is described as a mixture of functions, which is seen as a risk/threat to a reliable information management and adequate functioning of the (honest and controlled) organisation.

Each of the professional parties involved in legal proceedings has its own function, its own interests and its own rules of play within their own field of expertise. The functions differ from the impartial, executive investigative function, the partial trial-party representative, and the impartial, independent, decisive dispute resolution judge. The interests of the impartial expert/investigator and the partial trial-party representative are by their nature conflicting. Because of his objectivity, the expert must be able to conduct his investigation impartially and independently, without external interference; he must focus on truth-finding, answering the investigative question, in which the accuracy and completeness of the data is important. For these reasons, it should not matter to the expert whether he is acting on behalf of a party or whether he is appointed by a judge.

Reasoning based on relevant legal principles and the importance of independent and impartial dispute resolution and effective legal protection, the separation and balance of functions in the context of truth and justice can be said to be crucial in order to avoid the negative effects of unequal treatment and the concentration of (market) power in one party (or a profession). The positioning of the financial forensic investigation to be carried out by an impartial expert prior to the legal proceedings is an important part of this.

3.4 Investigation by lawyers

Following the retreat of accountancy firms in recent years from the forensic investigation market, some law firms have become more prominent as professional service providers able to take on the responsibility for, and coordination of, forensic investigations.[23] For various reasons, there are questions to be asked as

[20] R.W.M. Giard, *Werken aan waarheid, Over het belang van de onjuiste onderzoeksmethoden in het aansprakelijkheidsrecht [Working towards truth, On the significance of incorrect investigation methods in liability law]*, 2016, pages 27, 44, 46 and 53.
[21] Forum, Netherlands Financial Forensic Institute (NFFI), 'Het feitenonderzoek op hoofdlijnen' *[The fact-finding investigation in general]*, www.nffi.nl/forum/forum/stellingen-en-reacties/.
[22] Wetenschappelijke Raad voor het Regeringsbeleid, *De toekomst van de nationale rechtsstaat*, *[Scientific Council for Government Policy, The Future of the National Rule of Law]*, WRR report number 63, 2002.
[23] The Accountant, 'The advocate as forensic investigator', 28 April 2015.

to whether this extension of a lawyer's services to this field of work is a happy choice and pays respect to the necessary separation of functions.

The five core values that apply to lawyers are partiality, independence, expertise, honesty and confidentiality.[24] As lawyers, Leliveld and Van Kampen make the following observations about partiality and independence: '*Partiality means that the lawyer expresses his client's interests to the best of his ability. (....) To be able to serve this interest properly, a lawyer provides his client with the fullest possible information about his case, the opportunities and risks, and advises on the strategy to be followed and on how to deal with the legitimate interests of the other party and of third parties. (…) The aim of independence in the relationship with the client is that he can serve the party's interests as well as possible. It also seems impossible to us as lawyers to renounce the core value of bias (...) If, in our opinion, 'independent investigation' is mentioned in the context of internal investigations, this means nothing more and nothing less than that the lawyer had the opportunity to carry out an unimpeded investigation*'.[25]

The lawyer has a right to refuse to give evidence and a duty of confidentiality. The obligation of confidentiality is regulated in articles 10a and 11a of the Dutch Attorneys Act (*Advocatenwet*). The right to refuse to give evidence gives the attorney the right not to have to share the knowledge entrusted to him '*in that capacity*', according to Sluysmans and others.[26] Sluysmans and De Graaff rightly state that the principle of '*legal professional privilege*' is a fundamental principle that serves a major social interest.[27] However, in the context of the investigation and prosecution of criminal offences, Public Prosecutor Leenders has raised the question out loud whether the right to refuse to give evidence should be limited to the knowledge and work associated with the assisting role of the profession in the context of which the right to give evidence was granted.[28] [29] On 24 November 2016, the Minister of Security and Justice sent a letter to the House of Representatives in which he noted: '*This means that if there are signs that social developments are actually extending the scope of sectoral professional confidentiality, it should be considered to which areas professional confidentiality - and consequently the right to excuse - should extend*'.[30] As is clear from the case study the English court did not recognise the Swiss lawyer's right to refuse to give evidence because, according to the court, he was acting outside his task of assistance.

The published work *Facts make the law* records the views of lawyers, judges, professors and forensic investigators on various themes concerning financial forensic investigation, including the nature, scope and use of lawyers' right to exercise privilege. From the opinions recorded it can be concluded, inter alia, that there is no consensus among the lawyers interviewed on the use of the derived privilege for the work of investigators. From the various quotes it can be concluded that the use of this principle of '*legal professional privilege*' serves a more practical purpose for some, such as '*keeping investigation results under wraps*', '*consulting freely with the client and the investigator(s)*', being able to invoke it when necessary and '*not encountering unforeseen events*'.[31] De Bock questions the use of the right to refuse to give evidence and notes that it is urgently in need of revision, because the necessary support base is lacking in today's society.[32] Among other things, it considers that those in possession of confidential information should not be judges in their

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[24] Dutch Bar Association, the Attorneys Act, the Regulation on the Legal Profession and the Code of Conduct 1992.
[25] J. Leliveld and P. van Kampen, 'Trust me, I'm a lawyer', Strafblad *[Journal for Criminal Law]*, November 2015, page 390.
[26] J. Sluysmans and R. de Graaff, 'Het advocatuurlijke verschoningsrecht' *[The attorney's right to professional privilege]*, Netherlands Law Journal, issue 31, 16 September 2016; B. Steins Bisshop, 'Hoe vertrouwelijk is een vertrouwelijk onderzoeksrapport van de advocaat' *[How confidential is a confidential research report of the lawyer]*, Nyenrode Corporate Governance Institute, newsletter, August 2015; H.M.H. Speyart, 'The Vestia case', Tijdschrift Mededingingsrecht in de praktijk *[Journal on Competition Law in Practice]*; issue 6, September 2015; R. Sanders and N. Hupkes, 'Heiligt het doel de middelen?', *[Does the end justify the means?]* Netherlands Law Journal, issue 7, 21 February 2014.
[27] J. Sluysmans and R. de Graaff, 'Het advocatuurlijke verschoningsrecht' *[A lawyer's legal privilege]*, Netherlands Law Journal, issue 31, 16 September 2016, page 2247.
[28] Het Financieele Dagblad, 'OM: beperk verschoningsrecht advocaat en notaris' *[P.O.: limitation of the right to refuse to give evidence to a lawyer and notary]*, 19 June 2015, page 13.
[29] J. Sluysmans and R. de Graaff (2016), page 2251.
[30] Letter of 24 November 2015 from the Minister of Security and Justice to the President of the House of Representatives of the States General, on the subject of professional confidentiality and privilege and reference 703969.
[31] Grant Thornton, 'Feiten maken het recht' *[Facts make law]*, 2013, pages 40 - 43.
[32] Grant Thornton (2013), pages 61 and 62.

own cases, but that the courts should assess on a case-by-case basis whether such person is justified in invoking confidentiality. Werkhoven observes that the auditor who invokes the derived right to rely on privilege runs the risk of being convicted. The auditor is deemed to be able to demonstrate the sound basis of his report, which cannot be achieved if he has to invoke his derived right to privilege before the disciplinary court.[33] In line with Giard's vision, Werkhoven states that the influence that the lawyer (and the client) may have on the investigation should not go beyond formulating the open questions to be investigated.[34]

After reading the book *Facts make law* and the various articles by Sluysmans et al. written in part as a response to the Vestia case, the question arises where the boundaries of the services of lawyers lie, when '*in that capacity*' he could also perform other services, such as coordinating and conducting forensic investigations.[35] In an article by Schmelzer and Rense, which weighs up the pros and cons surrounding the finding of the truth and the right to refuse to give evidence, the authors also give a warning: '*If the right to privilege is invoked outside its legitimate boundaries and that appeal is upheld, this implies in such a case an unjustified subordination of the establishment of the truth to the right to privilege, and this must be guarded against'*. They further note that: '*As such, the lawyer will never be able or obliged to conduct purely independent and objective internal (factual) investigations'*.[36] It can be deduced from their argument that a lawyer will have to make a choice either for an '*independent and objective internal (factual) investigation*' without being able to invoke professional confidentiality or for an investigation '*of attorneys*', which is *'biased and party-specific'*.[37] Several court rulings point in this direction.[38]

Another important argument against the current line adopted, whereby attorneys take on the entire responsibility and coordination of the investigation, concerns the prohibition of lying.[39] Rule 30 of the Dutch Code of Conduct for Lawyers 1992 provides for this: '*The lawyer must refrain from providing factual information that he knows, or at least should know, to be incorrect*'. The position of lawyers' trust in society means that one must be able to rely on the statements of lawyers. From the Dutch literature and case law for lawyers it can be concluded that lying can be described as representing an incorrect and/or incomplete picture.[40] As described above, not considering the interests of other interested parties, limiting the scope of a forensic investigation, the lack of the necessary knowledge and experience and failure to conduct a thorough investigation in a pre-trial phase does not contribute to the material discovery of the truth and therefore there is a significant risk that the court is not adequately informed. The question arises whether the existing process, whereby lawyers assume responsibility for, and coordination of, the forensic investigation, is in conflict with the aforesaid judgment of the Dutch Disciplinary Court for Auditors and the judgment of the Disciplinary Court for Lawyers of 19 December 2005: '*The public interest in the proper professional practice of the attorney aimed at promoting good justice prohibits the attorney from deliberately depriving the court of information that he - the attorney - knows or should know is crucial for the judgement of the court*'.[41]

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[33] Grant Thornton (2013), page 62.
[34] Grant Thornton (2013), page 64 and Giard (2016), page 63.
[35] J. Sluysmans and R. de Graaff (2016); B. Steins Bisschop, 'Hoe vertrouwelijk is een vertrouwelijk onderzoeks-rapport van de advocaat' *[How confidential is a confidential investigation report of the attorney]*, Nyenrode Corporate Governance Institute, newsletter, August 2015; H.M.H. Speyart, 'The Vestia case', Tijdschrift Mededingingsrecht in de praktijk *[Journal of Competition Law in Practice]*, issue 6, September 2015; R. Sanders and N. Hupkes, 'Heiligt het doel de middelen?' *[Do the ends justify the means?]* Advocacy Journal, issue 7, 21 February 2014; P.P. van den Broek and M. Ligthart, *Wat is de invloed van het verschoningsrecht bij fraude onderzoeken? [What is the influence of the law of privilege on fraud investigations?]*, Erasmus University, ESAA, Training for Forensic Financial Expert, 10 April 2015.
[36] P. Schmelzer and J.F. Rense, 'In de bres voor het verschoningsrecht' *[To the rescue of the law of privilege]*, Journal for Sanctions Law & Business, nr. 4, October 2015, page 157.
[37] Schmelzer and Rense (2015), page 156.
[38] ECLI:NL:RBDHA:2015:248 and ECLI:NL:RBAMS:2006:AX3111.
[39] R. Verkijk, *De advocaat in het burgerlijk proces [The attorney in civil proceedings]*, 2010, page 572 et seq.
[40] Preliminary relief judge Court of Breda, 29 August 2007, LJN BB 3121; Disciplinary Court 1960, No 21. Disciplinary Court 21 September 1992, Advocacy Journal 1993, page 238; Supervisory Board Amsterdam 19 May 1967, Law Journal 1971, page 295; Disciplinary Court 31 January 1994, Advocacy Journal 1995, page 78; Disciplinary Court 8 December 1997, No 2443; Disciplinary Court of Arnhem 1 March 2004, Advocacy Journal 2005, page 271; Court of Discipline, 12 March 2003, Advocacy Journal 2004, page 562; Disciplinary Court of Amsterdam 6 June 2005, Advocacy Journal 2006, page 532.
[41] Disciplinary Court 19 December 2005, Advocacy Journal 2006, page 837.

It can be concluded that in view of the required separation of duties and the importance of establishing the truth, the added value of the attorney in financial forensic investigation lies in formulating the question to be investigated and providing support during the research phase in initiating legal proceedings for obtaining data.

4 Conclusion

It has often been established that the law is ineffective in cases involving financial crime. The injured party often lacks access to relevant facts and circumstances due to the incorrect (incomplete and poorly-positioned) approach to the fact-finding process. If the injured party is to be supported in reducing the information asymmetry and if justice is to be done to truth-finding as a fundamental principle of the law, the injured party must be given the opportunity to make the entirety of facts as fully transparent as possible in the pre-trial phase. Case law shows that experts must avoid an incomplete and biased investigation, because an incomplete report may be perceived by the court as '*misleading*'. The case study shows that the financial forensic investigator can have added value if the investigation to be carried out is positioned prior to the legal proceedings and the scope of the investigation is not limited by subjective obstacles. The role of the lawyer should focus in particular on formulating the question to be investigated and providing support during the research phase in initiating legal proceedings for obtaining data. Based on my experience, it can be concluded that professional financial forensic investigation is possible within the current possibilities, provided that existing issues are properly identified.