

#37: High and mighty

While 2019 is still brand new, we have already been treated with lots of developments. Britain is keeping everyone occupied with their Brexit worries, as are the United States with the shutdown. Meanwhile the various authorities are continuously expanding their fight against fraud. This year, on 4th of January, the Dutch Tax Intelligence and Investigative Service (FIOD) published an annual report for the first time. The title of the report on 2018 is: '[The silent revolution in the financial investigation](#)'. In the report the FIOD looks back on the accomplishments of the last year and their goals for 2019. Reading the report however makes one wonder: are there only just accomplishments or is the FIOD getting high and mighty on itself?

In 2018 900 investigations have been completed by the FIOD. The report doesn't mention when these investigations have been enacted and how long they took. A large part – 230 investigations – have been executed on the request of foreign authorities. The report states that the silent revolution is more and more visible, because of 1) the focus on facilitators and creators of the financial fraud, 2) using modern technology and 3) the improved international cooperation. The fight against facilitators (of fraud) has been there over the past years and it will remain on the agenda of the FIOD in 2019. We already mentioned the Dutch hunt for facilitators in [Lawlunch #06](#). Financial service providers, such as banks, are top priority of the FIOD. According to the FIOD financial service providers play a vital role in fighting fraud and these service providers should act as the gate-keepers in that fight.

The ING-deal on which we elaborated in [Lawlunch #33](#) is considered an example function. This title is somewhat dubious , especially from the perspective of lawyers (and probably

from ING as well). However it fits the vision of the FIOD, the prosecutors office and the tax department. Therefore the annual report elaborated on this “mega-deal” of last September in which ING settled for money laundering for an amount of € 775 million. This settlement received a lot of exposure in the media. This is important for the FIOD as it provides a signal to financial service providers to take their function as “gate-keeper” very seriously. Are there more banks who can expect such investigation and exposure? From the political field it shows that more and more options are being explored to make sure that financial service providers are not only considered gate-keepers but also act the part.

The report shows that the FIOD is very content with its accomplishments of 2018, the report however lacks reflection on things the FIOD could – or should – improve.

Jurisprudence shows that sometimes the authorities misuse their large set of legal artillery against a suspect. In [Lawlunch #30](#) we elaborated on a specific case in which the court judged that the misuse of powers by the prosecution service results in inadmissibility to prosecute. In other cases sometimes there is simply no proof for the suspicion. Are the suspects than protected enough against the power of the authorities? Recently a publication was made on the ‘[confirmation bias](#)’ of judges which result from a criminal legal system which is focused on conviction. This fact alone shows that the work of the authorities has to be checked thoroughly. This is an important task for the defense in every case. And the defense should show the judge where the authorities do not respect the rights of the suspect as they should.

Sometimes this means that the defense has to file a criminal complaint against public servants who are investigating a case. Recently such complaints were filed because servants had tampered with reports of the investigation. Even though the prosecution service acknowledges that this is a criminal

offense, these servants will not be prosecuted according to a [press release](#) of the prosecution service. Only disciplinary measures will be taken.

In this particular case the lawyers found out that the reports were tampered with and took action. In practice it however is not always easy to find out whether reports are accurate or not. Such reports under the law however are considered as strong evidence because they were made by a servant. The question is whether this is still suitable considering the fact that sometimes these reports are actually not reflecting the truth, on purpose. We believe it isn't. Until this law will change it is up to all professional legal parties to be critical of such evidence.

In this particular case it concerned police officers tampering with the reports, however it could also have been a FIOD officer. It would also be a worthy thing if the FIOD itself would be critical of its own work. Let's help the FIOD and the prosecutors services a little more in 2019 to be critical on itself instead of just being high and mighty about their accomplishments. If you come across a report in an investigation which seem to not represent the truth, as explained in [Lawlunch #15](#) the law provides a way to declare this report inadmissible or – if the report was tampered on purpose – to declare the prosecution inadmissible.

If you have any questions about the foregoing, please feel free to contact us via boezelman@hertoghsadvocaten.nl and boer@hertoghsadvocaten.nl.