

DE BRAUW  
BLACKSTONE  
WESTBROEK

# Outsourcing of investigations to lawyers of suspected companies: the Netherlands

**Around the globe, the practice of enforcement authorities allegedly outsourcing investigations to lawyers hired by companies being investigated, is grabbing public attention. This type of “collaboration” between companies and enforcement authorities is not new. Enforcement authorities favouring increased far-reaching cooperation has, however, fuelled the debate on individuals’ rights, legal privilege and the degree of cooperation required to receive prosecutorial credit. While companies need to be aware of these issues when cooperating with enforcement authorities, the issues vary by country. In this month’s edition of In context, we discuss the relevant issues from a Dutch point of view. (The issues from a US and a UK angle will be discussed in future editions of In context).**

The phenomenon of outsourcing investigations regained public attention in The Netherlands, when on 4 June 2019, the Dutch Financial Times reported that *“in the future the Public Prosecution Service would like to make more use of lawyers hired by companies being investigated for fraud and corruption. This places fewer demands on FIOD criminal investigators, and enables the Public Prosecution Service to settle matters more swiftly.”* In the same article, Thomas Bosch (coordinating Public Prosecutor of the National Public Prosecutor’s Office for Financial, Economic and Environmental Offences) confirmed this development and said that *“everything is possible, as long as it is clearly established that the investigation has been sufficiently broad and sound.”*

## **Different types of cooperation**

The scope of cooperation can range from the disclosure of a lawyer’s investigation report, in situations where the authorities’ involvement was not foreseeable at the time of the investigation, to far-reaching real time cooperation, for example, if the government has been involved since the beginning of the investigation. The enforcement authorities may then choose to outsource all, or part, of their investigation to the lawyers of the suspected companies.

## **Cooperation leads to efficiency**

Following Bosch’s comments, members of the Dutch Parliament raised questions, asking why and how often cooperation takes place. The Minister of Justice and Safety’s stated that cooperation between the enforcement authorities and the suspect – an individual or a company – leads to investigations being carried out more efficiently. However, he was unable to quantify the number of cases where cooperation was key. He also stipulated that the Public Prosecution always has the final say with respect to the investigation and the

validation of the documentation provided by the suspected company.

### **Required degree of cooperation is uncertain**

The cooperation of suspects in a criminal investigation is not new, and is often taken into consideration when determining penalties, as Bosch stated in the Dutch Financial Times article. However, the degree of cooperation required to achieve effective mitigation of penalties, remains unclear. In the Netherlands, there are no guidelines on this subject.

Similarly, the relevant Public Prosecution Directives do not mention cooperation as a requirement for settlement. Having said this, a settlement without a party's cooperation can be difficult, as demonstrated in the [ING settlement](#). ING's cooperation was considered relevant for the Public Prosecution to consider a settlement, rather than prosecution.

The fact that the required degree of cooperation is not clearly determined, leads companies to feel uncertain in their discussions with authorities.

### **Rights of individuals**

In the context of cooperating companies, the individual's rights deserve attention. In the Netherlands, the principle of being a good employee may under certain circumstances require employees to cooperate with their employer when the employer performs an investigation into their behaviour; at its simplest, the employee must provide documentation and answer questions during any interview.

In criminal investigations, suspects have the right to remain silent and the right not to incriminate themselves. The rights of the individuals must therefore be carefully observed in any cooperation. In 2015, the Court of Appeal in The Hague [confirmed](#) that documentation relating to an internal investigation cannot be directly used in a criminal prosecution, since in the framework of the internal investigation "individuals were heard without the caution that they were not obliged to answer, while it also was unclear whether the interviewee was a suspect, witness or disciplinary examinee".

### **Legal privilege**

Lawyers may be expected to waive legal professional privilege when cooperating with enforcement authorities during the course of an investigation. Documents and reports that normally fall within legal privilege may be disclosed in the spirit of cooperation. The circumstances surrounding the waiving of legal privilege [threatens to further erode this fundamental right](#) that is intended to protect the interests of both corporate and public citizens.