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Invordering door de overheid : de invordering van geldschulden uit herstelsancties onder de Awb

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ENGLISH SUMMARY – RESULTS AND FINDINGS

This PhD thesis (*“Collection by the government: the collection of debts owed as a result of administrative financial sanctions under the GALA”*) focusses on the collection of administrative financial sanctions in the Netherlands by writ of execution. Dutch administrative law provides for a collection process in title 4.4 of the General Administrative Law Act (‘GALA’). Once a sanction has been imposed by decision, the collections process in title 4.4 of the GALA requires that the government issue a second decision, this one pertaining to the collection of the sanction. In this decision the government must specify the sanction (the size of the debt), explain why it is being collected and provide the offender with a payment term (usually six weeks). If the offender refuses to pay, the government is required to send a final notice to the offender, in which the offender is notified that he has two weeks to pay, failing which the government will collect the debt by writ of execution. Once the two weeks have passed, the government is entitled to issue a writ of execution. With the writ of execution the government has a title to enforcement, bypassing the need to request such a title from the civil courts. The writ of execution can then be used to serve writs of attachments or of sequestration.

Dutch law has a variety of administrative financial sanctions. This research has focused on the use of title 4.4 GALA with regards to four specific sanctions. Firstly the conditional fine (‘last onder dwangsom’). The conditional fine is a sanction involving an order to cease an activity (a ‘last’), failing which a fine (‘dwangsom’) is automatically imposed. Secondly administrative coercion (‘last onder bestuursdwang’). Administrative coercion is a sanction involving an order to cease an activity (a ‘last’), failing which the government will end the breach of the law by force (‘bestuursdwang’). The offender is then legally required to pay for the costs the government has made for the use of force (‘kostenverhaal’). Thirdly the recovery of subsidies by way of sanction (‘terugvordering van subsidie bij wijze van sanctie’). The recovery by way of sanction is a sanction which is used if an entity which is subsidized by the government for a certain activity fails to comply with some or all of the conditions imposed by the government in return for receiving that subsidy. Fourthly the recovery of welfare benefits by way of sanction (‘terugvordering van uitkering bij wijze van sanctie’). If an individual receives welfare benefits from the government but does not comply with some or all of the applicable legal requirements, the government will recover part or all of the welfare benefits by way of sanction. As part of this research all of the published Dutch case law and literature regarding

the aforementioned sanctions that have been published since the 1st of July 2009 (the date on which title 4.4 GALA entered into force) has been studied. The central research questions was:

“How are debts which are the result of an administrative financial sanction collected using title 4.4 of the GALA, are there bottlenecks and if so, can these bottlenecks be resolved in a practical, effective and proportional way?”

The findings of this research are that there are a few specific bottlenecks which need resolving. They are the following:

1. The doctrine of formal legal force is a Dutch legal doctrine which dictates that once an administrative decision has not been contested within the available period of appeal, it is regarded as being legally binding and lawful. Occasionally a sanction decision is not appealed, even though it is evidently unlawful. In such cases, the doctrine of formal legal force requires the administrative judge to regard the decision as valid and lawful. This has the consequence that it is possible that a sanction is enforced by writ of execution even though the decision to impose that sanction is evidently unlawful.
2. It is unclear whether the financial capacity and culpability of the offender are factors which must be considered by the government when deciding to enforce a financial sanction by collecting it. It is clear that this is the case with a punitive sanction (the administrative fine), but unclear for the other non-punitive sanctions. This is due to the fact that financial capacity and culpability are generally regarded as irrelevant for the imposition of those sanctions.
3. The financial capacity and culpability of the offender are relevant for the recovery of subsidies by way of sanction, but not for the conditional fine and for administrative coercion.
4. Different terminology is used for the standard of assessment used in case law regarding the collection of a conditional fine and the costs of administrative coercion, while the standard of assessment seems to be the same.
5. Different terminology is used for the standard of assessment used in case law regarding the conditions in which the government cannot collect a conditional fine or the costs of administrative coercion, while the standard of assessment seems to be the same.
6. It is unclear whether the question if the costs of administrative coercion are reasonable should be answered in the decision regarding the sanction or the decision regarding the collection of the sanction.
7. There is no expiry date for the government to take a decision regarding the collection of a sanction.

8. The text of article 4:125 GALA (which stipulates that an appeal against the decision to collect the sanction automatically follows an appeal against the sanction decision, if the offender disputes the collection decision) means that this procedurally efficient article is not applicable to the conditional fine.
9. The requirement in article 4:125, 5:31c and 5:39 GALA to dispute the collection decision creates unnecessary confusion in practice.
10. The debtor receives inadequate protection under Dutch law.
11. The terminology of article 5:35 GALA creates unnecessary confusion about what actions the government is no longer able to take after its right to collect the sanction expires.
12. A third party which has an interest in the proceedings regarding the sanction and the collection of the sanction has no legal means to prevent the expiry of the sanction.

Regarding the first bottleneck this research establishes that within the confines of the current Dutch legal system, Dutch administrative law and the division of labor between the administrative courts and the civil courts, the doctrine of formal legal force is a necessary evil. In this thesis (specifically chapter 2.8.3) the doctrine is mapped out and the justification for the doctrine is studied. The conclusion is that although the doctrine can have negative consequences if the offender does not appeal a decision in time, it is a necessary evil because not having the doctrine would create legal uncertainty. As such the first bottleneck is in effect unresolvable.

With regards to the second bottleneck, this thesis concludes that the financial capacity and culpability of the offender should be factors which must be considered by the government when deciding to enforce a financial sanction by collecting it. The reason for this is that if these factors are not considered in the collection decision, the factors are never considered as they are not considered in the sanction decision nor are they considered by the civil courts when examining the writ of execution.

The tenth bottleneck regards the protection of the debtor. The current protection is lacking in terms of the protection of debtors. In the Dutch legal system an individual is not automatically freed from his debt after being declared bankrupt. Furthermore, whilst the Dutch system has a 'protected legal earnings' system in which a certain amount of earnings each month cannot be touched by debt collectors (including the government), the complexity of the system leads to frequent errors which in turn means that debtors usually do not have the full amount of protected legal earnings at their disposition. This means that it is possible that debtors end up not being able to provide for themselves. This is not a problem specific to the collection of administrative sanctions, but a problem for the Dutch legal system as a whole.

Nonetheless this research looks at whether Dutch administrative law could help debtors. The conclusion is that this is not the case. Whilst change is necessary in my opinion, administrative law is unable to provide the necessary solutions. I believe it is necessary to change the Code of Civil Procedure in order to effectively protect debtors.

The other bottlenecks can be solved within the confines of administrative law. I propose the following solutions.

3. In my opinion the Dutch administrative courts should no longer regard the financial capacity and culpability of the offender as relevant for the decision to recover subsidies by way of sanction – as is currently the case for the conditional fine and administrative coercion.
4. There should be a harmonized standard of assessment, for which I have proposed a specific standard to be used in judgments.
5. There should be a harmonized standard of assessment, for which I have proposed a specific standard to be used in judgments.
6. To avoid confusion I propose altering article 5:25 GALA to remove the reference to the reasonableness of the costs in the coercion decision which is causing the confusion.
7. I believe it is necessary to introduce an expiry term of five years.
8. I propose inserting a reference to article 4:125 GALA in article 5:39 GALA so that it is also applicable in the case of the collection of conditional fines.
9. I propose altering article 4:125, 5:31c and 5:39 GALA so that it is not necessary to explicitly contest the decision. Instead the collection decision would automatically become part of an appeal against the sanction decision, unless parties have no reasonable interest in such an appeal.
11. I propose altering article 5:35 GALA such that the confusion about what expires is avoided by changing the terminology.
12. I propose that the third party be provided with a means to prevent the expiry. Such means would entail a request to the government to interrupt the expiry, with which request the government is required to comply.