Fiscale Geheimhoudingsplicht: art. 67 AWR ontrafeld

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Summary and conclusions

Fiscal confidentiality in the Netherlands: Article 67 AWR unravelled

1 Introduction

As tax legislation ages, it can start to show signs of wear and tear or become less convincing. This also holds true for the fiscal confidentiality provision of Article 67 AWR[1]. Although the objectives of the Wet VB 1892 have remained unchanged, the use of fiscal data has increased significantly, both inside and outside of the Dutch Tax Authorities. This ranges from the collection of data for the enforcement of one specific substantive tax law in the case of one specific taxpayer, to the integral and recurrent use of data for the enforcement of all tax legislation in the cases of all those who are obliged to pay tax, keep records or act as a withholding agent, as well as in the case of third parties. Outside of the Dutch Tax Authorities, the world has also changed radically. Since the 1980s, the provision of data to other administrative bodies, in particular, has increased significantly. This was in line with the trend for integral government action, and the current 'one government' concept. After the entry into force of the AWR on 1 november 1961, the confidentiality provision was not altered until 1 January 2008. Article 67 AWR currently reads as follows:

1. *It is forbidden for any person to disclose, to any further degree than is necessary for the enforcement of the tax legislation or for the levying or collecting of any state taxes as referred to in the Collection of State Taxes Act [Invorderingswet 1990], anything which comes to light or is divulged about the person or the affairs of another person during any activity performed for or in connection with the enforcement of the tax legislation (duty of confidentiality).*
2. *The duty of confidentiality does not apply if:*
   a) *any statutory regulation obliges disclosure;*
   b) *it is determined by ministerial regulation that disclosure is necessary for proper performance of the public duties of an administrative body;*
   c) *disclosure is to the person to whom the information relates, insofar as this information has been provided by him or on his behalf.*
3. *In cases other than those mentioned in paragraph 2, Our Minister may grant exemption from the duty of confidentiality.*

Despite its age, the fiscal confidentiality obligation remains relevant and is not (or hardly) called into question. Nevertheless, the fiscal confidentiality obligation has been under pressure for decades as the result of the increasing (international) exchange of information, stemming from the (sometimes unbridled) urge to combat abuse or improper use of governmental schemes, fraud, tax evasion, or tax avoidance. In this regard, the importance of Article 67 AWR is (too) often neglected. The question of who should qualify as the persons subjected to the confidentiality obligation, and the question of the object of confidentiality, are furthermore not answered unequivocally in the literature. It is, therefore, useful to review fiscal confidentiality as a whole, taking into account the general

1 The Algemene wet inzake rijksbelastingen or 'AWR' is the Dutch General State Tax Act.

confidentiality provision of Article 2:5 Awb[2], which was introduced in 1994. In cases of the international exchange of information, it is effectively left to the states involved to give substance to the general principle of confidentiality. The present study, therefore, has direct international relevance. In this study, I provide an in-depth analysis of Article 67 AWR. The study aims to contribute to a better understanding of the provision, and is consequently relevant to administrative law in general, and specifically to tax scholarship. Aside from the relevance for tax scholarship, this study is (in light of the increasing attention for privacy) also relevant from a societal perspective. This study provides a thorough substantiation, and (where possible) an outlook on potential approaches for solving the difficulties which have been flagged. In this study, the following three research questions were addressed:

1. A study into the objectives of Article 67 AWR. Are the objectives of the current fiscal confidentiality provision and the motivation thereof – as have been developed since the Wet VB 1892, the Wet op de BB 1893, and the Wet IB 1914 – still in line with current (legal) thinking? If yes, why, and if no, what should the objectives of confidentiality, and the motivation thereof, be?
2. A study into the functioning of Article 67 AWR. Does Article 67 AWR function in accordance with its intended objective and is Article 67 AWR (still) in line with the manner in which this objective is implemented? If not, could this be solved by amendments to this article?
3. A study into the significance of Article 67 AWR in relation to the general confidentiality provision of Article 2:5 Awb. How does Article 67 AWR function, in relation to the general confidentiality provision? Would the general confidentiality provision of Article 2:5 Awb not suffice for fiscal matters?

To answer these research questions, I have explored the fiscal confidentiality provisions in the pre-AWR era. This provided me with a better understanding of the current legal provision in its historical and societal context. I could then build upon this foundation for possible approaches to a future fiscal confidentiality provision.

2 Moving forward with an eye on the past

In Part I of this study (Chapter 2 up to and including Chapter 5) the focus was to analyse the literature, in order to come to a systematic description of the current fiscal confidentiality provision. The parliamentary proceedings and the commentary provided in the literature, proved very limited on the point of the confidentiality provision, at the time of the implementation of the AWR in 1961. Effectively, not much more was mentioned than that Article 67 AWR was intended to replace several similar provisions which were included in various material tax laws. To achieve a better understanding of the current confidentiality provision, it was consequently necessary to research the confidentiality provisions in the pre-AWR era. Chapter 2, therefore, addresses the history and development of the doctrine of fiscal confidentiality in the pre-AWR era. Although fiscal confidentiality has a history going back centuries, to the Medieval period, I started my analysis with the Wet VB 1892. That Act paved the way for the current fiscal confidentiality provision. Attention is paid, mainly in Chapter 7, to several confidentiality provisions dating from the Second World

2 The Algemene wet bestuursrecht or 'Awb' is the Dutch General Administrative Law Act.

War, a period during which the strict fiscal confidentiality on paper was not in line with the harsh reality. The legal and legal-historical research based on the parliamentary proceedings, case law, policy, and literature, placed Article 67 AWR in its historical context and offered valuable starting points for the assessment of the provision.

My research into the various tax laws in the pre-AWR era has revealed a fixed pattern, consisting of five elements that are of importance to the fiscal confidentiality obligation:

1. The objectives of the confidentiality provision. What is the objective of confidentiality provisions?
2. The persons who are subjected. Which persons and/or institutions are subject to the fiscal confidentiality obligation?
3. The object of confidentiality. To which data and what information does the confidentiality obligation apply?
4. The fiscal delineation of the confidentiality obligation. In aid of what specific fiscal objective are the data gathered and for which (fiscal) purposes may the data be used?
5. The exceptions and exemptions. In which other cases, and for what other purposes, is the confidentiality provision not applicable?

Based on these five elements from Chapter 2, the current provision is addressed in more detail in Chapter 3. Effectively, these two chapters answer two sub-questions: How did Article 67 AWR come to be? And what are the most important elements of this provision?

In Chapter 4, the consequences of breaching confidentiality for both the perpetrator of the breach and the recipient of fiscal data were discussed. I have concluded that it is important that there is an effective, proportionate and deterrent sanction for breaches of confidentiality. The intentional breaching of the confidentiality is punishable under criminal law, but the culpable breach has (unintentionally) quietly disappeared upon the introduction of the AWR. However, not all subjected persons are within the scope of the disciplinary policy of the Dutch Tax Authorities. I recommend that it should be investigated whether this gap between the use of criminal law and the possible absence of policy regarding integrity at the level of (private) recipients of fiscal information can be filled by means of policy regarding fiscal penalties.

The protection of rights will improve if requests for compensation for a breach of fiscal confidentiality can be submitted, by administrative bodies, to the Administrative Court. The lawful use by an administrative body is governed by the 'conflicting to such an extent' criterion; the use by the receiving administrative body is only impermissible insofar as it was obtained in a manner that is so conflicting with what may be expected from a carefully operating government, that this use must be deemed impermissible under any circumstances. Bearing in mind the 'one government' concept, the consequences of unlawful provision or receipt of fiscal data will sooner be attributed to the recipient administrative body. In this chapter, the convergence of the Wob[3] and Article 67 AWR was also discussed. In the

3 The Wet openbaarheid van bestuur or 'Wob' is the Dutch Government Information (Public Access) Act.

end, it is up to the Administrative Court to decide whether Article 67 AWR was rightly invoked in a Wob procedure.

Finally, in this Chapter I have paid attention to several aspects of the (indirect) protection of rights. Within the closed system of legal remedies, no objection or appeal is possible against a decision based on Article 67, second or third paragraph AWR. Further (practical) research should determine whether it is desirable and feasible to make appeal possible, or whether (for example) a notification procedure offers sufficient protection of rights. This should include attention for the protection of rights in an international context, where protection of rights is only offered in the fiscal procedure in which the information is used by the recipient state of the taxpayer concerned. This should lead to an optimal balance between law enforcement and protection of rights. Other forms of offering (indirect) protection of rights are the 'can' stipulations and the possibilities for not complying with the information obligations, restrictions to the information obligation, the legal privilege of tax officials, and privacy rules. In this way, Article 67 AWR is placed in a broader (fiscal) context, to better assess the function of that provision. This was relevant for answering the research questions.

Chapter 5 focusses on the comparison between Article 67 AWR and Article 2:5 Awb. At the time of the introduction of the Awb in 1994, a general confidentiality obligation, applicable to the entire public administration, was incorporated in Article 2:5 Awb, regarding confidential data which the administration deals with when carrying out its tasks. With the introduction of the Awb, a great number of confidentiality provisions was abolished. However, a few specific, stricter confidentiality provisions, including Article 67 AWR, remained in place. A closer look at these stricter provisions provided insight into what was considered stricter, and also offered inspiration for the suggested amendments to Article 67 AWR.

3 A critical look at the present

In Part II of this study (Chapter 6 up to and including Chapter 10), the legal-dogmatic research method was leading, given the research questions raised. In this regard, the object of the research was the existing, positive law described in Chapter 3 up to and including Chapter 5. In Chapter 6 up to and including Chapter 10, I have set forth the difficulties which have been flagged, on a per-element basis, using the assessment framework included in Chapter 1. By doing so, I have contributed new knowledge and insights to the doctrine of fiscal confidentiality. In addition to this, I have drawn a number of conclusions and made recommendations regarding possible amendments to Article 67 AWR. In this way, the first two research questions are answered in Part II.

3.1 The objectives of Article 67 AWR

In Chapter 3, I addressed the objectives of the current confidentiality provision of Article 67 AWR and the arguments which have been proposed in support of these objectives. The first objective is the protection of privacy. This is an extension of the possibility to gather or exact information. The second objective is the willingness to cooperate. The tax inspector

has an interest in preventing that information is held back due to fears that it might be used for purposes other than the enforcement of tax law. The creation of a counterbalance for the extensive powers is sometimes suggested as a separate objective, but can, however, be seen as an argument in support of the objectives of the protection of privacy and ensuring willingness to cooperate. In Chapter 6, I have argued that the current motivation of the age-old, broadly accepted objective of ensuring willingness to cooperate, is outdated. Given the manifold exceptions to the main rule, the idea that taxpayers should not be deterred from providing information to the tax inspector by the fear that information is used for other purposes than the enforcing of tax law is surely no longer defensible. For this reason, I answer the first part of the research question – whether or not the objective of the confidentiality provision and the substantiation thereof still align with the current (legal) views – in the negative. In my opinion, the objectives of the fiscal confidentiality provision should be:

Willingness to cooperate: a different motivation

Retaining the willingness to cooperate remains of undiminished importance. However, confidentiality does not only pertain to the main rule (not disclosing more than is required for the enforcement of the tax legislation or the collection of taxes), but also to the exceptions and exemptions that have been formulated to this rule. This leads to a change in the motivation of this objective: the parties involved should not be deterred from providing the correct information to the tax authorities, by the fear that such information might be used for purposes other than the enforcement of tax law. They should be able to trust that – if this data is used for other, non-fiscal purposes – the handling of the fiscal data is adequately and transparently motivated, that it has a legal basis, and that there has been a visible weighing of interests which shows that further dissemination of the information is important enough to justify an exception to the main rule (the 'one government' concept). The parties involved should be able to trust that the legislator will be even more reluctant where it concerns the provision of fiscal data to private parties. When weighing the interests, it should also be considered whether additional safeguards are necessary and possible with regard to the provision of data to private parties. In short, the state should treat data that has been provided to it, both carefully and confidentially. This changed motivation does not detract from the fact that an overly strict (interpretation of the) confidentiality provision may also negatively affect the willingness to cooperate. Confidentiality must remain functional and – insofar as is possible – should not interfere with the provision of services. Facilitating taxpayers through (for example) pre-completed tax returns or the income statements, which taxpayers can download from the website of the Dutch Tax Authorities (a commitment made by Minister Zalm), is an example of such services.

A weighty interest regarding audit strategy

Cooperating with an investigation into third parties is an obligation stemming from tax law. I have noticed that the Dutch Tax Authorities demand confidentiality both from persons who are obliged to keep records and from private individuals, even though there is no legal basis to do so. It is not useful to impose a confidentiality obligation in all cases. The policy of the Dutch Tax Authorities is in principle, after all, not to make public the name of the person whose data is required, during investigations into third parties. The core values of the Dutch Tax Authorities – working openly, transparently and from a position of

trust – do not generally constitute a reason to inform the taxpayer or withholding agent of a pending investigation into a third party. This does not alter the fact that the tax inspector may on occasion still need confidentiality. I recommend that the present way of working is drastically limited and given a formal (legal) basis. In incidental cases, the imposition of a confidentiality obligation for investigations into third parties can be supported by a weighty interest regarding audit strategy. This must involve a temporary confidentiality obligation, which the tax inspector may impose on the party that is obliged to provide information, if and insofar as is needed in the interest of the investigation. This will in my opinion provide a better balance between law enforcement and the protection of rights.

Protection of privacy

Generally speaking, there is little to no discussion about the protection of privacy as an objective of the fiscal confidentiality obligation. Privacy is a fundamental right, and Article 67 AWR undeniably contributes to the protection of that right. Privacy is an issue of unabated interest. This is in part due to the European influences of amongst others the ECHR, the EU Charter and the entry into force of the GDPR. Privacy legislation has partly superseded the role of Article 67 AWR. In my view, this strengthens the protection of privacy as a stand-alone argument for the fiscal confidentiality obligation. Fiscal transparency puts pressure on privacy, both in terms of gathering information and sharing information with third parties. Both the 'one government' concept and the reciprocity in international information exchange agreements mean that more fiscal information is shared with other administrative bodies and tax authorities. The changed motivation of the willingness to cooperate does not, however, lead to the conclusion that the tax inspector, in using his very extensive powers of information, should exhibit much more restraint in order to better protect privacy. The importance of fiscal truth-finding often prevails over the importance of privacy protection. I have established that there is a system of communicating vessels: data that is not requested does not require the protection of a confidentiality provision, and cannot be shared with other administrative bodies. Incidentally, this means that information that has been requested and that has been judged fiscally irrelevant, should be eligible for destruction sooner. The right of self-determination regarding information will often clash with the interest of the government to request information (fiscal truth-finding), or – alternatively – not to keep data confidential but rather to share it with other administrative bodies (the 'one government' concept). Nevertheless, by striving towards transparency and accountability, the principles of privacy are in my opinion realised in the best way possible, because the legislator and the tax inspector are forced to continuously perform a careful and substantiated weighing of interests in the event of proposed infringements.

3.2 The persons who are subjected to confidentiality

In the pre-AWR era, a clear development can be seen of the persons who are subjected to fiscal confidentiality. This (eventually) led to a classification, which found its definitive form in the Wet IB 1914. These are the three current categories that I have formulated, of the persons who are subjected to Article 67 AWR. The subject is 'any person', however, this only concerns 'any person' who has first passed the hurdle of 'any activity performed for or in connection with the enforcement of the tax legislation'. The enforcement of tax legislation covers material tax legislation and the AWR (including the investigation,

prosecution and adjudication of the fiscal offences of Chapter IX AWR). Traditionally, the decisions by tax judges are also considered enforcement of tax legislation. However, I am of the opinion that there is, as a matter of principle, a difference between enforcing tax legislation on the one hand, and being subject to obligations that flow from that tax legislation or being able invoke rights that flow from that same tax legislation, on the other hand. My research shows that the three categories are strictly delineated. There is no open, or vague, norm, which would allow subjects to be added or removed depending on the spirit of the times, without first amending the legislation. In Chapter 7, I have paid attention to the persons who were intended to be subjected. I have also provided a number of concrete proposals to remedy existing imperfections and ambiguities in the current legislative text. Furthermore, I have provided a proposal to expand the subjects with a new category, to allow for a temporary confidentiality obligation, mentioned in Chapter 6, for those with a duty to provide information. The above leads to the following changes:

Persons subjected to fiscal confidentiality

Current provision	Proposed provision
first category civil servants c.s. involved in the enforcement of tax legislation *second category* third-party experts enlisted in the enforcement of the tax legislation	*Category I* any person that enforces tax legislation
third category public officials not involved in the enforcement of tax legislation	*Category II* the recipients of fiscal information
N.A.	*Category III* those with a duty to provide information, in cases of a weighty interest regarding audit strategy

Intended subjected person?

Despite the strict delineation of categories of the subjected persons in Chapter 3, the question of who is considered to be a subjected person has been at the centre of the debate for decades. It should be noted that no changes were intended either during the introduction of the AWR in 1961 or its revision in 2008. Without due consideration for the past, the concept of subjected persons has started to lead a life of its own, over the past decades. In my opinion, knowledge of the term 'during any activity performed for or in connection with' has to some extent been lost. As a result of an (overly) strict grammatical interpretation of Article 67 AWR, confusion has arisen on this point. Taxpayers, fiscal legal counsellors, withholding agents and witnesses do not fall into any of the three categories

of subjected persons. This should remain so. The arguments that I have provided in support of this position include: a restriction of the right of self-determination regarding information, the (contractual) relationship between those whose data it concerns and the intended subjected person, subjection to obligations arising from tax legislation, the extension approach for providers of fiscal legal counsel, and the limited amount of data which might potentially need to remain confidential. Regarding witnesses, the fact that a confidentiality obligation should in my opinion be incorporated in the Awb, and as such is relevant beyond the field of taxation, also plays a part.

Category I: Any person that enforces the tax legislation

The current first category of subjected persons includes civil servants c.s. involved in the enforcement of tax legislation. With regard to the levying and collection of taxes this is of course the tax inspector and the tax collector, as well as the civil servants and other members of staff of the Dutch Tax Authorities who have received a mandate, such as interns and temporary staff. With regard to the investigation, prosecution and adjudication of acts that are punishable under the tax legislation, this can include the persons mentioned in Article 80 AWR, and the competent prosecutor. With regard to the fiscal judiciary, reference can be made to Article 1 Wet RO, which determines who qualifies as a judicial officer or an officer of the court. The current second category of subjected persons concerns third-party experts, who are enlisted for the enforcement of the tax legislation. These experts are enlisted by a subjected person from the first category, in aid of the enforcement of the tax legislation by the latter.

I have shown that the distinction between civil servants and non-civil servants is understandable from a historical perspective, but that it is of secondary importance for fiscal confidentiality. The role of the expert may be of a supplementary, secondary nature, but he too is directly involved in the enforcement of tax legislation. It goes without saying that both categories should continue to be designated as a subjected person. If the enforcement of the tax legislation is taken as the starting point, I am of the opinion that they can be combined into 'any person that enforces the tax legislation'. Given the recommendation discussed below, namely to move the current third category to a new paragraph as Category II, Article 67, paragraph 1 AWR (new) would then exclusively concern the subjects in the new Category I. For the sake of simplicity, it would then be sufficient to remove a few words in Article 67, paragraph 1 AWR, so that the following remains:

> *any person [that obtains information] during ~~any activity performed for or in connection with~~ the enforcement of the tax legislation*

In my opinion, this amendment offers a clearer delineation of the intended personal scope of Category I, and removes any confusion regarding the meaning of the term 'any activity'.

Category II: The recipients of fiscal information

The current third category of subjected persons concerns the 'public officials not involved in the enforcement of tax legislation, who receive – through an existing subjected person – fiscal data, by virtue of their office'. With the entry into force of the Ambtenarenwet 2017, in which 'new' civil servants were added to this category, part of the incongruity between

different governmental bodies is, in my opinion, solved. However, this has not brought all (private) recipients of fiscal information within the scope of Article 67 AWR. I have come to the conclusion that the fiscal confidentiality obligation should continue to be passed on to the recipients of fiscal information. It emphasises the purpose limitation and prevents subsequent, unconditional transfer of data. I believe that the recipient of fiscal data can never, in cases of a subsequent transfer, guarantee that fiscal information is correct, complete and up-to-date (data quality). Furthermore, he cannot assess such a subsequent transfer on the basis of the fiscal starting points. In my opinion it is preferable not to focus on the capacity of the recipient (public official), but rather to tie in with the grounds for the provision of the fiscal data. This means that all recipients of fiscal information will be subject to the fiscal confidentiality obligation, regardless of whether this involves a public official, an administrative body or a private party. This will improve the protection of rights. This prevents the need for confidentiality provisions in other (non-fiscal) legislation in cases where information is provided to recipients. This Category II of subjected persons would in that case consist of persons that have received fiscal information based on Article 67, second or third paragraph AWR. This precludes a confidentiality obligation for the taxpayer or withholding agent themselves. I have recommended that the recipients of fiscal information should be included in Article 67, paragraph four AWR (new), which reads:

> *The first paragraph shall apply mutatis mutandis to any person who gains access, based on the second or third paragraph, to data as mentioned in the first paragraph. He is not authorised to process these data for any other purpose than the purpose for which the data was provided.*

Category III: those with a duty to provide information, in cases of a weighty interest regarding audit strategy

In Chapter 6, attention was paid to the objectives of fiscal confidentiality in the context of the recommendation to create a possibility of imposing, in incidental cases – in the event of a weighty interest regarding audit strategy – a temporary confidentiality obligation for those with a duty to provide information. The Dutch Tax Authorities hold the view that the confidentiality obligation would already apply to those with a duty to keep records and private individuals, in cases where an investigation into a third party is being conducted. The current legislation does not provide any grounds for this, and the criticism expressed in literature is therefore warranted. Based on my research, it is desirable that the tax inspector is given the option, in incidental cases involving a weighty interest regarding audit strategy, to impose a temporary confidentiality obligation on those with a duty to provide information.

I have therefore recommended that this should be formalised. The subjected persons, who are bound by confidentiality, in Category III, are the parties with a duty to provide information, and to whom the tax inspector turns to obtain information. That group is wider than just those with a duty to keep administrative records as referred to in Article 53 AWR, and also includes those with a duty to provide information as mentioned in Article 47, second paragraph AWR, Article 48, first paragraph AWR, and Article 55, first paragraph AWR. From the perspective of legal protection, such a temporary confidentiality obligation cannot infringe upon the right of those with a duty to provide information, to engage fiscal legal counsel; Article 2:1 Awb should remain fully applicable. As an extension

of the party with a duty to provide information, the legal counsel can be regarded as one with his client, and is also subjected to a temporary fiscal confidentiality obligation. With the inclusion of a sunset clause, the potential need for additional legal protection can be assessed at a later time.

For individuals who are not obliged to cooperate, a different balance should be struck. In my opinion, imposing a confidentiality obligation on them would be a step too far, regardless of whether they are willing to cooperate with the investigation of the tax inspector. In such cases, it is up to the tax inspector to weigh the importance of this particular investigation into a third party against the possible risk of damage, to decide whether he actually wants to initiate the investigation. I have recommended that those with a duty to provide information in Category III, should be included in Article 67, fifth paragraph AWR (new), which reads:

> *If there are weighty reasons to do so, the person to whom an obligation as referred to in Article 47, second paragraph, Article 48, first paragraph, Article 53 first paragraph part a, or Article 55, first paragraph, is applied, shall observe confidentiality with regard to all that, which is known to him by virtue of that obligation, at the request of the inspector. The previous sentence shall apply mutatis mutandis to the legal representative as referred to in Article 2:1 of the General Administrative Law Act.*

Consequently, I have recommended changing Article 48, second paragraph AWR (new) to:

> *Except in cases in which Article 67, fifth paragraph, is applicable, the inspector shall simultaneously inform the person whose data carriers have been requested from a third party for examination that such request has been made.*

3.3 The object of fiscal confidentiality

In the pre-AWR era and during the introduction of the AWR, the object of confidentiality did not lead to much discussion. The object of fiscal confidentiality is a collective term for information. This term should be interpreted in a broad and inclusive manner. The confidentiality obligation of Article 67 AWR is defined as a prohibition of the further disclosure of the object of confidentiality. The term 'disclosure' should not be mistaken for the broader concept of 'making public'. The fiscal confidentiality obligation is approached from the perspective of the subjected person. Information can only be designated as the object of fiscal confidentiality if the recipient of that information processes it in his capacity as a subjected person. As such, a functional connection is needed. In Chapter 8, I discussed the functional connection between a subject and an object in more detail. It follows from the comparison in Chapter 5 of the confidentiality provisions in the Awb and the AWR, that Article 2:5 Awb does not apply to data and intelligence which lack a confidential nature. I have examined whether the latter provision should be followed. Regarding the object of fiscal confidentiality, I have come to the following conclusions:

A functional connection

Information can only be regarded as the object of fiscal confidentiality if the recipient becomes aware of, or is provided with, the information, in his capacity as a subjected person. This functional connection also exists in cases where information is judged fiscally

irrelevant, or in cases involving the knowledge of information that has already been destroyed. The connection can even arise after the fact, in cases where pre-existing knowledge is processed by a subjected person acting in that capacity. With regard to the subjected persons of Category I, this functional connection is entirely logical, and does not, in my opinion, require any amendment.

It follows from the proposed wording of Article 67, fourth paragraph AWR (new) that the functional connection (and consequently the fiscal confidentiality obligation) is limited to the fiscal data, which is received by the recipients of fiscal information (Category II), and does not affect any possible subsequent information which the recipients gather based on their own, non-fiscal, powers. The same is true for those with a duty to provide information who have been subjected to a temporary confidentiality obligation (Category III): the functional connection does not apply to underlying information, but rather is limited to the information obligation that has been imposed. I have also taken a brief look at the question of whether the object should be taken as the starting point, rather than the subject. Is it possible to define the object of fiscal confidentiality first, and then to determine which of the persons that will have access to these data, should be designated as subjected persons? I quickly set aside this idea, as such a system would neither lead to a substantially different outcome nor make matters simpler or clearer.

Publicly accessible data

I am of the opinion that publicly accessible data should fully remain the object of fiscal confidentiality. Although the involved parties can expect less from their privacy in the event that their data are available from an open source, their privacy should still be protected. It is not up to the tax inspector to share these (potentially) publicly accessible data with third parties. Instead, it is up to these third parties themselves to consult the same publicly accessible sources, taking into account their own powers and responsibilities (the Dutch Tax Authorities are not a serving hatch). Additionally, any potential uncertainty, and discussion regarding what should be considered publicly accessible data, are prevented. As is the case with the prohibition of the further transfer of data for recipients of fiscal information, the fact that subjected persons can never guarantee that data obtained from publicly accessible sources is correct, complete and up-to-date (data quality), is also relevant.

Consent of involved party

Historically, it is not up to each individual person (whose data it concerns) to determine whether the information covered by the confidentiality obligation can be disclosed. In my view, this should not be changed. The objectives of fiscal confidentiality differ from the objectives of Article 2:5 Awb, and are not only aimed at protecting the interests of citizens and businesses, but also concern the interests of the Dutch Tax Authorities. The consent of the involved party is not necessarily in the interest of the tax inspector. Also, there are a number of practical objections to the Dutch Tax Authorities acting as a serving hatch. These practical objections are not insurmountable, but a clear and robust regulation remains preferable. For the final argument, I refer to Chapter 10, in which I propose to greatly increase the scope of data provision to the involved party itself. It is then up to the party involved to provide full disclosure to third parties, if it so chooses (right of self-determination regarding information).

Non-traceable data

Non-traceable data is historically designated as an object of confidentiality. As such, the provision of anonymised data can also lead to criminal prosecution for breaching the confidentiality obligation. This was confirmed by the Secretary of State for Finance during the revision of the confidentiality provision on 1 January 2008. Based on his remarks regarding the right to information of Article 68 GW[4] and the publication of anonymised rulings, I have established that the Secretary of State for Finance holds a different view in his role as enforcer of the tax legislation. The processing of non-traceable fiscal data for other, non-fiscal objectives, has become commonplace in practice, and does not detract from the objectives of the fiscal confidentiality provision. I therefore recommend that an adequate legal basis is created for the provision of non-traceable data. Provision of non-traceable data can in my opinion be included in Article 67, second paragraph letter d AWR (new), which reads:

> *it concerns data that are not traceable to individual data subjects. Our Minister shall establish rules regarding in what cases the previous sentence applies.*

It cannot be stressed enough that anonymisation involves much more than simply blacking out a few names. It must be prevented that the parties involved can still be identified using a little common sense, some background information or a couple of search queries on the internet.

3.4 The fiscal delineation

In Chapter 2, tax legislation from the pre-AWR era is researched, to determine the specific, fiscal objective for which information was gathered, and for which (fiscal) objectives the information could be used. As follows from Chapter 3, the persons in Category I – in their capacity as subjected persons – may use all fiscal information for the enforcement of tax legislation with regard to everyone with a duty to pay taxes, keep records or act as a withholding agent, as well as third parties. With regard to the strict fiscal confidentiality obligation, the widely supported starting point has historically been that the employees of the Dutch Tax Authorities should also apply the confidentiality internally. The objectives of Article 67 AWR, formulated in Chapter 6, do not, in my opinion, warrant an amendment of the fiscal delineation. With regard to the fiscal delineation, I came to the following conclusions in Chapter 9:

The term 'necessary'

The essence of fiscal delineation concerns the term 'necessary' and the manner in which this term is interpreted. This term is not defined, and cannot be defined (entirely) on the basis of objective criteria. The term needs to be interpreted in each and every concrete case. The amendment as of 1 January 2008 from 'needed' to 'necessary', merely clarified the legislator's intention, and seems to fit better with the original, stricter-sounding, formulation of 'is requisitioned'. What is in any case clear, is that the term 'necessary' is stricter than for example 'could reasonably contribute to', and should not be interpreted too broadly or in a non-committal manner. Although the interpretation of the term

4 The Grondwet or 'GW' is the Dutch Constitution.

'necessary' is a snapshot – as the years go by, different considerations could result in a different outcome – the strict fiscal confidentiality provision requires a degree of restraint, to prevent it from getting swept up in the 'whims of the day'. The right of complaint in the Awb, and fiscal mediation, show, in my opinion, that the term 'necessary' in the sense of Article 67 AWR is not static, and sometimes needs to be implicitly derived from non-fiscal legislation. When the right of complaint was introduced in the Awb, the relationship with the right to object and appeal was emphasised. The right of complaint is considered to be supplementary to the regulation regarding the right of objection and appeal. Precisely the fiscal context within which a complaint has arisen, is often of great importance, and sharing fiscally relevant information for the purpose of dealing with a complaint, does not detract from the objectives of Article 67 AWR as formulated in Chapter 6. However, it is recommended that fiscal mediation, which may be used as an 'ultimum remedium', is provided with a solid legal basis.

The pre-completed tax return

What is 'necessary for the enforcement of the tax legislation' is subject to change. This can be illustrated by the case of the pre-completed tax return (VIA). Pre-completing tax returns has become an indispensable part of the tax return process. Nowadays, the VIA will most likely be considered 'necessary for the enforcement of the tax legislation', especially from the perspective of the tax inspector. The primary processes of the Dutch Tax Authorities are not (or no longer) equipped for the large-scale retrospective checking of tax returns. I have, however, established it has never been argued or convincingly shown that there is a need for pre-completion using tax data. From the very beginning, the arguments provided in favour of pre-completion came from the perspective of providing a service, with words such as 'technically feasible', 'administrative burden reduction', 'ease of use', 'time gain', 'service' and 'another, easier way of monitoring by the Dutch Tax Authorities'. There must have been some tipping point at which the VIA became necessary, and the fiscal confidentiality obligation was no longer infringed upon every year as a result of the pre-completion. A good level of service may, in my opinion, contribute to the willingness to cooperate, but it is an improper argument for setting aside confidentiality. That is the downside of a strict confidentiality provision. Safeguarding the VIA with a legal provision, would have provided a clear, consistent confidentiality provision, without detracting from the objectives of the fiscal confidentiality provision formulated in Chapter 6, and would be in line with the existing practise. In Chapter 10, I have made a proposal for a far-reaching expansion of the provision of data to the involved party. This would retroactively provide a solid legal basis for the pre-completed tax return.

Tax case law and the judicial system

The starting point in tax cases (with the exception of cases involving fines) is that the investigation at the hearing takes place behind closed doors. It is up to the tax judge, in exceptional cases, to carry out a weighing of interests prior to a public hearing. In his role as enforcer of the tax legislation, he decides which judgements are released for publication on www.rechtspraak.nl. The poorly worded selection criteria refer to 'possibly interesting', 'worth publishing' and 'a wide interpretation of this rule', which in my view is not in line with the stricter term 'necessary' in Article 67 AWR. Even with the proposal set out in Chapter 8 – i.e. to create a proper legal basis for the provision of non-traceable data – it

is, in my view, to be recommended that the guidelines on anonymisation for the judiciary should be amended to bring them in line with Article 67 AWR. Where there is still a risk that an 'anonymised' judgement can still be traced to the person concerned, publishing a summary would be the obvious approach.

The CJEU and the ECHR both take as their starting point that their judgements are published entirely without anonymisation. Nowadays, to ensure the optimal protection of personal data, the CJEU explicitly asks the referring tax court – which is the only party with the full knowledge of the case – to ensure anonymisation of the case when posing a preliminary question. Incidentally, because the referring tax court has the option of anonymisation, it was already obliged (in order not to breach its fiscal confidentiality obligation), within the existing legal framework of Article 67 AWR, to anonymise preliminary questions posed to the CJEU. Tax courts do not make use of this, which is in my view incorrect, and they pass this responsibility on to the involved parties in the procedural regulations. The procedural regulations of the ECHR for preliminary questions are broadly similar to those of the CJEU with regard to anonymisation. The ECHR also takes as its starting point that judgements are published entirely without anonymisation, and also respects the anonymisation applied by the referring tax court to the parties concerned. This provides an opportunity for the Dutch Supreme Court – after adjustment of its procedural regulations – to address the matter of anonymisation properly from the start, by always applying anonymisation on its own initiative.

The income statement (commitment made by Minister Zalm)
A point that certainly touches upon the area of taxation, but can also not be considered as being 'necessary for the enforcement of the tax legislation', is the income statement that taxpayers can download from the website of the Dutch Tax Authorities. I have not found any evidence at all in support of the claim that the commitment made by Minister Zalm to provide a generic exemption in aid of this income statement, was in fact ever formalised. In the case of the income statement, the downside of a strict confidentiality obligation also holds true, namely that exceptions by the legislator need to be carefully motivated and, where needed, formalised. In my view, this leads to a clear, consistent confidentiality provision. In Chapter 10, I have proposed a far-reaching expansion of the provision of data to the involved party itself. In this way, the generic exemption could be abolished, and the provision of an income statement would retroactively be provided with a solid legal basis.

Fiscal mistakes and (too) far-reaching carelessness
In a number of situations, such as cases where information is leaked to criminals or where information from systems that have been consulted, is shared for improper reasons, there is evidently a breach of confidentiality. However, there is also a grey area where it may not be clear upfront whether it concerns 'the enforcement of the tax legislation' or whether it is 'necessary'. If the tax inspector takes the due care, which may be expected from a carefully operating administrative body, it can be expected that he will remain within the assessment frameworks of the general principles of sound administration. In that case, his actions can still be designated as being 'necessary for the enforcement of the tax legislation'. A hardening in the relationship between taxpayers and the tax inspector, fundamental criticism of actions by the Dutch Tax Authorities, and increased attention

for the issue of privacy will undoubtedly lead to more discussions on possible breaches of the fiscal confidentiality obligation.

The social duty of the Dutch Tax Authorities

The social duty of the Dutch Tax Authorities is – barring a few non-tax duties – the enforcement of the tax legislation. In light of the strictly formulated fiscal confidentiality obligation, the Dutch Tax Authorities, in the capacity as enforcer of tax legislation, have no other social duties, such as preventing abuse and improper use of government schemes, combatting non-fiscal fraud, or tackling crime that does not undermine taxation. From the perspective of Article 67 AWR, sharing fiscal information is not the norm, but merely the exception to the main rule. This does not detract from the fact that the tax inspector, taking into account the strict fiscal confidentiality obligation, can still have a signalling function towards the legislator or third parties, if he sees a socially undesirable phenomenon. In the event of a social problem, which the Dutch Tax Authorities could help tackle or solve, it is up to the legislator in general, and the Secretary of State for Finance in particular, to perform a well-motivated and transparent weighing of interests between the strict fiscal confidentiality obligation and solving the social problem at hand. This does not alter the fact that motivating the objective of the willingness to cooperate, as amended in Chapter 6, would provide a fiscal basis for sharing – after a careful weighing of interests – data with other administrative bodies in the context of the 'one government' concept. In my view, a clear wording of this starting point will lead to a better weighing of interests.

3.5 The exceptions and exemptions

In Chapter 3, I discussed the criticism of the exemption system (period 1961-2007) of Article 67, second paragraph AWR (old) and the revision as of 1 January 2008. During that revision, a new second paragraph was introduced, listing three situations in which the fiscal confidentiality obligation would not apply. The possibility of granting an exemption for the confidentiality obligation, was streamlined and renumbered to become the current Article 67, third paragraph AWR. When assessing a strict fiscal confidentiality provision, not just the scope of the confidentiality (the main rule) is relevant. The exceptions and the exemptions to this main rule, and the factual interpretation thereof, are also relevant. With the disappearance of the exemption system, the comprehensive overview was also lost. This has made it almost impossible to (continue to) map all the exceptions to the fiscal confidentiality obligation.

A properly motivated substantiation of the objectives that form the basis for fiscal confidentiality, would, in my opinion, increase the acceptance of Article 67 AWR and curtail the, sometimes unbridled, tendency towards publication. It forces the legislator, Minister or Secretary of State for Finance to be held accountable every time a new exception is created, an exemption is granted or an evaluation takes place. Each application of the second or third paragraph of Article 67 AWR – which allows fiscal data to be used for non-fiscal purposes – could, after all, harm the objectives of the fiscal confidentiality provision. The amendments as of 1 January 2008 did not, in my view, deliver what was expected: the content of the criticism has remained the same. The altered (motivation of the) objectives underlying Article 67 AWR, as well as the increased focus on privacy and the

right of self-determination regarding information, warrant an amendment of the current provision. In addition to the proposal mentioned earlier regarding non-traceable data, I have made several proposals for changing Article 67, second and third paragraph AWR, in Chapter 10. I have come to the following conclusions:

Continuous weighing of interests: three stages
Exceptions and exemptions require a continuous, careful weighing of interests. The examples given in Chapter 10 show that this has not always taken place. This continuous weighing of interests effectively consists of three stages. First of all, a careful and transparent weighing of interests should be performed prior to the introduction of an exception or the granting of an exemption. There is no clear assessment framework for this weighing of interests. There are however a number of elements that should more or less always be taken into account in this regard (e.g., purpose limitation, the size of the dataset, principles of privacy, the interests of the recipients of the fiscal information, the interests of the Dutch Tax Authorities, the interests of the persons whose data it concerns, an evaluation clause or sunset clause, and transparency). Historically, the Minister or Secretary of State for Finance has been responsible for showing visible involvement in order to stress the importance of the fiscal confidentiality provision. This visible involvement is sometimes lacking. In my opinion, the visibility of the involvement in this continuous weighing of interests should therefore be increased.

Secondly, before actually providing the fiscal data, a weighing of interests must take place. A ground for providing the data is only the 'entry gate'. Prior to the actual provision of fiscal data, it should – regardless of whether it concerns a legal requirement, the ministerial regulation or an exemption based on Article 67, third paragraph AWR – still be assessed (at least marginally) whether the intended provision of information meets all of the other conditions. In cases where an open, or vague, norm has been formulated, it is the joint responsibility of the tax inspector and the recipient of the fiscal information to interpret this. Finally, it is worth mentioning the ex-post evaluation. Feedback can provide a relevant contribution to the quality of the laws and regulations which have resulted in an infringement of the fiscal confidentiality obligation. A (periodical) evaluation could, for example, provide answers to the questions of whether the provision of the fiscal data has had the desired effect in an effective manner, and whether the provision should be amended or even abolished. A (periodical) evaluation can prevent unused, outdated or even incorrect information exchange provisions or covenants from remaining in force, which can increase the clarity and quality of laws and regulations. Given the examples cited, I recommend paying more attention to this matter.

Providing data to private parties
The fiscal confidentiality obligation means that it is unusual for the Dutch Tax Authorities to provide data to private parties. However, there is a development underway whereby the provision of fiscal information to private parties is no longer always ruled out a priori. With the changes to the motivation of the willingness to cooperate in Chapter 6, as an objective of the fiscal confidentiality obligation, this development has expressly been taken into account. Like administrative bodies, private parties can represent a social interest. Providing fiscal data to private parties for non-fiscal purposes does not necessarily have

a detrimental effect on the willingness to cooperate, providing it is done carefully and transparently. Precisely because there are a number of characteristic differences between administrative bodies and private parties, the parties involved may reasonably expect that an (even) greater level of restraint is observed in the provision of fiscal data to private parties, and that in the context of the weighing of interests, attention is also paid to whether additional safeguards are necessary and possible.

In Chapter 7, I have proposed that every recipient of fiscal information – including private parties – should be designated a person subjected to fiscal confidentiality (Category II). In the event of a deliberate breach of confidentiality, criminal law provides the possibility of sanctions. I recommend that further research is carried out to establish whether it is possible and desirable to also make use of fiscal penalty law in this regard. This would offer a concrete approach to the effective protection of rights against breaches of confidentiality. Such a fiscal sanction can improve the protection of rights as a deterrent sanction, and would not only be relevant for the subjected persons in Category II (recipients of fiscal information) but also for the temporarily subjected persons of Category III (those with a duty to provide information, in cases of a weighty interest regarding audit strategy), or the enlisted third-party experts or former employees of the Dutch tax authorities mentioned in Category I.

Any statutory regulation

The fiscal confidentiality obligation does not apply if a statutory regulation obliges disclosure. This exception was already present in a great number of material tax laws from the pre-AWR era and was codified (again) as of 1 January 2008. The starting point for this was that structural or foreseeable provisions of data must be regulated by law as much as possible. A statutory regulation is not intended to mean only laws in a formal sense, but includes rules set by bodies that can derive regulatory powers from the Constitution or laws. This concerns both national regulations and regulations of international or interregional law. The so-called 'can' stipulations offer a choice and are not an obligation in the sense of Article 67, second paragraph letter a AWR. The regulations which contain a possibility for not complying with the information obligations, are comparable to this. Needless to say, the exception of any statutory regulation should be maintained in full. However, this ground for exception should only be considered a framework for statutory regulations. Such statutory regulations require a continuous, visible weighing of interests. A (periodical) evaluation for each statutory regulation will have to show whether the envisaged effect of the provision of fiscal data is reached effectively, whether the statutory regulation requires adjustment, or whether it can even be abolished.

Farewell to the ministerial regulation

The confidentiality obligation does not apply to provisions of data to administrative bodies that are included in the ministerial regulation of Article 43 Uitv. Reg. AWR 1994. Upon the revision of Article 67 AWR as of 1 January 2008, the starting points for inclusion in the ministerial regulation were refined during the parliamentary proceedings. This is not (fully) reflected in current policy. On the one hand, Article 43c Uitv. Reg. AWR 1994, is intended for structural provisions of information in anticipation of the introduction of a statutory regulation. In the case of an addition, a new statutory regulation or an amendment of an

existing statutory regulation should be more or less imminent. On the other hand, the ministerial regulation is meant for the structural provision of data to partnerships. My research shows that the refined starting points have not been respected, and that there is structurally insufficient attention for periodic maintenance. This undermines the fiscal confidentiality obligation. The stated expectation that the list of data provisions would become shorter, has not materialised.

It is undesirable and illogical that the Minister or Secretary of State for Finance has the – in principle unfettered – authority to unilaterally and independently determine what fiscal data a different administrative body would need for the proper fulfillment of its public duties. This almost exclusively involves policy areas about which the Minister and the Secretary of State of Finance lack knowledge and expertise of their own, and for which they bear no responsibility. Given the proposed 'Wetsvoorstel gegevensverwerking door samenwerkingsverbanden', the ministerial regulation does not appear necessary for partnerships in the long run, either. In my opinion, this leads to the conclusion that Article 67, second paragraph letter b AWR should be abolished. It goes without saying that the administrative bodies listed in the ministerial regulations should be afforded a reasonable period for amending their own sectoral legislation, insofar as that would still be necessary.

Provision of data to the involved party itself
Upon the revision as of 1 January 2008, the confidentiality obligation towards the involved party itself was intentionally maintained, with the exception of documents provided by or on behalf of the involved party. Article 67 AWR contains a special disclosure regime, which has an exhaustive nature (lex specialis), which prevails over the Wob and the GDPR. Although the restriction of the right of access under the GDPR has a legal basis, it goes much further than what is necessary or proportionate, and it undermines fundamental rights and freedoms. It is questionable whether the possibility of obtaining an exemption based upon Article 67, third paragraph AWR, is a measure that is sufficiently specific to justify the existing limitation of the right of access of Article 15 GDPR. This tension must be solved, whereby a potential distinction between natural persons and non-natural persons should be avoided as much as possible.

The legislator wishes to increase individuals' control with regard to their own personal data. Even with the changed objectives of the confidentiality provision, informational self-determination will never be fully achieved, due to conflicting interests. This does not alter the fact that optimal transparency towards the involved party should be pursued, so that the party involved can have insight into the data that has been processed. In my view, making data available digitally (the VIA, the income statement (commitment made by Minister Zalm) and digital copies of tax assessments) is at present not comprehensively regulated either. Bearing in mind the government-wide development of individuals' data control, this warrants, in my opinion, an amendment to the fiscal confidentiality provision. The provision of fiscal data to the party involved can be expanded by means of my suggested amendment to Article 67, second paragraph letter c AWR (new), which reads as follows:

disclosure is to the person to whom the information relates, ~~insofar as this information has been provided by him or on his behalf~~. Our Minister shall establish rules regarding in what cases the previous sentence applies;

With this wording, Article 67 AWR remains – in relation to the right of access of Article 15 GDPR, or the Wob – a special disclosure regime with an exhaustive nature (lex specialis). It is ultimately up to the Administrative Court to assess whether the breach of the right of access, or the disclosure, is compatible with the broad discretion of the legislator. This effectively offers natural persons – albeit indirectly and only partially – the same protection of rights as would be offered by making Article 67 AWR directly subject to objection. Non-natural persons, to which the GDPR does not apply, remain (for the time being) dependent on the civil courts. With periodical evaluations it can, amongst other things, be monitored whether this ground for exception functions properly and remains in step with the government-wide development of individuals' data control.

Grounds for exemption under Article 67, third paragraph AWR

The general consensus is that – following the revision of the confidentiality provision as of 1 January 2008 – there would be only three grounds for exemption. Given its specific character and the manner in which it was introduced, I have identified the generic exemption for the purpose of the income statement (commitment made by Minister Zalm) as a separate ground for exemption. In Chapter 10, I have suggested changing the grounds for exemption, which would lead to the following mutations:

The grounds for exemption of Article 67, paragraph 3 AWR

Current provision	Proposed provision
first ground for exemption (A) the taxpayer himself insofar not under the first or second paragraph	N.A. (abolished)
first ground for exemption (B) generic exemption for the income statement (commitment made by Minister Zalm)	*Ground for exemption I* generic exemption
second ground for exemption to an administrative body ahead of the ministerial regulation	*Ground for exemption II* to an administrative body ahead of a statutory regulation
third ground for exemption incidental or unforeseen cases	*Ground for exemption III* incidental or unforeseen cases

In my opinion, the current ground for exemption (A) can be abolished as a result of the proposed expansion of the data provision to the party involved in Article 67, second paragraph letter c AWR (new).

The first ground for exemption (B) – the generic exemption – concerns just one specific objective: the income statement (commitment made by Minister Zalm). The reality is, however, more complicated, which has caused theory and practice to diverge. A generic exemption can be described as an exemption from confidentiality which is granted in advance in recurrent cases, providing certain predetermined conditions are met. Such an exemption applies to all parties involved under similar circumstances. I have established that several generic exemptions have arisen since 2008, even though effectively, these do not fit within the existing grounds for exemption under Article 67, third paragraph AWR. The lack of a proper legal basis for these generic exemptions is detrimental to the object and purpose of the strict confidentiality provision of Article 67 AWR. In my opinion, granting a generic exemption under strict conditions is practicable and does not necessarily undermine the objectives of the confidentiality provision. The next time the law is changed, the generic exemption of Article 67, third paragraph AWR as Ground for exemption I, could be formalised, without requiring an amendment of the wording of the law. Depending on the outcome of the weighing of interests, the following seem eligible for a generic exemption for publication:

- Exemption from confidentiality in cases of neglect of duty;
- The authority to report criminal offences (Article 161 Sv[5]); and
- The consent at public hearings or hearings of the tax court, with the exception of circumstances out of the ordinary.

I recommend investigating whether the exemptions in the covenants for the prevention of potentially unacceptable behaviour by accountants, and the transfer of the gift and inheritance tax returns to the National Archive, can also be classified as a generic exemption. The generic exemptions for the purpose of the income statement (commitment made by Minister Zalm) and the access to the standard form for rulings, can be abolished as the result of the proposed extension of the provision of data to the involved party itself. The exemption relating to the legal privilege of tax officials is unsuitable as a generic exemption, and should be abolished immediately. After all, whether or not legal privilege should be invoked will always require a weighing of interests by the witness who has been called in a specific case. The Dutch Tax Authorities or the Secretary of State for Finance cannot carry out such a weighing of interests beforehand.

The second ground for exemption concerns the exemption from confidentiality ahead of an amendment of Article 43c Uitv. Reg. AWR 1994. In the case of proposed legislative changes to allow for a structural provision of data to an administrative body, no (temporary) exemption is currently possible based on Article 67, third paragraph AWR (bearing in mind the refined starting point following from the parliamentary proceedings), unless there is also simultaneously a certain intention to (also temporarily) include the provision of data in the ministerial regulation. Given my recommendation to abolish the ministerial regulation within the foreseeable future, the second possibility for exemption should be changed to 'structural provisions of data which are necessary for the proper performance of the public duties of an administrative body ahead of a statutory regulation' (Ground for exemption II). From the perspective of transparency, I would prefer for the exemption granted

5 The Wetboek van Strafvordering or 'Sv' is the Dutch Code of Criminal Procedure.

to be published, e.g., as annex to the Explanatory Memorandum. In my opinion, it is not desirable that such an exemption would only lapse by right once the statutory regulation containing the legal basis enters into force. In particular in cases where the legislative implementation processes take unexpectedly long, it is preferable to periodically assess whether there are still weighty reasons to extend the exemption. The fiscal confidentiality obligation means that it is not customary for data to be provided to private parties; the involved parties may expect that the legislator shows even more restraint in such cases, and takes into consideration during the weighing of interests whether additional safeguards are necessary and possible. For that reason, I am of the opinion that it is desirable to (continue to) limit Ground for exemption II to administrative bodies.

Ground for exemption III (incidental or unforeseen cases) for now appears to me to be advisable for reasons of flexibility and effectiveness. This ground for exemption is intended for incidental or unforeseen cases in which the provision of data is desired, for example due to a great social interest. It is not a cumulative requirement. However, a recurrent case, such as for example investigations into the integrity of ministers and secretaries of state or the income-dependent increase of rent, cannot be said to be incidental or unforeseen. The fact that each case concerns a different member of government or tenant is irrelevant; in my opinion it should always concern one specific, individual case where it is clear which fiscal data will be provided once, for a specific goal. 'Pushing the boundaries' of this third ground for exemption is undesirable. Although this ground for exemption is apparently only occasionally used, an integral evaluation and weighing of interests can only be performed once it is clear in which cases an exemption was granted (or not granted).

4 A comparison of Article 67 AWR and Article 2:5 Awb

The third research question concerns the importance of the fiscal confidentiality provision of Article 67 AWR in relation to the general confidentiality provision of Article 2:5 Awb. The latter confidentiality provision is of a supplementary nature, and does not apply insofar as a confidentiality obligation already exists with regard to the data, by virtue of office or profession or any statutory regulation. An amendment to Article 2:5 Awb, changing the term confidentiality obligation to confidentiality regime (the main rule as well as the stated exceptions and exemptions), would in my opinion be more appropriate. I have come to the conclusion that the general administrative confidentiality provision of Article 2:5 Awb is not sufficient for fiscal purposes. In Chapter 5, both provisions are compared based on the five elements that are of importance for the fiscal confidentiality obligation. This showed that there are a number of noticeable differences between the two provisions. I will briefly list these differences below.

The objectives

The objectives of Article 2:5 Awb differ from those of Article 67 AWR. Article 2:5 Awb is solely aimed at protecting the interests of citizens and businesses, but not at protecting the interests of the administrative body. Article 67 AWR, however, also aims to protect the interests of the Dutch Tax Authorities. This difference is only increased by my proposal to introduce a temporary confidentiality obligation in cases where there is a weighty interest regarding the audit strategy for the tax inspector.

The subjected persons

The scope of the persons subjected to Article 2:5 Awb is materially largely similar to the three current categories of persons subjected to Article 67 AWR. There are, however, a few differences. An expert (natural person) who is not affiliated to an 'institution' is always subjected to Article 67 AWR, but nevertheless seems not to be within the scope of the Awb due to the fact that there is no affiliation with an 'institution'. I recommend that this gap in the Awb should be rectified. A more fundamental difference is that in cases where fiscal data is provided to officials who are not involved in the enforcement of the tax legislation, the fiscal confidentiality provision is passed on to the recipient. Under Article 2:5 Awb, the receiving official's own confidentiality rules apply. Although the practical effects will probably be limited, Article 67 AWR is in theory stricter in this respect. The difference is, however, increased by my proposal to impose confidentiality on all recipients of fiscal information.

The object of confidentiality

Article 2:5 Awb is of a supplementary nature. As Article 67 AWR exclusively pertains to information relating to the person or affairs of a different party, the scope of the provision in the Awb is in this respect broader. The confidentiality obligation of Article 2:5 Awb is not, however, worded in an absolute sense. This is clear from the fact that the wording of the law refers to the subjective element of the 'confidential nature'. This subjective element has been completely eliminated from the current fiscal provision. This leads to a number of differences. First of all, I note the time period. The object of fiscal confidentiality does not change due to the passing of time. As a result of the subjective element, Article 2:5 Awb entails a continuous assessment, as the nature of the information can change over time. The second difference concerns publicly accessible data. These lack the confidential nature of Article 2:5 Awb. In Chapter 8, I have argued that these should fully retain their designation as the object of fiscal confidentiality. The third difference concerns the consent of the party involved, which also removes the confidential nature of the data. In Chapter 8, partly in view of the other objectives, I have argued that this data should retain its designation as an object of fiscal confidentiality. The difference between the two provisions decreases however, as a result of my proposal to greatly increase the provision of data to the party involved itself. The fourth difference is the treatment of non-traceable data. This difference is removed by my proposal for the provision of non-traceable data.

The (fiscal) delineation

Article 67, first paragraph AWR determines that the tax inspector may not disclose the fiscal information to any further degree than is necessary for the enforcement of the tax legislation or for the levying or collecting of any state taxes. Although the delineation of Article 2:5 Awb is defined differently (data may only be disclosed insofar as *"disclosure is necessary in consequence of his duties*"), there is no substantive difference. The enforcement of the tax legislation or the levying or collecting of any state taxes is, after all, the duty of the tax inspector, which means that the fiscal provision is not stricter.

The exceptions and exemptions

However, Article 67 AWR is, in my opinion, significantly less strict when it comes to this element. Aside from the phrase *"unless he is obliged to do so by statutory regulation"*, Article 2:5 Awb does not, after all, contain any possibilities for an exception of an exemption. This

difference is decreased by my proposal to abolish the ministerial regulation, while retaining the flexibility and possibility of customisation which are desirable from a fiscal perspective.

Is Article 67 AWR stricter?
The prevailing view is that the fiscal confidentiality provision is stricter than Article 2:5 Awb. The points where the current Article 67 AWR is stricter than Article 2:5 Awb are currently largely negated by the significantly less strict exceptions and exemptions. Overall, this means that I cannot unambiguously answer the question of whether this prevailing view is in fact justified. With my proposed amendments to Article 67 AWR, it appears that this question will be easier to answer in the affirmative. I recommend that the findings of this study are used for an evaluation of Article 2:5 Awb.

5 Lastly: towards a new Article 67 AWR

Part III of this study consists of the concluding Chapter 11, which contains the summary and conclusions. With the changed motivation for the objective of the willingness to cooperate, and the proposal to introduce a temporary confidentiality obligation in the event of a weighty interest regarding audit strategy, I have answered the first research question in Chapter 6. After a thorough investigation into the meaning and functioning of Article 67 AWR, I made, in Chapter 7 up to and including Chapter 10, a number of proposals for further improvement of the fiscal confidentiality provision. This means that the second research question is also answered. With the comparison of the confidentiality provisions of the AWR and the Awb in Chapter 5, and the previously mentioned proposals for amending Article 67 AWR, I have, lastly, answered the third research question. This has resulted in my proposal for an amended Article 67 AWR (new), which reads as follows:

1. *It is forbidden for any person to disclose, to any further degree than is necessary for the enforcement of the tax legislation or for the levying or collecting of any state taxes as referred to in the Collection of State Taxes Act [Invorderingswet 1990], anything which comes to light or is divulged about the person or the affairs of another person during the enforcement of the tax legislation (duty of confidentiality).*
2. *The duty of confidentiality does not apply if:*
   a) *any statutory regulation obliges disclosure;*
   b) *[expired];*
   c) *disclosure is to the person to whom the information relates. Our Minister shall establish rules regarding in what cases the previous sentence applies;*
   d) *it concerns data that are not traceable to individual data subjects. Our Minister shall establish rules regarding in what cases the previous sentence applies.*
3. *In cases other than those mentioned in paragraph 2, Our Minister may grant exemption from the duty of confidentiality.*
4. *The first paragraph shall apply mutatis mutandis to any person who gains access, based on the second or third paragraph, to data as mentioned in the first paragraph. He is not authorised to process these data for any other purpose than the purpose for which the data was provided.*
5. *If there are weighty reasons to do so, the person to whom an obligation as referred to in Article 47, second paragraph, Article 48, first paragraph, Article 53, first paragraph part a, or Article 55, first paragraph, is applied, shall observe confidentiality with regard to all that, which is known to him by virtue of that obligation at the request of the inspector. The previous sentence shall apply mutatis mutandis to the legal representative as referred to in Article 2:1 of the General Administrative Law Act.*

My conclusions and recommendations in part concern an adjustment to the legal wording with a view to refining the fiscal confidentiality rules. *"Paper can wait"*, sighed Member of Parliament Bahlmann in the House of Representatives, during the parliamentary debate on the fiscal confidentiality provision of Article 47 Wet VB 1892. Rightly so, because in the end it boils down to the manner in which a concrete, careful meaning is given to this paper reality. This study contributes to a better understanding of the fiscal confidentiality provision.

It is now up to the legislator to take over the baton and to revise the fiscal confidentiality provision of Article 67 AWR in line with my proposals. The Dutch Tax Authorities subsequently have a role to play implementing this concretely, carefully and with due consideration.