1 SUMMARY

1.1 Introduction

This report is the result of a broad study on the functioning of the administrative debt regulation of the Dutch Algemene wet Bestuursrecht (General Administrative Law Act, GALA). This regulation is included in title 4.4 of the GALA which entered into force on July 1, 2009 as part of the Fourth instalment of the GALA.

Title 4.4 GALA contains general rules on monetary debts based on administrative law. These include rules for the establishment of the obligation to pay a sum of money, on the consequences of failing to meet that obligation, on the payment of debts and the possible collection thereof. The general rules of title 4.4 GALA largely apply to both monetary debts of citizens to government (e.g. taxes, fines and forfeited non-compliance penalties) and for debts of the government to citizens (such as awarded benefits and subsidies).

The intention of the legislature to establish a general regulation in this area existed for some time. The lack of a general public regulation for money debts necessitated reliance in practice on rules of private law, albeit with uncertainty about their analogous application. That led to legal uncertainty. Furthermore, the special administrative regulations that did exist in this area were fragmented; they exhibited many unexplainable differences. Initially, the legislature aimed at regulating the legal protection in the collection of non-compliance penalties by the government. Ultimately, title 4.4 GALA became broader in scope. According to the government there was a need for a regulation with a wider range. Moreover, the government found that the collection of money debts could not be regulated separately from related topics, such as terms of payment, statutory interest and limitation.

The comprehensive, general regulation of title 4.4 GALA thus received a potentially huge scope, not only because it covers many topics but also because its main topic, the monetary debt based on administrative law, has a wide scope and variety in legal practice. Furthermore, the regulation concerns a matter that is of potential interest to large groups of citizens; almost every citizenmaintains financial relations with the government. It is for this reason that the effects of the introduction of this new regulation are mapped. The study was commissioned by the Dutch Ministry of Security and Justice (WODC) and carried out in 2013.

1.2 Research plan

Research questions

The aim of the study was to evaluate the functioning in legal practice of title 4.4 of the General Administrative Law Act (GALA) concerning monetary debts. To this end, four research questions were formulated.

a. How do the provisions of title 4.4 GALA work in practice and what, if any problems do occur?
b. Does title 4.4 GALA thus meet the objectives set out in the legislative history of the development of this title?
c. What consequences does title 4.4 GALA have for the legal protection of the parties involved, compared to the situation that existed before the introduction of this title 4.4?
d. Has the regulatory burden of the parties involved, calculated as the degree of (administrative) costs for citizens, businesses, administrative bodies and other stakeholders, increased?

Research methods

In order to answer these questions both classic legal and empirical research has been conducted. First legislation, literature and jurisprudence on administrative law monetary debts were mapped in a desk study. Then six case studies were carried out in which special legislation and practical implementation in several areas of law was investigated and described in detail. Three of them – namely, the practice of the Gaming Authority ('Kansspelautoriteit), the Central Judicial Collection Agency ('Centraal Justitieel Incassobureau') and the municipal enforcement practice of the municipalities of Rotterdam and Alphen aan den Rijn – had a focus on monetary debts *to* the government. In three other case studies – concerning the Employment and Assistance Act ('Wet werk en bijstand'), the General Act Income-related Regulations ('Algemene wet inkomensafhankelijke regelingen') and subsidy law – the emphasis was on administrative monetary debts *of* the government to citizens. These case studies yielded a wealth of information on the functioning of title 4.4 GALA in practice.

Furthermore, interviews were held with empirical experts and other experts, including (officials of) administrative bodies involved in (handling of) money debts that were selected for the six case studies, administrative judges, civil judges, bailiffs and legal aid workers. Finally, the initial analyses of the study (including case studies and interviews) were presented to a broadly composed focus group in the form of a draft report, this to ensure a balanced presentation of the research results.

Specifically for the calculation of the administrative costs associated with the implementation of the administrative debt regulation the researchers, in analogy to the administrative burden measurement in companies, deployed the Standard Cost Model (SCM). This method was only applicable to a limited extent because title 4.4 GALA does not (directly) entail new disclosure requirements for citizens. The SCM was also applied for the measurement of administrative costs. Unfortunately, it soon became clear that administrative bodies barely have quantitative information available. Therefore, the researchers necessarily limited to measuring the subjective administrative burden.

1.3 Structure of the report

The research data obtained by these methods are incorporated in the present research in the following manner. After an introductory chapter, the second chapter is included identifying the objectives that the GALA-legislator wanted to achieve with the administrative law debt regulation. Also, the structure, content and scope of the regulation are discussed. For the sake of an orderly fashion, the provisions of title 4.4 GALA are divided into coherent clusters. In chapter three the following themes are discussed: a) emergence and establishment of an administrative law monetary debt, b) payment of an administrative law monetary debt, c) advances, d) default and statutory interest, e) limitation, f) notice and collection by writ of execution. Then, the problems that were identified will be reviewed. That part of the report is concluded with a (brief) preliminary analysis of the functioning of the debt regulation in legal practice (section 4.9). In Chapter 5 the case studies are presented. In Chapter 6, separate attention is paid to article 4:125 GALA and the related provisions that provide a concentration of legal protection. In Chapter 7 then, the findings regarding the administrative burden are mapped out. The research report is concluded with Chapter 8, which on the basis of all research data outlines the functioning of title 4.4 GALA in practice as complete as possible.

1.4 Research findings – objectives

To present the multitude of findings orderly the concluding eighth chapter draws on the four research questions listed above. The first two questions are more or less taken together by relating the identified problems to the formulated objectives of the debt regulation in the legislative history: uniformity, clarity and efficiency.

Uniformity

As regards the uniformity we determined that the GALA-legislator only moderately succeeded in its objective. Although the Council of State ('Raad van State') recommended to limit the debt regulation to an instrument for the collection of debts to the government, the legislator opted for a (much) broader scope. Firstly, the regulation is extended to apply to the entire process from taking the payment decision to the coercion phase, especially for those matters where it was necessary to provide clarity on the analogous application (or not) of the Civil Code. Secondly, the regulation also covers money debts of the government.

This expanded scope is understandable in light of the general desire of the GALA-legislator to bring uniformity to Dutch administrative law. The opinion of the Council of State, however, seems more geared to practice. It is true that the legislator created clarity on some points concerning the settlement of monetary debts of the government (the decision of article 4:88, third section, GALA, the advance payments in article 4:95 GALA and the statutory interest in articles 4:98 and 4:100 GALA), however its relevance to practice seems limited. That is, based on the interviews the researchers are not under the impression that the parties involved were seriously struggling with these issues before the introduction of title 4.4 GALA. The provisions of the regulation are rarely used in disputes over monetary debts of the government.

In cases of monetary debts to the government, practice indeed appears to be most in need of general rules for collection (in a broad sense, including settlement, deferment and remission). In that respect, title 4.4 GALA could have been more detailed. In particular *substantive* standards on the exercise of collection powers in a broad sense, for example regarding settlement decisions and decisions on payment plans and remission are sorely missed. The Guidelines on Collection 2008 ('Leidraad Invordering 2008') used in tax law is mentioned in practice as possible source of inspiration for these topics. Also, it has been observed that in practice there is a need for general rules relating to the phase *before* the taking of a payment decision. For example, it is unclear to what point in time a recovery decision may be taken if specific provisions in this respect are lacking. Furthermore, there is a need for a general competence for administrative bodies to charge statutory interest over the period that funds wrongfully stayed with a civilian. These topics are not covered by title 4.4 GALA.

Thus, even though the monetary debt regulation has a very wide range and unifying effect, not all provisions of title 4.4 GALA prove (very) relevant in legal practice. Also, topics that lead to legal uncertainty in practice are missing from the regulation.

In addition, the research team concluded that the intended uniformity has not been achieved for other reasons too. Title 4.4 GALA in several places leaves further regulation to the special (substantive) legislator. That is not unusual in the system of the GALA, but it detracts from the desired uniformity. In this context it is moreover problematic that many special laws (aside from the possibilities that title 4.4 GALA offers to deviate) declare the administrative law monetary debt regulation in whole or in part inapplicable and offer different regulations. Deviating almost seems to be the norm for the special legislator.

This can be in part explained by the fact that the administrative monetary debt regulation has some strong competitors. Article 4:124 GALA makes explicit that the legislature has deliberately let the collection by means of civil law exist alongside and in addition to collection possibilities under title 4.4 GALA. The consequence, in some cases, is that administrative bodies (due to workload, cold feet, etc.) did not adjust their collection practice. Not visible in the GALA but in practice much more important is the tax collection under the Collection Act 1990 ('Invorderingswet 1990') as well as the Guidelines on Collection (of tax debts). Not only the size of the collection of state taxes but also the fact that in many special laws the Collection Act is declared applicable makes tax law on collection a formidable competitor of title 4.4 GALA. Administrative bodies who worked with the Collection Act 1990 before July 1, 2009 are generally fairly satisfied with this regime and prove reluctant to switch to the 'general' regime of title 4.4 GALA. Indeed, in municipalities where both regimes coexist, there seems to be a preference for the tax regime and initiatives are launched to incorporate the municipal debt collection to the local tax authorities and the own (tax) bailiff. If the government means to make title 4.4 GALA a truly general regulation, it would do well to consider which lessons can be drawn from the tax collection practice. Specific attention could be paid to the different regimes ('ladders') that are applicable in civil, administrative or fiscal practices for the determination of the collection costs to be charged.

The present study has further shown that the collection process is sometimes deliberately kept informal. Administrative bodies and bailiffs at times prefer to settle the relationship with the debtor without (or in addition to) formal decisions and injunctions, which sometimes would be more practical and better for the relationship with citizens. However, the judiciary struggles to accommodate such practices into the decision model of the GALA, when it comes to proceedings.

For civilians finally, the uniformity does not seem to have much added value. The problem of citizens in financial distress, according to the interviews, is much more related to the great diversity of (government) creditors, each with their own approach, and the lack of consultation and coordination than to the lack of uniformity of the applicable law. Legal aid workers at times compare the

government-creditor with a many-headed monster with little ability to empathise. Provisions on topics that are important to citizens, such as the material aspects of settlement decisions, about deferment of payment and remission, are missing.

Clarity

De legislator has also intended to create clarity with title 4.4 GALA. The idea was that one, generally applicable regulation that incorporated existing case law and that describes the relation to the Civil Code, provides clarification on the applicable law to both administrative bodies and citizens.

That clarity has been partially realized, as this study shows. In practice the provisions of title 4.4 GALA are evaluated as clear and readily applicable. Admittedly, there were some transitional troubles but the judiciary has been able to bring clarification fairly quickly. This clarity however does assume familiarity with the regulation and case law on the subject, which, according to interviews, case law and the consulted administrative documents is lacking. In practice, the administrative law monetary debt regulation appears to be fairly unknown to both administrative bodies and judges: it is erroneously not applied or the possibilities that the title offers are not used (writ of execution, settlement). The previously observed lack of uniformity in administrative substantive law is certainly not helping. Because the regimes (civil, fiscal) existing before July 1, 2009 have persisted, many administrative bodies seem to have continued the associated administrative practice of prior to July 1, 2009. They were able to do so because civilians and judges are only little aware of the changes as of that date.

It is evident that the many exceptions of title 4.4 GALA in special legislation do not contribute to the clarity and knowledge of the applicable law. One striking example is the non-compliance penalty system in section 5.3.2 GALA. This section provides for the collection decision, the forfeiture by law and the short limitation period coupled with limited suspension possibilities in a way that is not fully consistent with title 4.4 GALA. Furthermore, as may occur with all national rules of administrative law, EU law may cause conflict in the application of the monetary debt regulation.

If administrative bodies are aware with the existence and applicability of title 4.4 GALA, the remaining ambiguities seem to exist in areas where general provisions about administrative debts are lacking, as discussed above. Ambiguities for civilians about the applicable rules are often a result of communication. They have difficulties interpreting decisions about administrative debts and are not familiar with phased decision-making and the doctrine of formal legal force of decisions. Legal aid workers emphasise that it should be mentioned in administrative decisions what the consequences

are of failing to meet the obligations arising from those decisions, as well as the consequence of not objecting timely to decisions.

Efficiency

A third objective of title 4.4 GALA that the GALA legislator set was realising efficiency gains, particularly in the collection process. In particular the standardisation of legal rules, the general writ of execution competence and the concentration of legal protection at the administrative court were to contribute to that objective.

The parliamentary history links the – already discussed – strive for uniformity to a possible subsequent national debt collection carried out by the Central Collection Agency ('Centraal Justitieel Incassobureau' or CJIB). It has already been mentioned that the standardisation of applicable law is only moderately successful. Therefore, much work has to be done before the efficiency benefits of national debt collection may be utilised. Nevertheless, it appears there is a need for institutional uniformity. The interviews with municipalities show that the municipal tax authority tends to be deployed as the exclusive, municipal debt collection service. This would result in a cheaper, simpler and more flexible debt collection practice. Bailiffs seem to endorse these efforts to the extent that they also observe inadequate information exchange within municipalities and among bailiffs employed by municipalities. Institutional uniformity may also respond to the complaint of legal aid workers concerning the government as a creditor in many guises; guises that do not coordinate nor take each other into account. This results in an complex situation for citizens. They nevertheless express their concerns about the existing proposals in this regard. A national debt collection authority does not create a government-wide debt collection authority; moreover there are concerns that precisely municipalities are left with the daunting debits. Furthermore, they are worried about the new substantial competences the CJIB would get that would weaken te position of citizens.

The general writ of execution competence would contribute to the efficiency because it replaces many differing schemes (efficiency through uniformity and clarity) and eliminates the need for an expensive debt collection procedure in a civil court. It should be mentioned that the power to recover by writ of execution exists only if there is a specific legal basis. In cases where the financial stakes are high, the legislature has often dismissed this possibility or has maintained special legal protection in the form of an opposition procedure with suspensive effect. In those instances, the legal protection of citizens has won from the pursuit of efficiency. However, in a number of broad areas of law (subsidy law, social security law, law enforcement) a general writ of execution competence was created, which administrative bodies have appreciated as an efficiency increase – provided that the competence is used. In practice however, the claim is often, without further

explanation, transferred for collection to a court bailiff. Remarkably, with respect to efficiency gains, bailiffs consider that in the majority of cases the writ of execution competence already existed before July 1, 2009.

Finally, the concentration of legal protection would also contribute to the efficiency gains. This issue will be addressed in the next section as a separate research question.

1.5 Research findings – legal protection

As title 4.4 GALA introduces new decisions with corresponding, concentrated legal protection by administrative courts as well as abolishing the opposition procedure in civil courts, this study assesses the implications thereof for the legal protection of citizens.

Although the disappearance of the 'cut' between administrative courts and civil courts in the settlement of administrative monetary debts is generally considered an improvement, the question remained whether the 'stacking' of decisions provided for by title 4.4 GALA would again lead to fragmented legal protection. The government claimed to have overcome this problem by providing concentrated legal protection, and it appears to be right. The concentration provisions (especially 4:125, 5:31c and 5:39 GALA) are in practice appreciated without exception. Concentration saves the interested party time; there is no need for him to start a new administrative procedure. However, the expediency assessment in the appeal proceedings will also be lacking, which can be of interest precisely in case of additional decisions (e.g. decisions on deferral of payment and remission). Furthermore, a concentration provision prevents confusion with civilians (the dispute about one legal relationship is not located at two or more bodies simultaneously) and money (the administrative court does not charge extra court fees for reviewing the secondary decision).

However, there are certain reservations. The possibilities of concentration are not unlimited (for example, additional decisions must come from the same administrative body) and the interested party still must 'challenge' additional decisions. This latter requirement has led to some confusion and jurisprudence, and it seems that many legal aid workers continue to object to secondary decisions 'just in case'. Because administrative bodies sometimes are insufficiently aware of the duty to concentrate, the Administrative Jurisdiction Division of the Council of State ('Afdeling bestuursrechtspraak van de Raad van State'), the highest general administrative court in the Netherlands) has created a reminder and information requirement. This should increase both procedural legal protection and knowledge of the existence of secondary decisions. This case law however does not seem to be well known with primary judges. It could be considered to provide

education in this regard to administrative bodies or even to legally adopt the reminder and information requirements as introduced by the Administrative Jurisdiction Division.

Finally, it is important that the possibility of concentration does not eliminate the problem (as is perceived in practice) of formal legal force. A citizen who fails to object timely to the payment order cannot subsequently dispute that decision in a procedure against a collection decision, a secondary decision or in an enforcement dispute.

1.6 Research findings – administrative costs

During the parliamentary debate on the fourth instalment of the GALA, the Association of Dutch Municipalities ('Vereniging van Nederlandse Gemeenten', VNG) in particular expressed concerns about an increase in administrative costs by the so-called 'stacking' of decisions. The minister has put these concerns, according to the present study, into perspective. Administrative bodies, bailiffs nor judges report a permanent increase of administrative costs. However, some changes did occur. This is most clearly visible within the judiciary, where the 'abolition' of the opposition procedure has resulted in the transfer of legal questions to the administrative court. That effect is particularly noticeable in law enforcement. In contrast, the division of labour between administrative bodies and bailiffs hardly seems to have changed.

The introduction of title 4.4 GALA did lead to a one-time burden on administrative bodies and (to a lesser extent) bailiffs in making the necessary changes to IT systems and training civil servants. Furthermore, the relative unfamiliarity with the regulation at times caused a one-time burden, for example when an objection or appeal procedure lead to the conclusion that the existing procedures and practices require adjustment. This one-time burden should not be underestimated. In some cases it proved to be the main reason for the special legislature not to seek consistency with title 4.4 GALA but to stick to the old familiar collection rules.

1.7 Research findings – specific problems

Finally, in the concluding chapter 8 of this study, attention is drawn to specific problems that arise from specific parts of the administrative law monetary debt regulation, of which the most important are summarised below.

There is a debate about the desired content of payment decisions of administrative bodies. Article 4:87 GALA stipulates that the payment decision must at least state the sum to be paid and the payment term. Thus is it not necessary to inform citizens about the consequences of overdue payment and untimely challenging the decision in case of disagreement. The interviews revealed that it is prudent to inform civilians about those matters in order to avoid misunderstanding, frustration and unnecessary and unmeritorious procedures. Therefore, it is recommended to regulate in title 4.4 GALA that the payment decision explains the consequences of overdue payment. A similar argument can be made for other decisions such as the decision to deferral of payment, during which delay the statutory interest as a main rule continues, and penalty payment decisions; because of the forfeiture by law it is not always clear for citizens that they are in default of payment.

Furthermore, the settlement decision was discussed. Settlement is only possible as far as the competence to do so is included in a specific legal provision (4:93 GALA). Although the rule is clear, this topic receives much attention in interviews. Administrative bodies find it frustrating that there are no more competences included in legal provisions. They often carry out several regulations that cannot be adjusted against each other. Legal aid workers clearly warn for the competence to settle debts with current advances, a power which is mainly used by the tax authorities. As current advances are often included in financial means calculations, the discontinuation thereof has in practice often led to not respecting the constraints-free rate. Moreover, various authorities get in each other's way when due to settlements the financial means of citizens changes on which payment arrangements with other administrative bodies are based. For many citizens such actions by administrative bodies as part of 'government', while one has just struck a payment arrangement with another administrative body (also regarded by citizens as 'government'), are incomprehensible. It is advisable to seek a government-wide collection service with carefully thought-out privileges and competences.

Also decisions on deferral of payment and remission received much attention in the interviews. For this, article 4:94 GALA only provides some procedural provisions, a deliberate choice of the legislator who deemed regulating these issues a task of the special legislator. There is an urgent need for substantive norms in practice. As the Collection Act 1990 and the associated Guidelines on Collection 2008 do contain these regulations, it is understandable that the legal practice regularly prefers fiscal collection, especially since the Guidelines on Collection according to various parties works quite satisfactory in practice.

Furthermore, it was concluded that a power to stop the advance payment – for instance as included in the General Law Income Related Regulations ('Algemene wet inkomensafhankelijke regelingen',

Awir) and the subsidy title of the GALA – could be included in article 4:96 GALA. This competence provides administrative bodies with the possibility, in case of suspected irregularities, to discontinue payment without having to give a final decision about the legal status of the addressee of the decision. Administrative bodies also need a general competence to claim interest on unduly paid funds concerning the period that they (wrongfully) stayed at the citizen. Section 4.4.2 only applies to interest after default because of untimely payment. For the former interest a separate legal provision is necessary in special legislation, which is often lacking.

Limitation is an important issue in the collection of non-compliance penalties, taking into account the deviating, short limitation period of one year (article 5:35 GALA). The practical difficulties are mainly a result of the limited, exhaustive suspension possibilities. This sometimes leads to the unintentional barring of the collection competence, in other cases it forces the government to give notice to prevent limitation while a concrete desire for collection does not (yet) exist. The position of third parties seems to be overlooked by the legislature. They have no legal possibility to prevent the intentional or unintentional barring of the competence to collect forfeited non-compliance penalties. Since the collection decision has been created to strengthen the position of third parties, it would be reasonable to supplement the legal regulation in this respect, for example with the stipulation that the limitation period is extended from the moment that the collection decision (regardless of its content) is taken until it has become final.

The derogating rules from title 4.4 GALA concerning the forfeiture and collection of non-compliance penalties has led to discussion in the literature, while the interviews show that parties are struggling with these issues in practice too. Municipalities sometimes are made aware only because of a legal procedure that there is a need to adopt a collection decision in order to exercise the power to give notice and to coercive collection . At the same time, civilians do not often realise that, if the sum is not paid within the grace period, the payment obligation of forfeited non-compliance penalties commences by operation of law, even if the administrative body does not inform them thereof. That is especially problematic in cases where a civilian believes to have fulfilled his obligation, only for the administrative body to take a collection decision (much) later. In that respect – for the education of civilians and administrative bodies – article 5:32a GALA should be complemented with the provision that a conditional penalty states that penalty payments after expiry of the grace period are forfeited by operation of law, that the offender is automatically in default if he has not paid after six weeks and that the due penalty payments, interests and costs are determined by means of a collection decision. A further adjustment would be to transform article 5:37 GALA into a payment decision in accordance to title 4.4 GALA, in the sense that the administrative body determines the amount of the

forfeited penalty payments in a decision, after which the regime of title 4.4 GALA on the settlement of this monetary debt can be applied fully.

1.8 Closing balance

Did the introduction of title 4.4 GALA bring about what the parties involved hoped and expected? As so often, the answer based on the research findings must be: partially. A general regulation with a very wide range was designed, but those rules are not applicable to all administrative law monetary debts. The coexistence of civil, administrative and fiscal collection systems, alongside the many deviations in special law undermine the uniformity and challenge the proposed simple application of the – in itself experienced as clear – monetary debt regulation. In the endeavour for simplicity and uniformity there is still much room for improvement. Although the legal protection of civilians has improved (at least on paper) by getting rid of the 'cut' between appeal at the administrative court and protest at the civil court, legal aid workers unanimously indicate that the main problems concerning administrative monetary debts lie in other areas that title 4.4 GALA does not – or only procedurally – regulate.

At the same time it can be established that the introduction of title 4.4 GALA was a rather quietly process. Protest from legal practice and criticism in the literature are limited and published case law exposes no major problems. There is a downside to this quiet introduction however. The administrative monetary debt regulation is only moderately known, even with administrative bodies and judges. Moreover, the research team is under the impression that the underlying problems of civilians in financial difficulties elude observation. The concerned citizens often lack the knowledge and resources, and the amounts involved are too small to benefit from the guarantees provided by title 4.4 GALA, including the (concentrated) legal protection. Education of the administrative bodies involved, the coordination of collection by various governmental bodies, legal regulations or policy regarding (the degree of) settlement, remission and collection and – last but not least – the legal obligation for administrative bodies to inform citizens in the payment decision about the consequences of non-payment, are some possibilities that could contribute to addressing these underlying problems.