



Strasbourg, 14 September 2021

CDL-REF(2021)073

Opinion No.1031 / 2021

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

NETHERLANDS

**REPORT OF THE CHILDCARE ALLOWANCE PARLIAMENTARY
INQUIRY COMMITTEE**

**ENTITLED "UNPRECEDENTED INJUSTICE" (ONGEKEND ONRECHT)
17 DECEMBER 2020**

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No. 2

XVI. LETTER FROM THE PARLIAMENTARY INQUIRY COMMITTEE

To the Speaker of the House of Representatives of the States General

The Hague, 17 December 2020

The Childcare Allowance Parliamentary Inquiry Committee on hereby presents its report entitled 'Ongekend onrecht' ('Unprecedented injustice') on the parliamentary inquiry that it carried out in accordance with the task assigned to it on 2 July 2020 (Parliamentary document 35 510, no. 1).

The reports of the hearings that took place under oath are appended.¹Chairman of the Committee,
Van DamClerk of the Committee,
Freriks

[photo]

The members of the Childcare Allowance Parliamentary Inquiry Committee, from left to right: R.R. van Aalst, R.M. Leijten, S. Belhaj, C.J.L. van Dam, A.H. Kuiken, T.M.T. van der Lee, J. van Wijngaarden, and F.M. van Kooten-Arissen

[photo]

The members and the staff of the Childcare Allowance Parliamentary Inquiry Committee, from left to right: J.F.C. Freriks, R.M. Leijten, F.M. van Kooten-Arissen, R.J. de Bakker, C.J.L. van Dam, R.R. van Aalst, A.J. van Meeuwen, S. Belhaj, A.H. Kuiken, A.C. Verbruggen-Groot, T.M.T. van der Lee, J. van Wijngaarden, and M.C.C. van Haften. W. Bernard-Kesting does not appear in the photograph.

¹ Parliamentary document 35 510, no. 3.

XVII. PART I

XVIII. Observations: The rule of law on trial

Observations by the Childcare Allowance Parliamentary Inquiry Committee

The purpose of the parliamentary inquiry was to investigate what ministers knew about the hardline anti-fraud approach in relation to childcare allowance, what guidance they gave in relation to that approach, and why it lasted for so long. These questions are answered in the main body of this report. Furthermore, the Childcare Allowance Parliamentary Inquiry Committee feels compelled to make two additional observations.

Breach of basic principles of the rule of law

The committee notes that basic principles of the rule of law were breached in the administration of childcare allowance. This reproach concerns not only the administration – specifically by the Tax and Customs Administration/Benefits – but also the legislator and the judiciary.

A basic principle of the rule of law is that the interests of people should be considered as much as possible whenever legislation is devised and implemented. It is not without good reason that legitimacy and efficiency are leading principles in the drawing up and implementing of rules and regulations on which basis people may claim financial support from the government. Legitimacy includes the prevention and tackling of fraud and misuse.

The committee notes that the desire among politicians for the administration of benefits to be carried out efficiently and the wishes of politicians and society at large to prevent fraud resulted in the creation and implementation of legislation that permitted little scope, if any, for taking account of people's individual circumstances, such as administrative errors committed with no ill-intent.

Legislators – the cabinet and parliament – should accept responsibility for adopting highly inflexible legislation that offered insufficient options for dealing effectively with individual situations. It contained no hardship clause, for example, and legislators devoted far too little of their attention to the necessary principles of sound administration, in particular the principle of proportionality.

The body responsible for carrying out the law – the Ministry of Finance – administered childcare allowance as a mass process. The group-based action that was taken, the 'all or nothing' approach, and the way in which the notions of malice and gross negligence were applied formed a serious breach of the rule-of-law principle whereby a person's individual circumstances should be taken into consideration as much as possible. Under the pressure of the clamour of overzealous politicians to deal with fraud, with every error being too easily viewed as such, the operations of the Tax and Customs Administration resulted in parents finding themselves incorrectly branded as deliberate fraudsters. The way in which the Ministry of Social Affairs and Employment interpreted its responsibility for the policy fell far short of the appropriate standards. Without wishing to comment on individual court judgements, the committee notes that for many years the administrative justice system also played a significant part in perpetuating the ruthless application of the legislation on childcare allowance, over and above what was prescribed by law. In doing so, the administrative justice system neglected its important function of safeguarding the legal rights of individual citizens. The committee was particularly struck by the dismissal of the general principles of good governance that are supposed to act as a buffer and protective blanket for people in need, which continued until October 2019.

The cumulative effect of all these shortcomings in serving the interests of individuals meant that, for years, parents never had a chance. During the course of its work, the committee came to this realisation first with astonishment, and eventually with deep outrage. It urgently calls upon all the State bodies involved to examine how a repetition can be prevented in future and how the injustices that have been inflicted can be rectified.

Supply of information not adequate

The committee notes that the supply of information from central government is not adequate. At the highest level, the House of Representatives has repeatedly received information concerning childcare allowance that was incomplete, inaccurate, or supplied late. It was not only the supply

of information in response to questions in the Lower House and during the Lower House debates that frequently could not be relied on – the provision of information to the inquiry committee itself was slow and sometimes incomplete.

At the ministerial level too, the supply of information was below par, both within and between ministries. It was only with great difficulty that a reconstruction of the administration of childcare allowance for ministers was possible. Even now, the reconstruction portrayed appears not to be complete. The poor supply of information repeatedly caused the work (political and otherwise) of ministers to be seriously impeded.

The deficiencies in supplying information conceal inadequate information management systems. In each of the ministries that were to some degree part of the committee's investigations, the information management systems were sub-standard. As this is not the first committee of inquiry to highlight the poor level of information services among ministries, it fears that this is a persistent problem in central government. The committee also learned to its astonishment that there are big differences between the ministries in the way that comments and statements by ministers are recorded and preserved (or not).

The committee believes that getting information management systems in order should be a priority. For ministries to function effectively and for the sake of parliamentary democracy and of the monitoring function of the media, this is a matter of necessity. The committee regards this as an important political task for the cabinet. Similarly, a significant level of responsibility lies with the highest-ranking officials at the ministries, the secretaries-general.

The committee also notes that transparency, openness, and thoroughness are not, in practice, the guiding principles used in answers to parliamentary questions, when drawing up letters to parliament, when responding to freedom of information requests (under the terms of the Public Access to Government Information Act), or when compiling dossiers for court cases. The provisions in and the intentions behind the Constitution, the Parliamentary Enquiries Act 2008, the Public Access to Government Information Act, and the General Administrative Law Act are all clear. Despite this, information was supplied – as shown by the committee's investigation – for the purpose of achieving a particular legal or political outcome, resulting in information that was incomplete or provided late, or not provided at all. Protecting the personal policy views of officials can be a legitimate reason for not disclosing documents, either in whole or in part. However, the committee notes that in practice the notion of 'personal policy views' is regularly stretched too far. Improving the supply of information is essential for parliament, the media, and legal protection to function effectively. Like the protection of individuals, this means that the supply of information is an important element of the democratic rule of law.

Unprecedented injustice

Many parents have been the victim of the hardline approach that has been applied in recent years in relation to childcare allowance. The Childcare Allowance Parliamentary Inquiry Committee regards what happened to them as an injustice without precedent. Without precedent, because it took a long time for the scale and seriousness to be recognised by leading politicians and officials. Without precedent, because the information provided by the Tax and Customs Administration was extremely limited. Without precedent, because the way in which parents were dealt with was totally disproportionate to what they were accused of – mostly wrongly – by the Tax and Customs Administration.

For a long time, resolving the problems that parents found themselves facing as a result of actions by the government was not regarded as necessary and was put off time and time again. All manner of explanations were given for this, such as long-existing administrative practices that were upheld by the courts, responsibilities being spread across multiple ministries, a focus on policy and politics rather than on effective implementation, fear of the financial and legal consequences, and fear of adverse publicity. In the view of the committee, however, these explanations can never be used as an excuse. Nobody among the ranks of the country's leading politicians and officials recognised the seriousness of the problems or took responsibility for the whole affair.

This led to an injustice to a large group of parents that lasted for many years. They were powerless against the powerful institutions of the State, which did not offer them the protection they deserved. Those who did have the courage to swim against the tide and identify the problem are worthy of great respect.

The problem is now recognised better, but has not yet been rectified. Apologies have been given; now it is time to put things right.

XIX. Introduction

On 19 August 2017, the National Ombudsman issued a report, "*Geen powerplay maar fair play* [*no powerplay, but fair play*]". This report concerned the way in which the Tax and Customs Administration had stopped childcare allowance payments to several hundred families and reclaimed payments they had previously received. The Ombudsman ruled that the actions of the Tax and Customs Administration had, for a long time, put the parents in an impossible position, causing them major financial difficulties and a high degree of uncertainty. In November 2019, the Benefits Administration Advisory Committee noted, in relation to the matter, that the Tax and Customs Administration operated in a way that was institutionally biased.

The Benefits Administration Advisory Committee and the Central Government Audit Service published reports in March 2020 that showed that the problems were more widespread than the case described in the report by the National Ombudsman. The problems were not limited to the way in which childcare allowance was stopped, but also the fact that the legislation itself was so rigid.

The cabinet recognised the problem and decided to compensate the parents who had fallen foul of the anti-fraud methods and the inflexible legislation.

On 27 May 2020, MP Bart Snels submitted a motion to establish a parliamentary inquiry committee for gaining a clearer picture of the political decision-making processes concerning the anti-fraud approach in relation to childcare allowance.² The House of Representatives voted for the motion on 2 June 2020. The inquiry committee was set up on 2 July 2020.

A. Purpose of the inquiry

The purpose of the parliamentary inquiry, as commissioned by the House of Representatives³, was to gain a clearer picture of the political decision-making processes and the responsibilities and involvement of high-ranking officials that had an effect on the childcare allowance anti-fraud policy, as well as of the political response to the signals about the far-reaching impact of the anti-fraud policy and the 'all or nothing' approach. The parliamentary inquiry focused on the period starting in 2013 until the presentation to the House of Representatives of the interim recommendations of the Benefits Administration Advisory Committee in November 2019.

B. The committee's terms of reference

The task of the committee was to conclude the parliamentary inquiry in 2020 and to produce a report of its findings before the Christmas break. Partly in view of this short period of time, the committee was given the task of examining the aspect from which the House of Representatives expected to gain the most: improving the monitoring of the involvement of ministers (past and present) and the highest-ranking officials from the relevant ministries. The role of lower-ranking officials did not form part of the committee's task. The role of the House of Representatives was not part of the committee's task either, but wherever the House played a prominent role, this was to be mentioned in the report.

Several important elements of the hardline anti-fraud methods featured explicitly in the investigation: the 'all or nothing' approach, the group-based action ('80-20' approach), and 'malice/gross negligence' approach. Other elements of the hardline anti-fraud approach, such as the use of 'blacklists' and of risk profiles that included nationality, were not included in the committee's remit. An investigation into the way in which the Tax and Customs Administration/Benefits used nationalities with risk selection has been carried out by the Dutch Data Protection Agency. The parliamentary inquiry has not investigated the compensation paid to parents after November 2019 either.

C. Questions for the inquiry

The proposal for the investigation contained the following questions:

² Parliamentary document II 2019/20, 31 066, no. 652.

³ Parliamentary document II 2019/20, 35 510, no. 1.

1. To what extent were ministers aware of the childcare allowance anti-fraud methods and of the signals about the possible disproportionate consequences for parents? To what extent did ministers actively initiate and/or approve the childcare allowance anti-fraud methods?
2. How did ministers and high-ranking officials deal with the following important elements of the anti-fraud action and the administration of childcare allowance:
 - a. The '80/20' approach, in which the risk was taken to pursue law-abiding parents who had no means of redress;
 - b. The 'malice/gross negligence' approach, as a result of which it was not possible for parents to arrange payment plans;
 - c. The 'all or nothing' approach, so that in the event of any errors or inconsistencies, entitlement to the allowance could be lost for a longer period of time.
3. Why was the policy on childcare allowance maintained, given the available information and signals, and why were the affected parents not compensated at an earlier stage?
4. What lessons have the witnesses learned from the hardline approach in administering childcare allowance?

These questions were aimed at four crucial elements identified by the preparatory committee: the establishment and remit of the 'Combiteam Aanpak Facilitators' (CAF) ['combined team for tackling facilitators'] (2013) and the preparations for same in the preceding period; the ministerial anti-fraud committee (2013-2015), coordination between the Ministries of Finance and of Social Affairs and Employment in the light of complaints and objections (from 2014), and the follow-up to the "*Geen powerplay maar fair play*" report by the National Ombudsman (from its presentation in August 2017).

Regarding the formation of the 'all or nothing' approach, the committee examined the period before 2013, looking at the introduction of the legislation in 2005 and its progress through parliament, and at the evolution and application of this approach in the period that followed.

D. The investigation

To find answers to the inquiry questions, the inquiry committee heard relevant ministers, high-ranking officials, and other insiders from 16 to 26 November 2020, who gave their evidence under oath. In preparation for these public hearings, the committee studied a large quantity of publicly available documents, including parliamentary documents, documents issued following freedom of information requests, and other reports. Additionally, the committee used its powers to demand documents on certain specific subjects from the cabinet.⁴

In preparation for the public hearings, the committee also asked Professor Zijlstra to write a paper on the case law of the Administrative Jurisdiction Division of the Council of State regarding the so-called 'all or nothing' approach towards the recovery of childcare allowance payments between 2010 and 23 October 2019, the date of the ruling that ended the 'all or nothing' approach. This paper is appended to this report.

E. Guide for the reader

This report consists of three parts and two appendices. Part I contains the observations of the parliamentary inquiry committee, this introduction, and the answers to the inquiry questions. Part II (Chapters 1-5) contains a reconstruction of the most significant events. Part III deals with accountability. Appendix 1 contains the lessons learned by witnesses. Appendix 2 contains the "*All or nothing*" paper by Professor Zijlstra. The reports of the public hearings can be viewed at www.tweedekamer.nl.

⁴ This concerns documents about the ministerial anti-fraud committee and about the follow-up to the "*Geen powerplay maar fair play*" report by the National Ombudsman (see Part III).

XX. Answers to the inquiry questions

F. Inquiry question 1

To what extent were ministers aware of the childcare allowance anti-fraud methods and of the signals about the possible disproportionate consequences for parents? To what extent did ministers actively initiate and/or approve the childcare allowance anti-fraud methods?

Prelude

Childcare allowance is a financial payment made by the government to parents for childcare costs, in accordance with the Childcare Act. The benefit has existed since 2005. The Benefits department of the Tax and Customs Administration is responsible for awarding, paying, and, if necessary, recovering childcare allowance, in accordance with the General Act on Means-Tested Benefits, which entered into force in 2005. Childcare allowance is part of a system of four benefits administered by the Tax and Customs Administration/Benefits. Responsibility for the actual policies lies with other ministries. In the case of childcare allowance, that is the Ministry of Social Affairs and Employment. The ministry is responsible for setting the conditions under which parents are eligible for childcare allowance, for the calculation method for determining the amount of the allowance payable, and for managing the relevant budget.

The intention behind the General Act on Means-Tested Benefits was to streamline the conceptual framework for, and the administration of, the four benefits. In 2004, the Advisory Department of the Council of State recommended that an option be included – a hardship clause – in the bill on the General Act on Means-Tested Benefits that would enable the Tax and Customs Administration/Benefits to deviate from the standard rules in extreme cases. This recommendation was not adopted by the cabinet. The argument against doing so was effectively that the Tax and Customs Administration/Benefits should operate like a machine, because of the large number of benefits payable. Exceptions would throw a spanner in the works. The House of Representatives did consider adding a hardship clause, but the matter was not pursued. Parliament voted to enact the General Act on Means-Tested Benefits without a general hardship clause.

There was political pressure to introduce the benefits system quickly. Such haste applied in particular to the healthcare allowance, which was related to the introduction of a new healthcare system. At the time the benefits were introduced, neither the cabinet nor parliament paid much attention to their feasibility. One result of that was that the Tax and Customs Administration/Benefits worked with an inadequate ICT system until 2011. That meant that the Tax and Customs Administration/Benefits were only able to verify claims retrospectively, sometimes as long as five years after the benefit had been awarded.

It was during this period that the contours of the anti-fraud action in relation to childcare allowance began to take shape. At various childcare organisations where the Tax and Customs Administration suspected fraud, the childcare allowance paid to parents was stopped and checked en masse. If any errors or inconsistencies were found, such as failure to pay personal contributions (either in whole or in part), the Tax and Customs Administration/Benefits set the allowance at zero, resulting in parents having to repay the total allowance that they had received. The Tax and Customs Administration/Benefits sought to have this hardline method confirmed by the courts, in order to set a legal precedent.

If the Tax and Customs Administration regarded malice or gross negligence on the part of parents as likely, they would not be offered a personal repayment plan, so that their debt would have to be repaid in full in 24 equal monthly instalments. If they were unable to do so, they faced the possibility of compulsory recovery orders, such as the seizure of their cars and enforced sales of their homes.

The fact that checks were mostly carried out retrospectively during the initial years of the benefits system not only led to uncertainty among and corrections for bona fide recipients of the allowance, but also created opportunities for fraudsters. This became notably clear in the spring of 2013, following the exposure of what was referred to as the 'Bulgarian fraud' in the media. A Bulgarian gang received housing benefit and healthcare allowance by using fake addresses. This instance of fraud gave significant added impetus to the anti-fraud activities, which were further

strengthened in the coalition agreements of the Rutte I (2010) and Rutte II (2012) cabinets. The Rutte I cabinet coalition agreement also included major spending cuts for the Tax and Customs Administration, with many of the savings to be achieved through streamlining and greater efficiency.⁵ As a result, the pressure on the benefits 'machine' increased even more.

Childcare allowance anti-fraud action by the Tax and Customs Administration/Benefits

The 'Bulgarian fraud' had consequences for the Tax and Customs Administration/Benefits. State secretary Frans Weekers addressed the department's employees in person in 2013, together with the director general of the Tax and Customs Administration, Peter Veld, and the Benefits director, Gerard Blankestijn. They made it clear that, for them, enough was enough, and that fraud should be tackled with even greater vigour. The state secretary wrote to the House of Representatives that measures would be taken.⁶ The most important measure was that more checks would be carried out before benefits were paid, in particular to people of whom there were no records at the Tax and Customs Administration. The ICT system introduced in 2011 made it possible to carry out these checks on a greater scale.

The system selected applications that were considered suspect on the basis of a risk-classification model. The risk-classification model is a self-learning model that 'learns' from examples of correct and incorrect applications. The process also involved the use of several dozen indicators. In 2020, the Dutch Data Protection Agency established that the risk-classification model entailed improper and discriminatory processes (between March 2016 and October 2018 at least), given that the nationality of applicants was used for the 'Dutch citizenship' indicator in the model.⁷

The applications selected by the system were subject to additional manual checks, for which applicants could be asked to submit extra supporting documentation. In effect, it amounted not just to tackling actual fraud, but also to tightening the regular verifications of the accuracy of benefit applications. In his letter to the House of Representatives, Weekers wrote that the measures could in practice affect law-abiding citizens, e.g. by them having to wait longer for their payments as a result of additional advance checks. This subsequently proved to be a statement with far-reaching consequences.

In May 2013, director general Veld of the Tax and Customs Administration decided to set up a special anti-fraud management team. By the end of the summer of 2013, the Ministry of Finance had prepared a business case for tackling benefit fraud. This arranged for the Tax and Customs Administration/Benefits to receive €25 million for additional monitoring and verification work. However, this sum was to be recouped every year by reducing the number of benefits awarded incorrectly. The directorate of the Tax and Customs Administration/Benefits ran the organisation on this basis until 2019. During the public hearing, state secretary Weekers stated that he did know about the existence of the business case, but that he was not aware that achieving the business case would be done in this way.

In the summer of 2013, the anti-fraud management team decided to set up the 'Combiteam Aanpak Facilitators' (CAF). The purpose of setting up this team was to tackle systemic fraud by focusing on people deliberately organising or starting large-scale systemic fraud, known as facilitators.

State secretary Weekers was informed of this by top-level officials, including by means of a presentation. During the public hearing, he stated that he got the impression that the CAF was concentrating on criminal intermediaries and, in line with this, was giving signals to the Tax and Customs Administration/Benefits to discontinue wrongful and fraudulent payments. Weekers was satisfied and supported this intensification of the anti-fraud activities.

In practice, dealing with CAF-related matters took on a much more sinister aspect. During the hearing, however, Weekers stated that he did not know that parents' allowances were stopped en masse, sometimes without warning and in the course of the year, before individual parents had been investigated. He also stated not to be aware of the degree to which information provided by parents was evaluated to excess and with mistrust, or of the fact that the slightest administrative error was enough for parents to be ordered to repay their allowance for an entire

⁵ Parliamentary document II 2011/12, 31 066, no. 117.

⁶ Parliamentary document II 2012/13, 17 050, no. 435.

⁷ Parliamentary document II 2019/20, 31 066, no. 683.

year. Finally, he stated he was not aware of how readily and how many people were accused of malice or gross negligence, as a result of which they were unable to arrange personal repayment plans, causing many parents to spend many years in poverty. Weekers resigned in early 2014 after a long debate in the House of Representatives on the introduction of the requirement of one bank account number per application, which led to a large number of people experiencing significant delays in receiving payment of their benefit. He was succeeded by Eric Wiebes. Wiebes also stated not to have been aware of the group-based approach, the biased way in which parents were checked, and the way in which malice or gross negligence was deemed to exist.

Ministerial anti-fraud committee

Cases of fraud, such as the Bulgarian fraud, led to a greater focus on fraud not just at the Tax and Customs Administration/Benefits, but also elsewhere. In June 2013, the cabinet decided to set up a special ministerial government-wide anti-fraud committee, chaired by the Prime Minister, Mark Rutte. The other members of the committee were the Minister of Social Affairs and Employment, Lodewijk Asscher; the Minister of Justice and Security, Ivo Opstelten⁸; the Minister of the Interior and Kingdom Relations, Ronald Plasterk; the Minister of Economic Affairs, Henk Kamp; the Minister of Education, Culture and Science, Jet Bussemaker; the Minister of Health, Welfare and Sport, Edith Schippers; the Minister for Housing and the Civil Service, Stef Blok; and the state secretary of Finance, Frans Weekers.⁹

The starting point whereby each ministry was responsible for curtailing fraud in its respective field and for tackling fraudsters remained the same. The anti-fraud approach by the Tax and Customs Administration/Benefits was therefore not specifically discussed by the ministerial committee.

The ministerial committee set down a number of starting points for tackling fraud, to apply through the whole of central government. For example, the ministerial committee emphasised the importance of a hardline approach towards fraud – not just through the use of criminal law, but by means of all possible methods. Emphasis was also placed on citizens' own responsibility for using benefits correctly. The committee confirmed that new anti-fraud measures should be underpinned by business cases. A strategy was also drawn up, in addition to the starting points. The strategy contained such elements as reducing the complexity of benefits, active communication and information provision, making legislation fraud-proof, the exchange of data, the use of risk profiles, and strengthening cohesion between monitoring, enforcement and detection. One purpose of the strategy was to increase the likelihood of catching fraudsters, including the recovery of unlawful payments, and to publicise anti-fraud measures. All of this was intended to boost the anti-fraud culture.

By the autumn of 2013, the ministerial committee was preparing a letter to parliament about the government-wide approach to tackling fraud. Following discussions in the ministerial committee, the original hard line was somewhat modified by means of an explicit statement that deliberate fraud and unintentional errors were not the same, that action taken by the authorities should be proportionate, and that trust, rather than mistrust, should be the starting point for any action taken. The letter to parliament stated that every effort should be made to prevent law-abiding citizens being tarred with the same brush as those who break the law.¹⁰ At the time the ministerial committee finalised the letter – in late 2013 – the hardline approach by the Tax and Customs Administration/Benefits was running at full steam. The ministerial committee had virtually no influence over this. In his evidence to the hearing, prime minister Rutte recognised that the emphasis the ministerial committee had placed on the hardline approach towards fraud may have given people involved in implementing the policy the feeling that they could cross boundaries, although this was of course not a justification.

Tackling fraud – the Ministry of Social Affairs and Employment

At the Ministry of Social Affairs and Employment, the focus with regard to childcare lay primarily on the quality of childcare itself. But in late 2013, in the wake of the actions of the ministerial committee, the Ministry of Social Affairs and Employment set about the task of tackling fraud.

⁸ Succeeded by Ard van der Steur on 9 March 2015, after his resignation.

⁹ Succeeded in January 2014 by state secretary Eric Wiebes.

¹⁰ Parliamentary document II 2013/14, 17 050, no. 450.

This was founded on the notion that fraud and poor quality often go hand in hand. The Childminder Centre Quality Improvement and Anti-Fraud project ('kwaliteitsverbetering en fraudebestrijding gastouderbureaus', KEF) was launched. The aim of the project was to force poorly performing childminder centres out of business. The proposal for the project set out two methods: the monitoring of levels of quality (carried out by the municipal health service, GGD), and the stopping of the childcare allowance payments to parents whose record keeping contained errors, as a result of which the income of the childminder centres would dry up. Parents in this category were designated as 'parents committing fraud'. The Tax and Customs Administration/Benefits were to carry out the latter aspect of the project. The project proposal stated that the contracts or timesheets of most childminder centres contained inaccuracies. Minister Lodewijk Asscher gave his approval to the project. He has stated that he did not realise that this also meant approving an approach in which the hunt for fraudulent childminder centres – as was the case with the CAF – was mostly performed through the wallets of parents whose record keeping was not entirely in order.

Asscher heard about the high number of benefit payments being recovered, but the scale was not clear

In early 2013, an official memorandum to minister Asscher stated that parents in the De Appelbloesem affair were being forced to repay large sums of money. He did not ask any further questions on the matter. In December 2013 and June 2014, he received several letters from and on behalf of victims in this case, in which they described the high level of the repayments they were making. In August 2013, his officials reported that they felt that recovering the benefit in full was a very severe penalty in cases where childcare organisations advertised 'free childcare' and parents were unaware that this was not permitted. In September 2014, in a discussion with the House of Representatives held in the context of his proposal to introduce a new funding system (direct funding), Asscher himself mentioned the high level of repayments being made by parents. In late 2014, Asscher was informed of the concerns of the Tax and Customs Administration about the 'all or nothing' approach in relation to personal contributions, prompted in part by the De Parel case. To Asscher, it was not clear how many parents were faced with the 'all or nothing' approach.

No realisation by Wiebes of the true scale of the problems

Wiebes succeeded Weekers as the state secretary of Finance in early 2014; the existence of the CAF and its purpose were pointed out to him at the time. In 2015 and 2016, he received statistical information about the team's results, but he was not informed of its methods or the far-reaching consequences for parents. In late 2014, the 'all or nothing' approach used with De Parel was pointed out to him. He asked questions about the approach, but did not implement any modifications to the policy. In 2015, Wiebes was informed about difficulties at the Tax and Customs Administration/Benefits noted by the Ombudsman, including the prompt processing of applications, complaints, objections and requests for personal repayment plans, and failure to honour undertakings made to citizens. In August 2017, the Ombudsman published his report¹¹ about the CAF 11 affair. This revealed to Wiebes, who by then was already due to step down as state secretary, the disproportionately hardline methods used against parents, the loss of citizens' perspective, the injustice of the stopping of the allowances of an entire group of parents, and the deficiencies and excessive slowness of the processes for dealing with objections in the CAF 11 affair. Although these events took place while he was state secretary of Finance, they had until that point remained out of his line of vision.

Focus by Van Ark (Ministry of Social Affairs and Employment) was on decision about direct funding

State secretary Tamara van Ark took over the childcare portfolio from the minister, Lodewijk Asscher, in October 2017. At the time of her appointment, the focus was on whether or not to introduce the new funding system, which had been in preparation for the past three years. Against this background, she noticed that there was a large number of benefit recovery proceedings,

¹¹ W. van den Berg, M. Alhadjri, M. Mulder, *Geen powerplay maar fair play. Onevenredig harde aanpak van 232 gezinnen met kinderopvangtoeslag* ['Disproportionately hardline action against 232 families with childcare allowance'] (report 2017/095), 9 August 2017

some of which were high, but she regarded this as a regular part of the advance payments system, for which a solution was being devised. In April 2018, Van Ark decided, after being urged by state secretary Menno Snel, not to introduce direct funding, but to bring about improvements to the existing system of benefits. The minister, Wopke Hoekstra, was not in favour of maintaining the existing system, but accepted Van Ark's decision. Before making this decision, in March 2018, Van Ark was informed about a part of the benefits improvement plan being developed for setting the allowance proportionately, but it was not until later that she realised that the initiatives for setting childcare allowance proportionately resulted from the far-reaching consequences of the 'all or nothing' approach. From September 2018, Van Ark gained a clearer picture of the problems affecting the CAF 11 parents, at which point she was informed that this method had been abandoned. In the summer of 2019, Van Ark was involved with compensating the CAF 11 parents.

Snel first regarded the CAF 11 case as an isolated one, but from June 2019 had a clear picture of the seriousness and scale of the problems

Shortly after his appointment in October 2017, state secretary Snel was informed about the CAF 11 affair following the investigation by the National Ombudsman. This brought him up to date about the group-based and unjustified stopping of benefits, the poor level of legal protection for the parents, and the slowness with which objections were dealt with by the Tax and Customs Administration. At the time, he regarded the CAF 11 affair as an isolated one, the problems related to which had been or were being resolved.

Snel declared that he began to doubt in March 2019 whether the CAF 11 case was indeed an isolated one. During a debate in the House of Representatives, he announced that he would be ordering the Central Government Audit Service to investigate whether similar things had gone wrong in other CAF cases. The Central Government Audit Service eventually started its investigation in September 2019. The Benefits Administration Advisory Committee¹², which was set up in May 2019 with the agreement of the council of ministers, was also asked to include not just the CAF 11 affair, but also similar cases, in its recommendations. Between May 2019 and late November 2019, the council of ministers regularly discussed the problems relating to childcare allowance. In their testimony to the public hearings, Minister of Finance Hoekstra and prime minister Rutte stated they were increasingly informed about the topic from May 2019. Minister Hoekstra also stated that, from that time, he was increasingly involving himself with the Tax and Customs Administration.

In June 2019, Snel was informed of the fact that parents in the CAF 11 affair had been treated as potential fraudsters on the basis of tunnel vision, and of the deficient rationale of this CAF investigation. The necessity for compensation was then discussed in the council of ministers, which body therefore came to be aware of the problems. From the spring of 2019, Snel received indications that the CAF 11 affair was not an exception, and that the Tax and Customs Administration had used a similar method in other cases. In the summer of 2019, he was informed about the number of parents affected by the other CAF cases and how many of them had outstanding tax or benefit-related debts. He was also informed that compulsory recovery orders were still being carried out in these cases. He consented to ongoing compulsory recovery orders not being suspended. However, they were suspended on the insistence of the House of Representatives in early November 2019.

At the end of October and the beginning of November 2019, Snel received two memoranda about the way in which the Tax and Customs Administration deemed parents to be guilty of malice or gross negligence, as a result of which they were unable to arrange personal repayment plans with the Tax and Customs Administration. The memoranda stated that past experience showed that around two-thirds of applications for personal repayment plans had been rejected due to malice or gross negligence. In many cases, no second assessor was involved in the decision to reject the applications. A commonly occurring reason for parents being deemed guilty of malice or gross negligence was late notification of the fact that the childcare had stopped. It was clear from the memoranda that in practice it was often the most vulnerable people who were affected by this – those with the greatest debts and the lowest incomes.

¹² The Advisory Committee members were J.P.H. Donner, Professor W. den Ouden, and J. Klijsma

On 14 November 2019, the Benefits Administration Advisory Committee concluded in its interim recommendations that the group-based approach in the CAF 11 affair involved institutional bias.

In summary, the committee answered the inquiry question as follows:

As members of the Rutte II cabinet and of the ministerial anti-fraud committee, Weekers, Wiebes, Asscher, and Rutte helped initiate a hardline approach towards tackling fraud.

Weekers initiated a harder line towards tackling fraud, specifically with regard to benefits, including childcare allowance. He was aware of the focus of the Combiteam Aanpak Facilitators on fraudulent childcare organisations and childminder centres, for which he had given his approval. Weekers received indications of the disproportionate consequences for parents, especially the high level of the payment recovery demands. However, he did not know about all the elements of the hardline methods being used by the Tax and Customs Administration/Benefits – the group-based and biased approach, the intensive, zero-tolerance checks, and the methods used for determining malice or gross negligence.

Asscher also approved the intensification of the anti-fraud efforts aimed at childcare organisations and childminder centres. He received indications of the disproportionate consequences of the high level of the payment recovery demands resulting from the ‘all or nothing’ approach. However, his attention was directed primarily at the quality of childcare and a new funding system.

From August 2017, state secretary Wiebes was personally aware of the extent of the group-based approach, the poor level of legal protection, and the disproportionate consequences for parents of the anti-fraud methods in the CAF 11 affair.

Snel was aware of the content of the Ombudsman’s report shortly after his appointment. It was clear to Snel personally from the start of June 2019 that parents in the CAF 11 affair had been treated as potential fraudsters on the basis of tunnel vision.

Until that point, the ministers referred to here had received signals that were largely linked to incidental cases; the fact that the problems were occurring on a larger scale was, for them, a blind spot. The subject was barely given any attention when the ministers relinquished office to their successors. From the summer, it became increasingly clear to Snel that the problem was much greater than just the CAF 11 affair. However, he did not suspend the compulsory repayment demands in the other CAF cases; this happened only on the insistence of the House of Representatives, in early November 2019. Snel was informed about the method used for determining malice or gross negligence and the consequences this had on repayments at around the same time.

State secretary Van Ark had been aware of the scale of the hardline approach and the consequences for parents in the CAF 11 affair since September 2018. She had previously noticed the high number of payment recovery demands, but she regarded that as a regular part of the advance payments system. From March 2018, Van Ark was in principle aware of initiatives for recovering a greater proportion of payments in the context of the benefits improvement plan, but did not examine the background to the matter in any great depth.

From May 2019, the council of ministers regularly discussed the problems relating to childcare allowance. Minister of Finance Hoekstra and prime minister Rutte were in any case aware of the matter from that time. Minister Hoekstra therefore became more actively involved with the matter.

On 14 November 2019, the Benefits Administration Advisory Committee concluded in its interim recommendations that the group-based approach in the CAF 11 affair involved institutional bias.

G. Inquiry question 2

How did ministers and high-ranking officials deal with the following important elements of the anti-fraud action and the administration of childcare allowance:

a. The ‘all or nothing’ approach, as a result of which entitlement to benefit could be denied for a long period of time due to errors or inconsistencies;

One of the reasons the misguided efforts in detecting childcare allowance fraud had such distressing consequences for parents was the use of an ‘all or nothing’ approach. Whenever the Tax and Customs Administration/Benefits identified an error or inconsistency, such as the failure to pay (either fully or in part) a personal contribution or a missing signature, the benefit would be reclaimed from the parents for the whole year, even though the total amount had already been used to pay for childcare. Because childcare allowance is subject to many preconditions and the amount depends on a large number of variables, the scope for error is greater than is the case with other benefits. Moreover, the level of the benefit depends on income. This means the greatest benefits – and therefore the highest payment recovery demands – generally involve the parents on the lowest incomes.

Formation of the ‘all or nothing’ approach

The ‘all or nothing’ approach was not the direct result of any legal requirement. Neither from the bill proposing the legislation nor from its passage through parliament was it apparent that legislators were actively in favour of an ‘all or nothing’ approach. In 2009, the Tax and Customs Administration/Benefits asked the State Advocate whether it could set childcare allowance at zero if no personal contribution had been paid. The State Advocate argued that childcare allowance in such cases could be set at a lower level and that each case should be assessed on its individual merits. He also saw scope for a form of partial (proportionate) awarding of childcare allowance. The strict ‘all or nothing’ approach, about which the Tax and Customs Administration/Benefits had sought advice, was viewed by the State Advocate as ‘arguable’. The Tax and Customs Administration/Benefits subsequently decided on the strict option; in its view, it was about parents who were committing fraud. The Tax and Customs Administration/Benefits presented its decision to the courts.¹³ The Council of State did not condemn the decision. For the Tax and Customs Administration/Benefits, this legitimised its decision to pursue the strict option. The rulings almost completely removed any scope to use existing legislation or case law to decide on a different course. The Tax and Customs Administration/Benefits subsequently applied the ‘all or nothing’ approach not just in the cases of parents who had not paid their personal contributions, but also where administrative errors had been made. This, too, was not condemned by the courts. The result was that, because of the interaction of the law, administration, and case law, the proportionality principle was effectively cast aside until well into 2019.

Weekers allowed the ‘all or nothing’ approach to continue, despite the initial objections

In late 2012, Weekers was advised by officials not to reclaim payments for every year in the De Appelbloesem case because of the far-reaching consequences and risks of adverse publicity. Weekers initially opted for a softer approach towards parents than did his officials: he wanted only for the personal contributions to be paid (retrospectively). However, after a ruling by the Council of State on 19 December 2012 that left intact the practice of recovering the benefit in full, Weekers’s officials advised him to authorise full recovery of payments, as there was no longer any other legal option. Weekers accepted this.

During the first six months of 2013, high-ranking officials from the Tax and Customs Administration and the Ministry of Social Affairs and Employment discussed the possibility of amending legislation, but this did not lead to any concrete proposals for ministers to end the ‘all or nothing’ approach. However, the officials from the ministry, with Asscher’s consent, did point out the importance of providing good-quality information about the rules to parents and childcare providers.

¹³ Parliamentary document II 2020/21, 31 066, no. 753. It is not clear from this document who exactly took these decisions.

And officials from the Tax and Customs Administration did explicitly ask Weekers and Asscher (in writing) whether they were willing to change the law in relation to another problem. This concerned whether the personal contributions paid by childminders could be paid to parents, on the basis of Council of State case law. This amounted to free childcare, without payment of a personal contribution. The ministry officials and minister Asscher did not regard any changes to the law necessary in this regard.

Wiebes and Asscher did not change the 'all or nothing' approach either

In late 2014, officials reported to Wiebes that the 'all or nothing' approach could lead to significant financial problems for parents, and that the Tax and Customs Administration was proposing to the Ministry of Social Affairs and Employment that, if parents had not paid their personal contributions, only that amount should be reclaimed rather than the full allowance. Wiebes supported this and was prepared to discuss the matter with minister Asscher if the officials were unable to reach agreement themselves. He then gave no further thought to the matter and his officials made no reference to it either after it had become clear in 2015 that the officials at the Ministry of Social Affairs and Employment did not favour any changes. Neither Wiebes nor Asscher drew up a concrete proposal for making changes. The harsh 'all or nothing' approach was continued, as were the hardline payment recovery procedures.

Van Ark and Snel decided to end the 'all or nothing' approach in October 2019

In April 2018, state secretary Van Ark reported to the House of Representatives that direct funding would not be introduced, but that improvements to the existing benefits system were being implemented. She made no mention of whether there would be any changes to the 'all or nothing' approach. After being questioned in the House of Representatives, Van Ark responded in July 2018 that, together with the Ministry of Finance, she would be exploring the possibilities for allocating childcare allowance proportionately. At the time, she still did not realise that the 'all or nothing' approach lurked behind the proportionate payment initiative. In September 2018, she was informed about the 2014 fraud cases. The exploration of the possibilities for making proportionate payments never got off the ground.

Following the ruling by the Council of State in April 2019, state secretary Snel was aware of the 'all or nothing' approach. Snel asked the Benefits Administration Advisory Committee for its advice on the application of this approach where there were minor differences in established cases. On 11 June 2019, Snel again announced, in conjunction with Van Ark, that he would be exploring the possibilities for making proportionate payments. Things then moved more quickly – on 9 October 2019, both state secretaries decided to work out the details of "setting proportionate payments based on the costs of childcare that had been paid for". Through the Benefits Joint Decree, the cabinet introduced proportionate payments on 25 December 2019, thereby bringing an end to the 'all or nothing' approach.

In summary, the committee answered the inquiry question as follows:

The 'all or nothing' approach did not follow explicitly from the law or from its passage through parliament. In carrying out the law, the Tax and Customs Administration/Benefits opted for an 'all or nothing' approach, despite a recommendation by the State Advocate arguing for a more proportionate approach. In its rulings, the highest court, the Council of State, supported the position of the Tax and Customs Administration and did not condemn that organisation's interpretation of the law, thereby reducing its scope to deviate from the law. The result was that, for years, administrators and the justice system effectively reinforced each other and the 'all or nothing' method became increasingly firmly anchored. Both Weekers and his successor, Wiebes, questioned this hardline approach, but they did not effectuate any changes themselves. Officials from the Tax and Customs Administration stated that they had highlighted the problems with officials from the Ministry of Social Affairs and Employment, but that they had no plans to change the law. The officials from the Tax and Customs Administration did not subsequently explicitly act to persuade their ministers, Weekers and Wiebes, to attempt a breakthrough at the political level. No concrete amendment proposal was therefore presented to minister Asscher.

b. The '80/20' approach, in which the risk was taken to pursue law-abiding parents who had no means of redress;

The group-based approach

The inquiry question refers to the '80/20' approach. The committee regards this as a reference to the group-based approach. The group-based approach had previously been used in CAF affairs, and elsewhere. Investigations by the CAF were aimed at, among other things, childcare organisations. These investigations could prompt the highly strict group-based checks on all of the parents affected. The top-level officials at the Tax and Customs Administration were aware of the possibility of innocent parents being exposed to these intensive checks. The biased method behind carrying out checks, combined with the deficient internal and external legal protections led, in practice, to parents being almost completely unable to escape the high payment recovery demands.

Tarring everyone with the same brush

As a result of the Bulgarian fraud, Weekers had reported to the House of Representatives that the more effective method for tackling systemic fraud could affect law-abiding citizens, e.g. by them having to wait longer for benefits as a result of checks being carried out. In practice, things were taken a step further, with the consent of the high-ranking officials in the Tax and Customs Administration. In cases where the Tax and Customs Administration/Benefits believed there to be a risk of fraud, existing benefits for whole groups of parents were unlawfully stopped.

During his testimony to the public hearing, the director general, Veld, stated that as far as he was concerned, it was a condition that people should be given the opportunity of having incorrect decisions against them rectified. In practice, however, this was almost impossible for parents, partly because decisions were not communicated clearly to parents and objections were dealt with slowly and not independently of the first assessor. The weekly reports by the CAF showed a picture of biased treatment: the case workers viewed as improbable the likelihood of parents acting in good faith or being able to demonstrate that their applications were in order. In 2015, the leading officials at the Tax and Customs Administration noted as an action point that politicians should be involved with the "dilemma" of the group-based "80% wrong/20% correct" approach and its impact on the 20%. This 80-20 ratio, incidentally, is an assumption: there is no quantitative substantiation for the figures. The action point remained on the action list for a long time before disappearing, with no evidence from the documents about what happened to it. State secretary Wiebes stated being unable to remember ever having been informed about the dilemma concerning the group-based '80/20' approach.

Meanwhile, the Tax and Customs Administration continued to operate the group-based approach. This was not limited to clients of fraudulent childcare organisations or childminder centres. It also occurred in cases, such as the CAF 11 affair, in which after investigations by the CAF and after consultations with the Fiscal Intelligence and Investigation Service and the Public Prosecution Service, it was concluded that there was no evidence of fraud at the childcare organisation.

The CAF 11 affair referred to by the Ombudsman was long viewed as exceptional

It became clear to Wiebes from the investigation by the Ombudsman that was presented to the House of Representatives in August 2017 that the Tax and Customs Administration had unlawfully stopped benefits to groups of parents. The report stated that the Council of State had condemned the way in which the benefits in the CAF 11 affair had been stopped. The Ombudsman also concluded that there had been no fair play and that objections were processed far too slowly. Despite this, the House of Representatives was informed by Wiebes in September, in answer to a written question on whether parents had suffered unnecessarily as a result of the abrupt withdrawal of their benefits and the repayment demands, that there was no evidence of this. In his testimony to the hearing, Wiebes described this as an incomprehensible, astonishing, wrong and idiotic answer.

The fact that the Benefits technical coordinator had referred in a specific memo to the Benefits management team in March that year to the errors made by the Tax and Customs Administration/Benefits and had argued for compensation was not reported to Wiebes.

Shortly after his appointment, state secretary Snel gave an official response to the Ombudsman's report. Although the Tax and Customs Administration/Benefits had dealt with the parents as a group, there was no willingness to compensate the parents as a group. Snel's officials told him that the process had not gone well, but that the CAF 11 investigation was started for good reasons and that the work method used by the Tax and Customs Administration/Benefits in denying benefits to groups had been changed in 2016. Parents who were found to be entitled to the allowance received apologies and were able to submit individual applications for damages, via the courts or otherwise. Snel consented to this approach and assumed this meant the matter had been dealt with. The childcare director at the Ministry of Social Affairs and Employment was also informed by the Tax and Customs Administration that a case like CAF 11 would never happen again. At the time, the fact that the problems in the CAF 11 affair were present in other cases, and that the problem of the group-based approach did not just relate to the way in which benefits were stopped, was not a point of discussion. It was only on 4 June 2019 that Snel and the director general of the Tax and Customs Administration, Jaap Uijlenbroek, who had been appointed to the position in 2017, realised that the parents in the CAF 11 affair had incorrectly been viewed as potential fraudsters. It also became clear to them that the lack of a single piece of evidence was sufficient to compel people to repay several years' worth of benefits. During the summer of 2019, it gradually emerged that similar problems had occurred in other CAF cases.

In summary, the committee answered the inquiry question as follows:

In the wake of the Bulgarian fraud, state secretary Weekers reported to the House of Representatives that law-abiding citizens would be inconvenienced by the enhanced checks more often, for example by having to wait longer for their benefits. The top-level officials at the Tax and Customs Administration accepted a group-based approach, in which the consequences for law-abiding citizens would extend beyond waiting longer for their benefits. They resolved to get politicians onside for this, but it is not apparent that this happened. What is true is that state secretary Wiebes is unable to remember.

In 2017, it quickly became clear to Wiebes and his successor, Snel, from a ruling by the Council of State and the "*Geen powerplay maar fair play*" report by the Ombudsman, that a lot went wrong with the processes in the CAF 11 affair. For example, the benefits for whole groups of parents in the CAF 11 affair were unlawfully stopped, there was no fair play, and the time taken to deal with objections was far too long. In spite of this, Wiebes stated to the House of Representatives, less than a month after the Ombudsman's report, that there was no evidence of unnecessary suffering by parents resulting from the withdrawal and repayment demands of childcare allowance – an answer that he described as idiotic in his testimony to the hearing.

The official advice in the wake of the report by the Ombudsman was exclusively in relation to the CAF 11 affair. Snel did not ask whether the problems were more widespread. It was only in June 2019 that it became clear to Snel and the top-level officials of the Tax and Customs Administration that, in addition to the findings by the Ombudsman, the CAF 11 affair was also incorrectly viewed as a case of fraud and that the parents had been treated as potential fraudsters from a tunnel-vision perspective.

c. The 'malice/gross negligence' approach, as a result of which it was not possible for parents to arrange payment plans;

No personal payment plans in the event of malice or gross negligence

Anyone who has to repay benefits to the Tax and Customs Administration/Benefits may apply for a personal repayment plan. The Tax and Customs Administration then sets the amount to be paid in monthly instalments – the amount depends on the applicant's financial situation. If there is still an outstanding debt after two years, no further repayments are needed. However, it can be used to set off benefits and income tax rebates for another three years.

Requests for personal payment plans are rejected if, in the view of the Tax and Customs Administration, it is likely that the debt is the result of malice or gross negligence. Only standard repayment plans are possible in such cases. This means that debts have to be repaid in full in 24 equal monthly instalments. Failure to pay on time may lead to the Tax and Customs Administration taking far-reaching recovery measures, such as possession of cars or the

enforced sale of homes. In situations where malice or gross negligence are deemed to be involved, there is generally no limit on the period during which the recovery of payments stops. Moreover, people can be denied debt counselling if it is clear that they have been accused of malice or gross negligence by the Tax and Customs Administration/Benefits.¹⁴ In practice, the designation 'malice' or 'gross negligence' can lead to the most dire situations, not least because people so designated are regarded as malicious fraudsters by other organisations as well.

In the cabinet response to the final report by the Benefits Administration Advisory Committee¹⁵, in March 2020, state secretary Alexandra van Huffelen reported that between 2012 and 2019, some 25,000 to 35,000 people had been deemed to be guilty of malice or of gross negligence. Several months later, she reported that on the basis of a random check, it appeared that in 94% of such cases, the designation of malice or gross negligence was unjustified according to present-day criteria, because the reason had not been properly recorded, because there was no clear evidence of malice or gross negligence, or because the grounds for being so designated had not been given to the parents in question.¹⁶

Little attention was paid by ministers and high-ranking officials to malice or gross negligence

Weekers was aware that people not considered to have acted in good faith were unable to have personal repayment plans. He was not informed about the Tax and Customs Administration's working methods in practice. The same was true for his successor, Wiebes. In November 2014, he reported to the House of Representatives that no personal repayment plans were available in proven cases of malice or gross negligence. He was informed by officials in the same month that a number of individual cases in the De Parel affair involved malice or gross negligence, such as where no childcare had been provided, for example, and that the Tax and Customs Administration/Benefits would therefore be imposing penalties in a few cases.

The Ombudsman asked questions about malice and gross negligence

Prompted by a letter from the Ombudsman, officials informed Snel in February 2018 about malice and gross negligence in relation to the recovery of payments by the Tax and Customs Administration. His officials reported that, in the case of people accused of malice or gross negligence, there was in principle no time limit after which attempts at recovering payment were abandoned. It was also stated that the consequences could mean people in this category spending many years living at the minimum social security level of income. The Ombudsman asked whether the Tax and Customs Administration, at the request of the person in question, could stop the practice of setting off their debts, either in whole or in part, against their current entitlement to childcare allowance, otherwise people would be unable to pay for their childcare, with all the consequences that that would entail. The Tax and Customs Administration/Benefits changed course and started to proactively inform parents and service providers about the possibility of their debts no longer being set off against advance payments for childcare allowance. No further action was taken.

The House of Representatives asked about malice and gross negligence

In May 2018, MPs asked questions about malice and gross negligence, following the report by the Ombudsman about CAF 11. The questions were answered in general terms. It was only after publications in the media, following the presentation of a catalogue of cases by the Socialist Party in late August 2019 and an express request for more information from the House of Representatives standing committee on Finance on 24 October 2019, that Snel and high-ranking officials at the Ministry of Finance were informed in greater detail about the approach taken by the Tax and Customs Administration towards malice and gross negligence when recovering payments. Snel and secretary general Manon Leijten were shocked, not least because it was the most vulnerable groups in particular who were impacted by accusations of malice or gross negligence in the context of the financial threshold being applied. Snel did not wish to see people in financial problems that were impossible to oversee as a result of accusations of malice or gross negligence. He promised the House of Representatives that investigations of malice or gross

¹⁴ Parliamentary document II 2019/20, 31 066, no. 681.

¹⁵ Parliamentary document II 2019/20, 31 066, no. 613.

¹⁶ Parliamentary document II 2020/21, 31 066, no. 754.

negligence were to be suspended in anticipation of the investigation by the Central Government Audit Service, which had been decided on in March 2019. He also promised that compulsory repayments were being suspended for people who in the past had been unable to obtain a personal repayment plan as a result of their being accused of malice or gross negligence by the Tax and Customs Administration. On 5 November 2019, he received another official memorandum. It stated that determining malice or gross negligence occurred mostly in the case of childcare allowance¹⁷ because of the high amounts that had to be repaid and the financial threshold operated by the Tax and Customs Administration for malice and gross negligence. Information from a memo about repayment claims from people deemed to be guilty of malice or gross negligence that were still outstanding from the years 2005-2012, and which amounted to a total of €192 million, did not reach the state secretary. There is no apparent evidence of officials actively keeping ministers informed about malice or gross negligence. The silence surrounding the subject was only broken following explicit requests from outside the ministry.

Even during the course of the investigation by the inquiry committee, new information emerged about malice and gross negligence. On the day after the final public hearing, state secretary Van Huffelen sent an official memo dating from February 2016 to the House of Representatives. The memo described a proposal whereby parents who had to repay more than €3,000 in childcare allowance would be labelled malicious and grossly negligent by default and without any verification. The aim was to be able to quickly clear 7,000 requests for personal repayment plans. The status of and follow-up action in relation to this memo remain unknown at present.

In summary, the committee answered the inquiry question as follows:

State secretary Weekers and his successor, Wiebes, knew that personal payment plans were not available to those whose debts were attributable to malice or gross negligence. They were not informed about the way in which these debts were administered. Following questions raised by the Ombudsman, state secretary Snel was explicitly informed in February 2018 that the designation of malice or gross negligence could result in families having to spend many years managing on the minimum level of social security income. At the time, the Tax and Customs Administration stopped setting off debts against current entitlement to childcare allowance, but no further action was advised, and none was taken. The Benefits Administration Advisory Committee did not include malice/gross negligence with its recommendation about compensating CAF 11 parents in November 2019. It was only upon the insistence of the House of Representatives in late 2019 that the state secretary made more information available and that the Tax and Customs Administration/Benefits stopped applying the label of malice or gross negligence in cases where requests for personal repayment plans had been submitted. But even at that time, there was still information at the Tax and Customs Administration that had not yet reached the state secretary.

H. Inquiry question 3

Why was the policy on childcare allowance maintained, given the available information and signals, and why were the affected parents not compensated at an earlier stage?

As apparent from the answers to the previous inquiry questions, there had been many indications about the hardline approach, such as in the media and the House of Representatives. Despite this, the committee can see a number of reasons why a turnaround took so long to materialise.

Distance between administration and policy: nobody taking responsibility

The combination of a group-based approach, an 'all or nothing' policy, the designation of malice or gross negligence when demanding repayments, and deficiencies in internal and external legal protections was maintained for a long time and led to very distressing situations. Various indications, already mentioned, of the disproportionate consequences of the 'all or nothing' approach reached as high as the ministerial level. The signals about malice/gross negligence

¹⁷ It has since emerged that the institutional bias of the Tax and Customs Administration in administering the childcare allowance was also a feature in its administration of other benefits. See parliamentary document II 2020/21, 31 066, no. 754.

were not present until October 2019. Because of the lack of a hardship clause in the General Act on Means-Tested Benefits and the development of case law, which was created in part by proceedings launched by the Tax and Customs Administration, there were in practice no easy solutions available for modifying the all or nothing approach. The view at the Tax and Customs Administration was that a change in the law would be needed to alter the hard line. However, no concrete proposals for amending the Childcare Act or the General Act on Means-Tested Benefits were ever presented to ministers.

The variance between the administration on the part of the Tax and Customs Administration/Benefits and the policy officials at the Ministry of Social Affairs and Employment, as well as their different perspectives towards the problems, formed an obstacle to finding a solution in 2013 and 2015. The separate political responsibilities for administration and policy impeded Weekers from urging Asscher to change the law. In a discussion in the House of Representatives in September 2014, Asscher in turn referred to the state secretary for Finance with regard to a solution for parents facing high repayment demands.

All told, a picture emerged of a culture of separate areas of responsibility in which ultimately nobody showed sufficient leadership for the moral responsibility for the overall picture with the aim of ending the disproportionate approach.

Signals and solutions not prioritised; seriousness and urgency not detected

It should also be pointed out that, for a long time, the scale of the problems was not fully appreciated by ministers. The discussions about the 'all or nothing' approach were prompted mostly as a result of specific individual cases, such as De Appelbloesem and De Parel, and the supply of information about the approach remained largely limited. Nor did ministers ask probing questions about the problems as a whole. During the handover of ministerial positions, too, the full extent of the problems was not raised, and previous signals that had been received were lost. Time and again, responses to signals were limited. In response to the recommendation by the technical coordinator in March 2017, for example, that parents in the CAF 11 affair be compensated, it was instead decided that parents would continue to be investigated on an individual basis before an offer was made to them. The initial response to the recommendation by the Ombudsman in 2017 that the same group of parents should be offered apologies and compensation was to only apologise to those parents whose allowance had been unjustly stopped, and only after a further investigation by the Tax and Customs Administration. Compensation was not actively offered; parents were themselves supposed to submit an application for damages. The observation by the Ombudsman that the Tax and Customs Administration/Benefits was legally obliged to give parents a second opportunity to provide documentation led initially only to adjustments in CAF cases, fraud investigations, and intensive and subject-based monitoring, and it was only after coverage in the media and further questioning by the Ombudsman that the practice was introduced more broadly by the Tax and Customs Administration/Benefits in 2020.

Tunnel vision with fraud led to mistrust as the starting point

The fact that signals were not detected at an earlier stage resulted in part from the impression among Weekers, Wiebes, and Asscher that the signals referred to cases of fraud, and from the fact that they were presented to them as such. The distinction between fraud and administrative errors or oversights on the part of parents was frequently not made sufficiently clear in the information provided on these matters. The predominant political opinion, especially between 2013 and 2015, was that a hard line was needed against fraudsters. This was the product of the 2010 and 2012 coalition agreements, and was further stoked by cases of fraud, including the Bulgarian fraud, and by the setting up of the ministerial anti-fraud committee. On the ground, too, there was a harder line towards tackling fraud. Against this background, parents – such as those in CAF cases – were approached from a position of mistrust and regarded as fraudsters, or potential fraudsters. This tunnel vision, in relation to the CAF 11 affair, continued until June 2019.

Focus on mass process and targets

The regular information on progress relating to the administration of the childcare allowance was centred around big numbers, targets, and key performance indicators, rather than on the hard and distressing consequences of the anti-fraud approach that some of those applying for the

allowance were faced with. For years, policy officials and ministers at the Ministry of Social Affairs and Employment concentrated on a new system of funding childcare, and had little focus for the urgency of necessary improvements to the existing system. The lack of interest among those responsible for policy on childcare allowance and the gap between their involvement and that of those applying the policy created a situation in which the Tax and Customs Administration/Benefits had plenty of scope in determining, without any checks or balances, how the policy should be implemented in practice.

A chasm and “layers of loam” hinder the proper supply of information

It was not only between implementation and policy, but also between politicians and officials that a yawning chasm existed. Various high-ranking officials at the Tax and Customs Administration have stated that they were uneasy about the consequences of the ‘all or nothing’ approach. However, there is very little evidence of this in documentation sent to ministers. Wiebes and Asscher therefore never had the impression that officials were sounding alarm bells. And indeed, Weekers, Wiebes, Snel, and Hoekstra have all pointed out that, time and again, the Tax and Customs Administration is not or only partially forthcoming with politically and socially relevant information. Weekers and Wiebes described this in the public hearings as a “layer of loam”. The way in which information about malice or gross negligence emerged is a striking yet tragic example of this. Another example is that of the memo from the technical coordinator dating from 2017, which only appeared after repeated questioning by the House of Representatives and which was made public in the autumn of 2020.

Lack of internal and external counterweights; little room for criticism

Forces that could have offered a counterweight and been on the side of the parents were for too long of little significance. This started internally at the Tax and Customs Administration/Benefits. One example is that of the legal advisor, who was supposed to supervise the correct implementation of the law, but was unable to advise from an independent position vis-à-vis the rest of the Tax and Customs Administration.

For many years, objections by parents were dealt with far too slowly and insufficiently independently, despite the moral and legal obligation on the Tax and Customs Administration to investigate and, if necessary, to rectify errors, debatable working methods, and disproportionate consequences.

Parents who appealed to the courts were often deemed to be in the wrong by the Council of State, which adjudged that the ‘all or nothing’ approach by the Tax and Customs Administration did not have to be assessed in terms of the principle of proportionality.

The House of Representatives was affected not just by the same “layer of loam” that ministers encountered, it was also misinformed on several occasions and faced refusals by the cabinet to provide information – for example, with a view to protecting personal opinions, in accordance with the Rutte doctrine. The advisory memo by the technical coordinator dating from 2017 can again serve as an example of this. The most important parts of the memo were not initially shared with the House of Representatives. It was only after the relevant legal advice was read out during a public hearing of the inquiry committee that the whole of the memo was sent to the House of Representatives.

Compensation a long time coming

It was not until June 2019 that state secretary Snel wanted to give compensation for more than just missing statutory deadlines. By then, the matter had already been covered extensively for some time in the media and in the House of Representatives. Snel’s turnaround occurred after it had become clear to him on 4 June 2019 that the arguments underpinning the CAF 11 case were too weak. The Tax and Customs Administration/Benefits embarked on this course following questions by journalists from Trouw and RTL Nieuws. It became clear at the ministry that this marked the start of a political crisis and that the state secretary could expect a tough debate. Consideration was given to making a gesture to the parents in the short term, but Snel ultimately decided not to do so. Even though much of the subject matter was clear at the ministry, the task of considering what form compensation should take was given to an external advisory committee, with the consent of the council of ministers. Legal risks and the fear of the financial consequences of creating a precedent formed obstacles to reaching a rapid solution. The immediate costs of

compensating the CAF 11 parents did not form an obstacle to compensation being paid speedily. Also, the cabinet was hoping to draw a line under the matter and believed that recommendations by an external and well-respected committee would lead to fewer discussions in the House of Representatives and would generate greater trust among victims. Partly because the Council of State returned in October 2019 to the years-old case law on the 'all or nothing' approach, the recommendations by the committee did not appear until mid-November 2019. That was the point at which compensation for the CAF 11 parents could finally materialise. On 24 December 2019, minister Hoekstra reported to the House of Representatives that 280 of the 287 CAF 11 parents had received compensation.

Decision moments

The committee noted that, in the past fifteen years, there had been several occasions on which ministers and top-level officials could have made different decisions, based partly on the signals that were appearing. This could have prevented, lessened, or rectified any disproportionate consequences for parents. In the view of the committee, important decision moments up to the end of the period covered by its investigation were, in any case:

- the non-inclusion in legislation of an option to intervene or to deviate in the event of unintended severe consequences, such as in the form of a hardship clause or discretionary powers. Legislation on disproportionately high repayment demands was not amended between 2005 and December 2019, even though this could have been done at any time;
- the decision by the Tax and Customs Administration/Benefits in 2009 to interpret the law strictly, meaning that repayment of the entire sum of childcare allowance was demanded from those who did not pay their personal contributions, or even part thereof. The Tax and Customs Administration/Benefits could also have opted, for example, to demand repayments on the basis of the childcare costs actually paid, in line with the recommendation by the State Advocate;
- failure to act on the part of top-level officials at both the Tax and Customs Administration and the Ministry of Social Affairs and Employment as well the state secretaries of Finance and the Minister of Social Affairs and Employment in the light of indications of disproportionate repayment demands between 2012 and 2016;
- the decision by the Tax and Customs Administration and the Ministry of Social Affairs and Employment in 2013-2014 to address fraudulent childminder centres and childcare organisations via the parents;
- the working methods used by the Tax and Customs Administration in tackling fraud and in following up signals from the CAF team, which saw the childcare allowance of groups of parents being stopped without any individual assessments and where parents were refused personal repayment plans;
- the efforts of the top-level officials and ministers at Social Affairs and Employment to develop a new funding system between 2014 and 2018, but all the while doing nothing for the parents who at the time were facing debt problems because of the high level of repayment demands in relation to childcare allowance;
- the decision by the Benefits management team in March 2017 not to follow the internal recommendation by the technical coordinator to compensate parents in the CAF 11 affair;
- not acting immediately on the recommendation by the National Ombudsman in the "*Geen powerplay maar fair play*" report of August 2017 to compensate parents in the CAF 11 affairs for the suffering they had endured;
- the slow examination and development of proportionality in setting childcare allowance by the Ministries of Social Affairs and Employment and Finance between April 2018 and December 2019;
- not immediately compensating parents when state secretary Snel established in June 2019 that parents had been wrongly treated, but instead setting up and awaiting the recommendations of the Benefits Administration Advisory Committee.

In summary, the committee answered the inquiry question as follows:

Over the years, there had been various signals about the far-reaching consequences of the anti-fraud approach and of the monitoring of childcare allowance. For a long time, specific

signals about the 'all or nothing' approach did not lead to any changes. The chasm between the Ministry of Social Affairs and Employment, as the body responsible for the policy, and the Tax and Customs Administration/Benefits, as the body responsible for its implementation, as well as the separate political responsibilities for policy and implementation, operated as obstacles to finding a solution. It did not help that the signals were frequently linked to a specific case, without the full extent of the problems being evident. If any action was ever taken as a result of signals, it was often only limited. Moreover, tunnel vision was a feature of anti-fraud action, all against the background of a political desire to come down hard on fraudsters. The line between deliberate fraud and unintentional errors became blurred, and it became standard practice to treat parents with mistrust. By designating parents as 'malicious' or 'grossly negligent', the Tax and Customs Administration put many parents in financial difficulties. High-ranking officials and politicians remained in the dark about the practice of the 'malice/gross negligence' designation until October 2019.

Ministers blamed the fact that there were not more and clearer signals on a broader pattern of inadequate provision of information from the Tax and Customs Administration. Various internal and external counterweights were insufficiently able to make their roles count. Nonetheless, it was questions in the media and the House of Representatives that resulted in state secretary Snel deciding in June 2019 to compensate the victims in the CAF 11 affair. This did not happen straight away, partly because of legal questions and the uncertain financial consequences of setting a precedent. The cabinet agreed to Snel's proposal to ask a committee to advise on the form compensation should take, in the hope that this would be more likely to win over both parents and the House of Representatives than if the Ministry of Finance itself were asked to come up with a solution. The CAF 11 parents finally received compensation in November 2019, after the committee had issued its advice.

I. Inquiry question 4

What lessons have the witnesses learned from the hardline approach in administering childcare allowance?

During the public hearings, the committee asked the witnesses what lessons they had learned from the childcare allowance affair. Appendix 1 contains a selection of the lessons mentioned. As well as the answers to the specific question, many implicit lessons were learned during the public hearings, the most prominent gist being that something should have been done differently at the time. These implicit lessons can be read in the reports of the public hearings. The explicit lessons learned by the witnesses mostly concern the benefits system, the legal framework, the feasibility of the wishes of politicians, the human dimension, the Tax and Customs Administration, and the importance of ministers having a clear picture of what is being carried out in their fields of responsibility.

Complexity of the benefits system

Several witnesses described the benefits system as complex and said it places a significant degree of responsibility on citizens' shoulders. For the Ministry of Social Affairs and Employment, that was also the reason for aiming for a different system.

Scope for flexibility in legislation

A few witnesses stated that legislation should offer scope for flexibility in dealing with unforeseen effects of legislation, with the possibility of taking account of the fact that citizens may not have a full overview of laws and regulations. Greater discretionary powers for the relevant minister were also mentioned as a solution for dealing with unforeseen effects.

The feasibility of the wishes of politicians

Some witnesses remarked that consideration should be given to the feasibility of the wishes of politicians before new policies are introduced.

Not losing sight of the human dimension

A lesson referred to by a number of witnesses was the importance of not losing sight of the human dimension. One witness stated that there should be greater empathy in the administration of policies. It is not just the efficiency with which legislation is carried out that should be looked at, but also other public values, such as dealings with citizens.

No financial incentives for tackling fraud

Anti-fraud practices should not involve the use of financial targets that have to be reached, and where organisations have to make up any shortfalls from the rest of their budgets if they do not reach their targets. After all, that creates an additional institutional interest.

The culture at the Tax and Customs Administration

The lessons about the Tax and Customs Administration concern its culture and organisation. Additional skills are needed to ensure that signals from the work floor are properly picked up. Several witnesses stated that the guarantee of the ‘conscience function’ of the Tax and Customs Administration – more specifically, its technical structure – should be properly in order. It was also said that the Tax and Customs Administration – or rather, the director general’s span of control – is too large.

A clear view of the consequences of policies

The distance between policy and implementation should be smaller than was the case with childcare allowance. Ministers with responsibilities should always have to face the consequences of their policies. In this matter, a clear view could have been achieved by entering into discussions with parents, “with people who themselves have to deal with the consequences”.

XXI. PART II

Chapter 1 Prelude

For the origins of the anti-fraud approach in relation to childcare allowance, this chapter goes back to legislation dating from around 2005, the decisions taken on interpreting the legislation, and the tightening of the anti-fraud approach during the Rutte I and II cabinets.

J. 2004: Childcare Act (Wet kinderopvang)

The Childcare Act entered into force on 20 October 2004, creating the right to claim childcare allowance from the year 2005. The Act provides the statutory basis for childcare allowance. In essence, the childcare allowance amount depends on the ability of the parents to pay and the costs of childcare.¹⁸

The Childcare Act contains several preconditions that must be met in order to be eligible for childcare allowance. No binary interpretation of these preconditions (eligible/not eligible) was prescribed or mentioned in the legislation and no such interpretation automatically derives from it. However, a strict ‘all or nothing’ approach would subsequently be applied in practice. State secretary Van Huffelen recently confirmed to the House of Representatives that this approach does not explicitly follow from the law: “*It is right to conclude that there is no explicit reference in the law from which it could be interpreted that the proportionate allocation of childcare allowance was not possible, even though we did apply the law in this way, which practice was also confirmed by the courts.*”¹⁹

During the formation of this law, in the cabinet’s explanatory notes in relation to the law, and during its passage through parliament, there was no examination of the possible consequences for parents of repayment demands for large sums of money. Nor was there any mention of an ‘all or nothing’ approach.

¹⁸ Section 1.7 of the Childcare Act.

¹⁹ Parliamentary document II 2020/21, 35572, no. 34. It should also be pointed out that “the law” is more broadly defined here and may also refer to the General Act on Means-Tested Benefits.

K. 2005: General Act on Means-Tested Benefits (Algemene Wet Inkomensafhankelijke Regelingen)

With the passing of the General Act on Means-Tested Benefits in September 2005, means-tested benefits, especially those relating to healthcare, children, and housing, were harmonised. The General Act on Means-Tested Benefits relates to the awarding, payment, and recovery of benefits by the Tax and Customs Administration. Despite the advice of the Council of State, the government made the conscious decision not to include a hardship clause in the General Act on Means-Tested Benefits that would permit derogations from binding legislation in the event of unforeseen and unreasonably harmful consequences.

During its examination of the bill, the House of Representatives focused on a large number of aspects in the proposed act, such as hardship clauses, safety nets, cash flow problems, and repayment schemes. The House of Representatives initially submitted an amendment for the inclusion of a guarantee against unforeseen and unjust consequences, in the form of a general hardship clause. The amendment was ultimately not put to a vote.

During the public hearings, Professor Marseille explained that although a strict ‘all or nothing’ approach was not explicitly laid down by the law, the rules for demanding repayment of benefits governed by the General Act on Means-Tested Benefits were clearly strict.

Mr Marseille: Section 26 states that if it is established that benefits have been paid that should not have been, the whole amount must be repaid. A discussion is now taking place as to whether there is some leeway in that provision, Section 26, but reading it at first sight, it is a fairly strict provision.

L. 2005-2008: Focus on payment of benefits

There was political pressure to introduce the benefits system quickly. This was caused in particular by the healthcare allowance, which was related to the introduction of a new healthcare system. At the time the benefits were introduced, neither the cabinet nor parliament paid much attention to their feasibility. One result of this was that the Tax and Customs Administration/Benefits was working with an inadequate ICT system until 2011. This meant that, during the first few years, the Tax and Customs Administration/Benefits were only able to verify claims retrospectively, sometimes as long as five years after the benefit had been awarded. In the first years following the introduction of the benefits system, the focus of the Tax and Customs Administration lay on the provision of its services and on getting the payments of the childcare allowance in order.

M. 2009: Focus on tackling fraud and improper use

In 2009, the Tax and Customs Administration investigated suspicions of fraud at several larger child minder centres, including De Appelbloesem. As part of its investigation, the Tax and Customs Administration asked the State Advocate for advice regarding the interpretation of the law where arrangements existed that offered ‘free’ childcare and for which parents paid no, or hardly any, personal contributions.

The State Advocate advised that the childcare allowance for parents who had not paid a personal contribution be set at a lower level, to be followed an individual assessment in each case. At the same time, the State Advocate stated that the reasoning of the Tax and Customs Administration/Benefits, by which childcare allowance was provisionally set at zero, was arguable, but that parents should be given the opportunity to demonstrate that they were facing costs for childcare. In the view of the State Advocate, this would involve a specific assessment that would take all the facts and circumstances into account. To the extent that a personal contribution had been paid following an initial cut in childcare allowance, the State Advocate believed that entitlement to childcare allowance did exist.²⁰

The Tax and Customs Administration/Benefits did not follow the advice of the State Advocate – or what the State Advocate regarded in the Tax and Customs Administration/Benefits’ reasoning as “also arguable” – and started applying a strict interpretation of the law, in which a failure to pay, either wholly or partly, one’s personal contribution led to demands for repayment of childcare allowance in its entirety. The Tax and Customs Administration/Benefits did not present this

²⁰ Parliamentary document II 2020/21, 31 066, no. 753.

decision to the political arena, but instead sought to have the interpretation it had opted for upheld by the courts.

During the public hearing, Mr Marseille confirmed that the Tax and Customs Administration could at that stage have chosen a different, more proportionate approach. In his view, this would certainly have gained the approval of the courts:

Mr Marseille: *If a regulation allows an administrative body leeway and if it uses that leeway, then it must do so 'within the bounds of reason' if you then move slightly in the other direction. Before you cross the limits, the courts are unlikely to object. Suppose for example that the Tax and Customs Administration had decided on 10%. Let's say error was €100 and the allowance was €10,000, and we then deduct 10%. You have not been able to account for 10% of your personal contribution, so 10% is deducted from the allowance as well, so you get €9,000 and €1,000 is reclaimed. The courts allowed this. I'm convinced of that, to be honest.*

Mr Van Wijngaarden: *You say the leeway already existed.*

Mr Marseille: *Yes, I believe so.*

The strict 'all or nothing' approach used by the Tax and Customs Administration/Benefits led to court proceedings, in which appeals went all the way to the highest court, the Council of State. The Council of State sided with the Tax and Customs Administration/Benefits; in the view of the latter, the ruling legitimised the 'all or nothing' approach.²¹

After the rulings by the Council of State, it became more difficult for the Tax and Customs Administration to opt for a different approach:

Ms Van Kooten-Arissen: *What scope did the Tax and Customs Administration have for choosing a different approach after the initial rulings by the Council of State – that is, to deviate from those rulings?*

Mr Marseille: *I think there are two things to be said about that. If the Tax and Customs Administration had said itself that they believed that the Childcare Allowance Act afforded them the scope to work in a proportionate manner when setting the level of the allowance, then they could have done so, in principle. The only thing is, if you have been given a ruling from the highest court that says what you are doing is perfect, then psychologically that could be more difficult. But if they had started working that way earlier, then my prediction, made with hindsight, is that the Division would have said, yes, that's fine, if that's your decision, then good.*

The notion that the Tax and Customs Administration/Benefits could have chosen a different line even after the rulings by the Council of State is reaffirmed by Professor Zijlstra in the paper he wrote at the request of the committee. Zijlstra had slightly more reservations about the likelihood of success in the highest administrative court: *"Because the most important elements of the 'all or nothing' case law were legally binding as a result of the relevant legislation in the opinion of the Division, it is impossible to conclude from the rulings anything other than that the legal options for the Tax and Customs Administration/Benefits to operate a more lenient policy, even if it had felt so inclined, were more or less non-existent. But because the Tax and Customs Administration/Benefits did not operate a significantly more lenient policy, the question of what the Division's attitude to it would have been remains a matter for speculation. However, it did appear to be possible in 2019 for the Division to give its own completely different interpretation of the statutory provisions; it is not entirely inconceivable (but in my view, not probable) that the Division would have started doing so earlier if the Tax and Customs Administration/Benefits had taken the view that that was the correct interpretation."*

In a paper, the former government commissioner for general administrative law, Michiel Scheltema, argued that it was primarily up to the Tax and Customs Administration to interpret the law differently: *"If the consequences of a particular interpretation are as serious as these sources suggest, then is a different interpretation not possible? Just as a court can, upon further consideration, reach a different interpretation, so can an administrative body. I would go so far as to say that an administrative body should do so first, as it is much better placed than the courts to assess the significance of signals from the National Ombudsman and the Scientific Council for*

²¹ Examples of rulings of this kind include, but are not limited to: ABRvS 24 August 2011, ECLI:NL:RVS:2011:BR5679; ABRvS 9 July 2014, ECLI:NL:RVS:2014:2473. The paper produced at the request of the committee by Professor Zijlstra contains more examples.

Government Policy. Also, the reports from both these bodies were directed at the government, not the courts.²²

N. 2010: Rutte I coalition agreement, tougher anti-fraud policy

On 14 October 2010, the Rutte I cabinet took office, including state secretary Weekers (Finance) and minister Kamp of Social Affairs and Employment (having responsibility for childcare policy). The section in the coalition agreement about work and social security includes the following: “Stronger approach towards tackling benefit fraud. Benefit fraud undermines solidarity. Benefits awarded incorrectly will actually be recovered, regardless of the level of fraud.” State secretary Weekers explained at the time what lay at the basis of the harder line towards fraud:

Mr Weekers: *When I became state secretary, the image of the Tax and Customs Administration was largely based on a strong reputation. My focus was getting the State's finances in order, at a time of extremely difficult financial and economic conditions. We were still in the middle of the credit crisis, the euro crisis. We were in the worst economic crisis since the 1930s. Drastic spending cuts were necessary and taxes had to be raised sharply. There was a strong focus on fighting fraud, because – to paraphrase MP Nijboer in one of the debates at the time – fraud is not just toxic for what we as a society provide, but also erodes support for the welfare state. At the time, it was felt that any money at all that ended up in the wrong pockets was not just highly regrettable, but also that it should be saved in other ways. That's how things were at the time.*

State secretary Weekers was given the task in the coalition agreement to carry out reforms in the area of child allowances. The Ministry of Social Affairs and Employment was responsible for policy, but it was the Tax and Customs Administration that had to carry it out. In the handover file he received upon taking office, childcare allowance was described as a problem area:

Mr Weekers: *In the case of child allowances, parents were expected to make a personal contribution in proportion to their income, but there was an expectation that fraud would be rigorously tackled as well. [...] Very specifically in relation to childcare allowance, perhaps: in my handover file, it was stated that benefits, and childcare allowance in particular, were a problem area. These actual words were in my handover file. [...] The allowances had been a major problem at the Tax and Customs Administration for a number of years. [...] The childcare allowance was mentioned in particular because of its considerable susceptibility to fraud that the ministry had identified at the time. [...] expenditure is greater than the budget and the system encourages abuse and fraud – this is especially true of childminding. It was also stated that the Tax and Customs Administration was the villain of the piece in the media, but that was because of the statutory framework. Elsewhere, it stated that the Netherlands Court of Audit and the Central Government Audit Service had for years indicated that fraud margins and uncertainty about their legality were considerable.*

At the time, the childcare allowance budgets were under pressure:

Mr Weekers: *It was a time of very deep spending cuts. I remember that my colleague, Kamp – who at the time was responsible for Social Affairs, for child allowances – was warned by the Minister of Finance: “The demands on the budget are expected to be even greater than what is in the books. You have 2.5 billion for childcare allowance, and no more.”*

State secretary Weekers was specifically informed in the handover file about the De Appelbloesem affair, which at the time was very much ongoing:

Mr Weekers: *Very specifically with regard to De Appelbloesem, it was noted that there were a large number of irregularities and that many of these were malicious, but also that there were cases involving credulity and that some people were taken in by smooth-talking intermediaries or childminder organisations to the effect that they could use De Appelbloesem without having to pay a personal contribution.*

²² Michiel Scheltema, *Een wet van Meeden en Perzen? Geen onwrikbare wet in het hedendaags bestuursrecht*, preliminary advice for the 2020 annual meeting of the Vereniging voor Wetgeving, p. 28, <https://www.nederlandseverenigingvoorwetgeving.nl/wp-content/uploads/2020/11/Preadvies-Scheltema-Een-wet-van-Meeden-en-Perzen.pdf>, consulted on 9 December 2020.

O. 2010 – 2011: House of Representatives motion about parents at De Appelbloesem

On 22 November 2010, during a committee debate on draft legislation on childcare with minister Kamp, a motion was submitted by MP De Mos (PVV),²³ which was subsequently carried, that requested the government *“to investigate which parents had fallen victim to fraudulent childminder organisations, and to reclaim the retrospective tax payments received by these parents from the fraudsters and not from the parents who have acted in good faith”*.

2011

On 20 January 2011, in a letter²⁴ about the De Mos motion – of which one of the signatories was state secretary Weekers – minister Kamp set out the grounds used by the Tax and Customs Administration for assessing whether the requirements of the law had been met. The minister also stated that parents may have relied in good faith on a childminder organisation, but that the Tax and Customs Administration was seeking repayment from the parents, in accordance with the law. The parents could have taken a private prosecution to establish the childminder organisation’s liability:

“If childcare allowance applications meet all the legal requirements, no repayment of the benefit will be demanded. Repayment demands are made in cases where no right (or only a partial right) to childcare allowance exists. If parents have to repay their childcare allowance in full, it is because the requirements of the Childcare Act have not been met. Examples of cases where benefit was paid out incorrectly include claiming for more than 52 weeks’ childcare in a year, submitting a backdated application without any evidence, non-payment of a personal contribution for childcare, using childcare allowance for paying a study insurance policy premium, as savings for a child, or adding it to one’s disposable income.

It should also be pointed out that the Childcare Act states that applicants for the allowance are responsible for the accuracy of their applications. It is possible that applicants for the allowance had in good faith authorised others to deal with their application. However, this does not alter the fact that responsibility for applications (and their accuracy) remains with the applicants themselves. If an applicant believes they have acted in good faith and have been hoodwinked by a childminder organisation, that is a private legal matter between the parties. The applicant can in such cases hold the childminder organisation liable.”

For parents in the De Appelbloesem case, recovering losses from the childminder organisation was not an option: by that time, it had been declared bankrupt six months previously. Co-signatory Weekers stated not to have been aware of this fact.

The committee debate on childcare on 18 May 2011, which was prompted chiefly by the abuse case in Amsterdam concerning Robert M., looked at the policy on fraud, but did not go any further than the November 2010 De Mos motion.

XXII. Chapter 2 Tightening the anti-fraud policy

This chapter deals with the fiscal agenda and the 2012 Taxation Plan, the Rutte II coalition agreement, the De Appelbloesem case, the establishment of the anti-fraud management team and the CAF, the anti-fraud policy at the Ministry of Social Affairs and Employment, and the establishment of the ministerial anti-fraud committee.

P. Fiscal agenda and 2012 Taxation Plan

In 2011, the anti-fraud policy was further tightened on several occasions, in accordance with the coalition agreement.

On 14 April 2011, the aims of the coalition agreement were translated to the Dutch taxation system, in the *“Naar een eenvoudiger, meer solide en fraudebestendig belastingstelsel [‘Towards a simpler, more solid, and fraudproof taxation system’]*” fiscal agenda. This saw the announcement of measures aimed at reducing tax and benefit-related fraud and at dealing rigorously with fraud that had been detected: *“A major point of concern is that systematic abuse of the existing tax and benefits system is increasing all the time. It could even be argued that the*

²³ Parliamentary document II 2010/11, 31 322, no. 106.

²⁴ Parliamentary document II 2010/11, 31 322, no. 116.

services being provided have gone too far. There are times, for example, when inaccurate information is provided with a view to claiming advance payments of benefits or provisional rebates. If this is discovered, recovering the amounts is often very difficult. The cabinet believes that this type of brazen fraud should be dealt with severely.”

Mr Weekers: *A few months after taking office, I published a fiscal agenda, based on three principles: simplicity, solidity, and fraud-proofing. As well as taxation matters, I had to balance out the administration of provisional rebates and advance payments of benefits with tackling fraud, which until then had not been much of a priority. I then took a number of measures in that context.*

Ms Kuiken: *You wondered whether the provision of services had not gone too far. [...] What exactly were you referring to?*

Mr Weekers: *To the order that no checks were to be carried out before a benefit was paid out. Actually, the order came from politicians in 2006 – if a benefit was applied for, it was simply paid out. We would look later at whether it was appropriate or not, and if not, we would reverse it. That could have major consequences. You have to be much more in charge of events, rather than following them. It has also been shown that it is not socially responsible first to give people large advance payments that you then demand be repaid. That causes people problems.*

On 13 May 2011, it was announced in the letter to parliament on tackling fraud and the improper use of childcare allowance²⁵ that penalties would be increased: higher fines (up to 100% of the fraud sum) and the introduction of a fine if checks showed that a substantially lower number of hours was taken than claimed in advance.

On 20 September 2011, the tightening of the previously announced anti-fraud policy – in relation to fines in particular – was implemented with the introduction of the 2012 Taxation Plan.

Q. Rutte-Asscher coalition agreement

The Rutte-Asscher cabinet took office in November 2012. Tackling abuse and fraud with income-related benefits were again mentioned in the coalition agreement, but the recovery of payments made incorrectly was not referred to as explicitly as was the case in the Rutte II coalition agreement:

“Anyone who can work should not be dependent on benefits. Anyone unable to work through no fault of their own has the certainty of an income of at least subsistence level. We want to keep things that way. That is why we are actively tackling abuse and fraud; all benefits will be structured so that they remain sustainable and accessible in the light of the ageing population and the fall in the proportion of people of working age.”²⁶

According to prime minister Rutte, however, this did not involve a change of course in terms of tackling fraud compared to the previous cabinet.

Mr Van der Lee: *As you perceived things, was there any difference in how fraud was to be tackled in the second coalition agreement between the Labour Party and the VVD compared to the previous coalition, in which you worked alongside the CDA, with the parliamentary support of the PVV?²⁷*

Mr Rutte: *No, because in my opinion this is very important to all three of the traditional popular parties, whether you’re talking about the Labour Party, CDA, or VVD – we all believe that there should be a proper safety net for people who are in difficulties. Since the start of the century, a benefits system has been created that is focused primarily on income support for people in particular circumstances, not entirely comparable with social security benefits, but more of an extension to that. But that also means you have to make sure that you get the balance right between helping people in the country and tackling fraud, and that support is given to those who are entitled to it. In my view, the Labour Party, CDA, and VVD all aim to achieve that balance.*

²⁵ Parliamentary document II 2010/11, 31 322, no. 123.

²⁶ Rutte II VVD-PvdA “Bruggen slaan” coalition agreement, 29 October 2012

²⁷ No mention of tackling fraud appears in the parliamentary support agreement.

R. The De Appelbloesem case did not result in a different approach

Following the media and political coverage of the De Appelbloesem case in the autumn of 2010, things remained quiet on the political front after the letter of 20 January 2011. That changed in the autumn of 2012. On 2 October 2012, the director general of the Tax and Customs Administration, Mr Veld, sent a memorandum to state secretary of Finance Weekers about the De Appelbloesem case, pointing out the major impact of demands for full repayment of childcare allowance in cases of non-payment of personal contributions. The memorandum stated that the repayment sums involved were high, “*similar to the level of a normal annual salary*”, and that it was believed a large number of parents were affected. What prompted the memorandum was the expected ruling by the Administrative Jurisdiction Division of the Council of State (for the sake of brevity, hereinafter referred to as the Council of State) in a case where a personal contribution was repaid by a childminder parent to a parent on the basis of a contract between the parent and the childminder organisation. The memorandum set out three options. Option 1 was to reclaim all benefits where no entitlement existed. Option 2 was to reclaim only the personal contributions, and option 3 was to reclaim all the benefits which at that point had not been definitively allocated. The official advice in the memorandum was to exercise option 3 – reclaim all the benefits that were not yet definitive at the time. This meant that officials were proposing a softer line in relation to the matter.

However, state secretary Weekers asked his officials to explore option 2 – the recovery of only the personal contributions.

Mr Weekers: I was presented with three options. It was pointed out to me that if we reclaimed the amounts in full, there would be social consequences and it would generate much publicity. The memorandum also raised the question of whether all these parents were aware of the fact that arrangements of this kind are against the law. [...] I said, doing nothing at all, not recovering anything, is not fair either. I then thought it was reasonable to offer a kind of voluntary disclosure scheme.

On 17 December 2012, a more detailed version of option 2 was presented to state secretary Weekers. The proposal entailed a derogation from the General Act on Means-Tested Benefits, after the consent of the Ministry of Social Affairs and Employment had been obtained, whereby parents would be given a one-off offer to pay a sum equal to their personal contribution to the Tax and Customs Administration/Benefits. Parents would be unable to object to or appeal against the offer. It was also proposed to inform the House of Representatives in advance. State secretary Weekers agreed to the proposals.

On 19 December 2012, the Council of State issued its ruling. It ruled that the Tax and Customs Administration had correctly set the childcare allowance of the parent in question at zero because the parent had not demonstrated that the childcare costs had been paid for in full. In its ruling, the Council of State also pointed out that if a gift agreement were to exist between a parent and a childminder in which the parent’s personal contribution was to be returned as a gift to the parent, then the entitlement to childcare allowance would remain.

As a result of the ruling, discussions were held between officials from the Ministries of Finance and Social Affairs and Employment. It was proposed to state secretary Weekers in a memorandum dated 1 February 2013 that full repayment demands should nonetheless be made of parents who had not paid their personal contribution, in the light of the ruling by the Council of State. This proposal was in sharp contrast to those of 2 October and 17 December 2012. However, the state secretary agreed to it.

Mr Weekers: When we were talking about October and early December [...] I was assuming it was on the basis of the documents in front of me that I was able to take the decision to demand repayments up to the level of the personal contributions. [...] It was then pointed out to me more than once that a requirement for receiving childcare allowance is payment of a personal contribution. That was not just the policy of the Ministry of Social Affairs and Employments, it was also the law. And that had now been confirmed by the highest administrative court. So I did not feel able to derogate from the law as it had been interpreted by the highest-ranking court.

In this memorandum of 1 February 2013, it was also remarked that free childcare could be arranged through pre-agreed gifts. It was stated that this was a “leak” in the regulations. State secretary Weekers provided minister Asscher with a memo on this matter on 5 February 2013

on the fringes of the so-called 'political quadrangle' – discussions between ministers at which they talk about one specific subject, for example.

On 25 February 2013, minister Asscher also received an official memorandum about the ruling by the Council of State in the De Appelbloesem case. The officials from the Ministry of Social Affairs and Employment advised that the system governing the personal contributions be maintained. *"For parents who had to repay the benefit they had received incorrectly, the rulings by the Council of State came as a bitter blow. In many cases, the sums involved were considerable."* Before this memorandum, the director general of the Tax and Customs Administration, Veld, officially requested the Ministry of Social Affairs and Employment expressly to present the decision to demand repayment to minister Asscher. Minister Asscher then did indeed receive a memorandum from his officials, which dealt primarily with the "leak" in the regulations. However, it was pointed out in the memorandum that the Tax and Customs Administration had specifically asked that the repayment demands be presented to the minister, and reference was also made to the in many cases large sums that parents had to repay.

Mr Van Aalst: *Your officials wrote to you about the consequences of the repayments for the parents. "The consequences were distressing and in many cases the sums involved were considerable. It is not clear whether parents were sufficiently familiar with the rules. However [...] the Council of State had stated in a ruling that nothing needed to be changed." They therefore advised you not to change anything. Did you agree with this line?*

Mr Asscher: *Well, the Council of State ... The fact that nothing needed to be changed concerned the question of whether the law needed to be tightened up.*

Mr Van Aalst: *Leave the 'all or nothing' approach intact.*

Mr Asscher: *The question before me was whether the law should be tightened up in order to stop the leak. Should you ban gifts between grandparents and other families? The question put to me in the memorandum was whether I could consent to the statutory framework remaining as it was. I read that as "we are not going to tighten the law". I agree with you: elsewhere in the memorandum, under the publicity heading, it states, "this is distressing for parents". I should have picked up on that. I did not do so. I should have questioned more thoroughly. I should have asked, what's this about? What is going on here? I regret it now, because perhaps I could have better understood the injustice of the impact of it all and I could have done something about it. But my judgement at the time was that the highest court had said that the Tax and Customs Administration was correct. The highest court had said that gifts were allowed, provided they were properly recorded. No reason to tighten the law.*

Minister Asscher decided to accept the official advice to leave the legal regulations unchanged. During a discussion between both directors general on 28 May 2013, director general Veld stated that he expected much dissatisfaction among parents, but Work and Pensions director general Maarten Camps "stood his ground" and was of the opinion that the repayments should start regardless. In June 2013, the repayment proceedings in the De Appelbloesem case started.

S. Social Affairs and Employment (Stricter Enforcement and Sanctions) Act

The Social Affairs and Employment (Stricter Enforcement and Sanctions) Act (or SZW Fraud Act) took effect on 1 January 2013. This served to implement the savings set out in the Rutte I coalition agreement. The childcare allowance was also addressed in the explanatory memorandum for this consolidated act. Through the act, the government was seeking to take a number of measures aimed at tackling fraud with childcare allowance. Checks on applications for childcare allowance were to be tightened up and heavier penalties imposed. The revenues for childcare allowance were expected to be €25 million a year. According to several witnesses, the significance of the SZW Fraud Act on childcare allowance was limited and it provided no financial incentive to deal with childcare allowance more rigorously.

Mr Van Aalst: *What significance did this SZW Fraud Act have for the tackling of fraud involving childcare allowance?*

Mr Asscher: *It was aimed primarily at Social Affairs legislation – unemployment benefit, income support. The significance here was that higher fines were being introduced, as was a minimum fine, even for minor offences. It was a very strict anti-fraud law, so much so that not long after its introduction there were signs that things were not going well and that people who had made mistakes were unjustly being treated as fraudsters. The act was therefore amended*

relatively quickly. [...] You have to imagine: at the time, we had much bigger problems than 25 million. It was period of huge economic crisis and rising unemployment, and my problem was actually that too little use was being made of childcare allowance, because people had no work or were losing their jobs. So at that time, there was a decrease in the overall level of claims for childcare allowance.

T. Intensification of the monitoring of allowances – business case

On 28 May 2013, the Work and Pensions director general, Camps (of the Ministry of Social Affairs and Employment), urged his counterpart at the Tax and Customs Administration, Veld, to use the €157 million²⁸ from the Rutte II coalition agreement for strengthening monitoring by the Tax and Customs Administration not just in relation to income tax, but also to benefits. By that time, the Tax and Customs Administration had already set up a business case for the intensification of monitoring and recovery (referred to as ITI), of which allowances did not form a part. The Ministry of Social Affairs and Employment suggested that the Tax and Customs Administration draw up a business case in which *“extra money is generated for the allowance component”*. Former minister Asscher stated that he was not aware of this pressure from the Ministry of Social Affairs and Employment, but regarded it as logical that the ministry urged the extra resources for monitoring by the Tax and Customs Administration to be used in relation to benefits as well.

Director general Veld said that he had the outlines of the plan for the business case for intensification of monitoring and recovery (ITI) *“in his drawer”* before the formation of the Rutte I cabinet. He preferred to support any additional task of the Tax and Customs Administration by generating extra revenues rather than by dismissing employees and so regarded the generation of revenues through additional monitoring as a normal activity. The business case for the intensification of monitoring allowances was developed alongside the ITI business case.

The allowances business case made €25 million a year available for intensifying the monitoring of allowances. Of this amount, €16.5 million would come from the Ministry of Social Affairs and Employment budget for childcare. The incentive of this business case would be felt, according to Benefits director Blankestijn, in the monitoring of childcare allowance:

Mr Blankestijn: *Based on this business case, we were able to take on 100 FTEs over the years, starting from April 2014. At the time, we set up the IST teams, Integraal Subjectgericht Toezicht (‘integrated subject-oriented monitoring’). The heart of the business case was that ministries, especially those of Interior and Kingdom Relations, and Social Affairs and Employment, wanted those revenues or money they had given the Tax and Customs Administration back from allowance applications that had not resulted in any payments. In retrospect, the name ‘fraud business case’ – as it was called – was a poor choice because the revenues, you might say, from the business case resulted from regular work, such as applications that were not correct, people who applied who did not live in the Netherlands, who had no entitlement at all. The intention was very clear – that money that we as policy ministries had put in, we wanted to actually see returned.*

Ms Kuiken: *Were you held to account for that?*

Mr Blankestijn: *I have set that out. I’ll say it again: I described this in my regular progress reports until the end of my time at Benefits.*

Under Benefits director Agaath Cleyndert, Mr Blankestijn’s successor, the fraud business case, as it was known at the Tax and Customs Administration/Benefits, also had a binding character. On her second day in the position, in December 2018, she had to decide to defer 1,950 objections by six weeks, thereby extending the period within which they should have been dealt with. This is because the manpower that should have been available at the Tax and Customs Administration/Benefits for processing objections had been deployed during the last few months of 2018 for monitoring purposes, in order for the fraud business case to be completed. During the public hearings, former state secretary Weekers made the following comment regarding the binding nature of the business case:

²⁸ Reference was made in the hearings to €156 million; this is also used in the Ministry of Social Affairs and Employment report.

Ms **Belhaj**: *In its final report, the advisory committee described the business case as an entirely inappropriate incentive, which resulted in a form of moral corruption. What is your view of that?*

Mr **Weekers**: *If the business case had been applied properly and not been regarded as a target, then that's fine. If it turned out in the way that Donner concluded, then it is a perverse incentive.*

During the public hearing, the Prime Minister also said of hard targets regarding business cases:

Mr **Van der Lee**: *Minister Opstelten [...] favoured concrete quantitative targets that ministries should "cash in" – in inverted commas – including for repayments of benefits that had been incorrectly awarded. [...] These proposals were coordinated with your ministry in advance. What was your position with regard to establishing targets?*

Mr **Rutte**: *Well, the limit of what I find acceptable is that in tackling fraud you consider what are referred to as business cases, but not hard targets. That is unwise. Hearing you read it out, you almost get the feeling that it became a type of target, and that if you didn't reach the sum involved, you'd simply have to add it from another part of your budget.*

U. Anti-fraud management team and CAF

As a result of the Bulgarian fraud, a special management team – the anti-fraud management team – was set up on 28 May 2013 at the Ministry of Finance at the initiative of director general Veld. The then managing director of the Tax and Customs Administration, Hans Blokpoel, said of the establishment of the management team:

Mr **Blokpoel**: *Yes, as you said, the Bulgarian fraud very much put the phenomenon of fraud in the spotlight. Obviously, tackling fraud has always been part of the work of the Tax and Customs Administration. At the same time, the Bulgarian fraud was the subject of extensive coverage and discussions among politicians, inside the organisation, and in the press. It all left us with the impression that we should do more to tackle fraud. So a much stronger focus on tackling fraud featured in our overall package of duties and services – regular checks, information, and all kinds of other things. In that sense, a special meeting of the Tax and Customs Administration management team was set up that was specifically about tackling fraud.*

Mr Blokpoel described the management team as a manifestation of the regular Tax and Customs Administration management team. The top-level officials at Ministry of Finance in 2019 only learned about the existence of the management team in June of that year.

The purpose of this management team was to place a greater focus on tackling fraud by bringing together all the existing initiatives in the various parts of the Tax and Customs Administration. No operational decisions were taken in the management team, although it appears that the various members had no clear idea at the time of the decision-making character of the team. The directors on the anti-fraud management team replicated the process agreements made on the team in their own organisational divisions in order to put them into practice there. The first report by this new management team stated that the "*innocent will suffer with the guilty*", but also that this should be prevented as much as possible. No mention was made of how this was to be guaranteed.

In June 2013, state secretary Weekers paid a visit to the Tax and Customs Administration/Benefits, where he spoke to employees. About this, Mr Blankestijn stated:

Ms **Kuiken**: *And there, state secretary Weekers said – and I quote from your personal position paper – the words: "For me, enough is enough, and for you, probably even more so. We have built a system that looks very socially responsible, but in reality is not. It is painful to see it being used in this way by criminals. "So everyone felt, we now have to ...*

Mr **Blankestijn**: *Something really needed to be done.*

Ms **Kuiken**: *Everything was based on that idea?*

Mr **Blankestijn**: *Yes, it really did feel very much the case, yes. Yes.*

In June 2013, state secretary Weekers was given a presentation about the anti-fraud management team. He asked the management team to give him periodic updates about the progress the anti-fraud efforts were making. These periodic updates took the form of verbal messages, memorandums, and the usual half-yearly reports.

On 13 August 2013, the anti-fraud management team decided to set up the Combiteam Aanpak Facilitators (CAF) in accordance with a proposal by Mr Blokpoel and Mr Hans van der Vlist, the director of the Fiscal Intelligence and Investigation Service (FIOD). This was prompted by various indications from the work floor at the Tax and Customs Administration and the FIOD regarding the lack of a structured approach by the facilitators. The creation of the CAF meant having a team in which employees from every division of the Tax and Customs Administration could pass on signals of possible facilitators. Mr Blokpoel was given the position of managing director.

State secretary Weekers was informed about the establishment of the CAF and of the CAF approach in October 2013. No mention was made of the way in which the investigations by the CAF were followed up by the Tax and Customs Administration/Benefits.

In January 2014, state secretary Weekers resigned because of late childcare allowance payments to parents, which put them into difficulties. On 4 February 2014, Wiebes was appointed as the new state secretary for Finance. Upon his appointment, state secretary Wiebes was informed about the CAF. During the public hearing, he stated that he was not explicitly informed about the CAF after that, nor informed about the working methods used by the CAF.

The CAF was evaluated by the anti-fraud management team for the first time in February 2014. Mr Blokpoel then referred to the dilemma of the CAF approach, and that the CAF worked with a client package, of whom 80% were 'bad' and 20% 'good'. In the public hearing, Mr Blokpoel stated that these percentages were not based on any particular evidence, but rather that they were assumptions. According to Mr Blokpoel, his comments should have been regarded as a warning that the innocent would suffer with the guilty. The evaluation resulted in director general Veld accepting the CAF approach, which meant that he also accepted the approach being used in the case of parents who had acted in good faith. The anti-fraud management team also decided that politicians should be made aware of the 80%-20% assumption, a point that remained on the management team's list of action points for a long time. It is not clear whether director general Veld did indeed share this with the state secretary. During the public hearing, he said he had mentioned to politicians on several occasions that the innocent would suffer along with the guilty. It is not clear whether this was in response to the action point emanating from the CAF evaluation. The weekly reports drawn up by the CAF team were regularly discussed in the anti-fraud management team. This is apparent from the discussion of the evaluation in February 2014, for example, when Mr Blankestijn asked that more attention should be paid to the tone of the weekly reports. An example of the terms used in the weekly reports was "*Licence to disturb*". During the public hearing, Mr Blankestijn said he found the tone unprofessional and showing a lack of respect. From the weekly reports, it appears that there was a prejudiced view of parents involved in CAF cases. Although director general Veld, as a member of the management team, received the weekly reports, he did not take any action in this regard.

Cases were discussed at a process level in the anti-fraud management team on the basis of the weekly reports from the CAF, in the context of aspects of fraud, for example. For example, this led to the decision in February 2014 that the CAF files would be added to the sources for risk selection. Risk selection is defined as selecting particular groups and/or individuals on the basis of certain features, such as nationality.²⁹ The management team also decided in February 2014 that benefits could be stopped in cases of reasonable doubt. The previous criterion had been serious doubt. During his testimony to the public hearing on this matter, Mr Blankestijn stated that this decision was taken because employees were under great pressure to tackle fraud and because, in his view, fraud was very widespread at the time.

The elements of the monitoring practices that already existed at the Tax and Customs Administration/Benefits in 2013 – that is, the group-based 'soft stop', the intensive checks and requests (zero tolerance), not issuing reminders – that the Benefits management team had decided on in 2013, and the 'all or nothing' approach were not discussed by Mr Blankestijn in the anti-fraud management team. It also emerged during the public hearings that the top-level officials in the Tax and Customs Administration had for some time certainly been aware of the 'all or nothing' approach at least.

Mr Blokpoel: *Yes, but mostly between the DG and me. Perhaps I can sketch the atmosphere in our part of the organisation. The idea was apparently that if a minor mistake was made, the*

²⁹ In its report dated 17 July 2020, the Dutch Data Protection Agency concluded that incorporating dual nationality in risk-selection models was unlawful and discriminatory.

whole allowance had to be repaid – that fact was a major headache for us and we had very intensive discussions on the matter. That was incredibly far removed from what we are used to on the tax front! There, if a mistake is made, the first question is whether it is deliberate or not. The most commonly used instrument is a correction, in the event of a mistake being made. [...] There were intensive discussions about this.

In his testimony to the public hearing, director general Veld confirmed the picture painted by Mr Blokpoel. However, the responsible politicians from the time, state secretaries Weekers and Wiebes, do not recognise this description.

Mr Wiebes: Those headaches were never in evidence. Let me try to put it precisely. [...] In late 2014, I received a memorandum that I next saw when Follow the Money published it. It was mentioned in that. But in all honesty, I later ... No, when Follow the Money published it – I'm following this as well, obviously – I looked at the memorandum again and in fact it is not a 'headache' memorandum at all. In fact, the memorandum gives me no warning about a headache about this matter at all or that unreasonable things are happening. [...] This is a memorandum – and then I remembered – that I interpreted as meaning the Tax and Customs Administration were warning me that they are being too soft.

Several witnesses stated that the aforementioned way in which parents were dealt with by the Tax and Customs Administration/Benefits was not about tackling fraud but was actually regular monitoring, which is why it did not feature in the anti-fraud management team. At the Tax and Customs Administration/Benefits, checking applications was regarded as regular monitoring.

Ms Kuiken: I asked you specifically whether, at the time of the launch of this anti-fraud management team, you did not say one way or another, "Look, I have two, three years' experience of a number of cases relating to childcare allowances and of how things can go wrong". You did not make that known in any way?

Mr Blankestijn: No, because there's a difference between taking action against fraud and carrying out regular checks on applications. There really is a huge difference between them.

The working methods of the CAF

The work of the CAF was directed at "facilitators" of fraud. This refers to people who organise fraudulent actions or make them possible. The purpose of the CAF was to make it impossible for these facilitators to continue with their activities.

The CAF acted upon signals from the work floor or from other sources. If the signals concerned childcare centres or childminder organisations, they could also have come from a municipal health service (GGD). The CAF investigated any such signals. This may have meant paying visits to childminders or to childminder organisations ('on-site observations'). The conclusions from the CAF's investigations were set out as recommendations to the body where the signals originated. The CAF itself had no power to issue tax assessment notices or stop benefits.

If the investigation revealed a strong suspicion or evidence of fraud, then the CAF would transfer the matter to the Fiscal Intelligence and Investigation Service and the Public Prosecution Service. It has since emerged that CAF investigations into childcare centres or childminder organisations hardly ever resulted in criminal proceedings, but did often involve the stopping of parents' benefits.

Acting on recommendations on the part of the Tax and Customs Administration/Benefits

Having received recommendations from the CAF, the Tax and Customs Administration/Benefits could then decide to verify the legitimacy of the childcare allowance. Until mid-2016, it made extensive use of the 'soft stop' on the full set of clients of an alleged facilitator. This effectively meant that the benefit was stopped for a whole group on a future date. Before that date, the parents were given the opportunity to produce evidence showing that they were indeed entitled to the benefit. This involved a large number of documents. The process of verification by the Tax and Customs Administration/Benefits was an intensive one.

CAF 11 working method

The name CAF 11 stands for the investigation that the CAF team started in 2013, using the name "Hawai". It was prompted by two signals from the GGD in 2011 concerning the Dadim childminder organisation. As a result, the CAF paid sixteen visits in late 2013 to childminders and visited the childminder centre itself in May 2014 to carry out administrative checks. From

official reconstructions by the Ministry of Finance and other underlying documents, it appears that the decision to stop the benefits for around 302 parents involved in the CAF 11 investigation was taken on 10 April 2014 by the Tax and Customs Administration/Benefits enforcement management team. A member of that team, who also worked for the CAF team, issued the order to stop the benefits. No or insufficient reasons were stated on the order form for stopping the benefits. The decision to stop the benefits was therefore taken more than a month before the visit to Dadim had taken place. Following the visit to Dadim in late May 2014, discussions were held with the Fiscal Intelligence and Investigation Service and the Public Prosecution Service, at which it was concluded that there was no evidence of fraud at Dadim.

V. Ministry of Social Affairs and Employment fraud policy – the Childminder Centre Quality Improvement and Anti-Fraud project (KEF)

In February 2014, minister Asscher received a proposal for the childminder centre quality improvement and anti-fraud project ('kwaliteitsverbetering en fraudebestrijding gastouderbureaus', KEF). The purpose of the project was to reduce improper use and abuse, to improve quality and safety, and "to squeeze poorly performing childminder centres out of the system". At the start of the childminder centre quality improvement and anti-fraud project, it was already clear that deficiencies existed at many childminder centres in the contracts between the centres, the parents of the children, and the childminders themselves. In addition, often (80%) there were no timesheets. It was therefore clear in advance that many mistakes would be found. Nonetheless, childcare centres were also dealt with through repayment demands to parents. Of this, Work and Pensions director general Marcelis Boereboom (Ministry of Social Affairs and Employment), said the following:

Mr Van Aalst: *It strikes us that in this project structure, at the start of the project, it was already clear that deficiencies existed at most childminder centres in the contracts between the centres, parents, and childminders. At 80% of them, there weren't even any timesheets. So actually, it was therefore clear in advance that many mistakes would be found. Nonetheless, these childcare centres were also dealt with through repayment demands to parents. Do you know why that was?*

Mr Boereboom: *That happened because it resulted from the law and – as I said in my previous answer to Ms Leijten – that it was in part due to the principle that parents were themselves responsible for childcare and for having their paperwork in order. So the reasoning was solid enough ... Childcare allowance is a benefit for parents. That means parents are responsible for the accuracy of their applications for childcare allowance.*

Mr Boereboom explained that the project operated along two lines – quality monitoring by the GGD and by the parents:

Ms Leijten: *Are there any other ways of squeezing childminder centres out of the system that you believe are poorly performing/acting fraudulently?*

Mr Boereboom: *In my experience, as I understood it, there were only two ways of doing so. One was through quality deficiencies and GGD monitoring. The other was if parents ... By cutting off the financial support lines. Based on the knowledge at the time, it was the case that if childcare allowance was not being spent correctly – that was the standard approach – then it was recovered. So, those two methods.*

With this project, the focus of minister Asscher lay on the quality and safety of the childminder centres. He regarded the price to society of unsafe childcare much greater than that of a childcare centre whose paperwork was not in order. Asscher stated that he did not realise that childminders were also affected through repayment demands to parents, although this was explicitly mentioned in the project plans:

Mr Asscher: *I had not viewed the recovery of payments as an instrument at all. I regarded it as an unfortunate effect of the benefits system, not as an instrument or even almost as a weapon, in the way it was subsequently deployed, against parents. The idea was, if people are fiddling the system, then the quality is probably questionable as well, and if the quality is questionable, they could well be fiddling the system. That's why it was not ...*

Mr Van Wijngaarden: *So you knew that there were childminder centres fiddling the system, I think.*

Mr Asscher: Yes.

W. The ministerial anti-fraud committee

In June 2013, the cabinet decided to set up a special ministerial anti-fraud committee, proposed by the minister for Justice and Security, Opstelten. The setting up of the committee was prompted mostly by incidental fraud cases such as the Bulgarian fraud (healthcare allowance and housing benefit), fraud with student grants, and with personal budgets.

Mr Van der Lee: *What I am finding are references to incidents – the Bulgarian fraud and fraud with personal budgets. To any reader now, many years later, it gives the impression that things were incident-driven rather than based on any thorough analysis. Is that an inaccurate conclusion on my part?*

Mr Rutte: *No, it is perhaps correct, but that is also in the nature of politics. It is not the case that we carry out these thorough analyses ourselves. Obviously, you have officials to support you who perform thorough analyses. It is then the politicians in what is a layman's democracy who have to attempt to draw conclusions from the analyses in a sensible manner. And that's what we did. I believe that's an effective allocation of roles. You also have sometimes have academic or scientific input available, in the form of research bodies.*

Minister Asscher is one of the members of the committee. The state secretary of Finance, Weekers, also takes part in the committee's meetings. The chairman of the committee is prime minister Rutte. He actively carries out the role.

Mr Van der Lee: *On 14 June 2013, you received more advice from your officials to speak to other ministers as a matter of urgency regarding their commitment and to give the message that – and I quote – “everything, but everything must be done to limit fraud”. [...] I am confronting you here with a quote in which you emphatically are the driver and are even advised to speak to ministers on the question as a matter of urgency.*

Mr Rutte: *My understanding, and I believe it makes sense, that what was said was that if we set up such a committee, it's only right that we all do what the committee is intended for – that is, helping towards the fight against fraud in the Netherlands. Once again, I am not seeking to trivialise my role in this. I agree with you. It's absolutely true; what I don't mean to say is that I was just playing hammer tap tap. Of course not. As the chairman of such a committee, I have an opinion on the matter. And I do have an opinion about fraud in the Netherlands. I think it very important that Dutch taxpayers can see what we are doing with all the money we collect ... So if it is given back to people in the form of allowances or benefits, that we do so carefully and properly.*

In the autumn of 2013, the committee discussed a letter for the House of Representatives about the government-wide approach to tackling fraud.³⁰ The tone of the letter was very much a subject of the discussion. The initially harder tone was modified. It was emphasised that any action taken should be proportionate.

Mr Van der Lee: *Did you have a discussion with your colleagues on the matter in the council of ministers?*

Mr Rutte: *No, I believe it was in the committee. I reread the report over the weekend. I believe it says there that opinions differed on the matter [...] and that I then concluded to let us combine the two opinions in the tone of what we say. That is a reference to a previous report by the committee from September 2013, as I remember off the top of my head, in which we also said you had to strike a balance between providing a service and fighting fraud.*

The emphasis on proportionality by the ministerial committee was not sufficiently reflected in the working practices of the Tax and Customs Administration/Benefits. Of this, Mr Weekers stated:

Mr Weekers: *The draft versions of letters were modified accordingly. So action was taken. That is why it is so regrettable that we have to be here today, because a number of people have been so adversely affected, which shows that that proportionality in practice quite obviously did not turn out in the way it was always supposed to.*

In the autumn of 2013, the ministerial committee set down a number of starting points for tackling fraud, to apply through the whole of central government. For example, it emphasised the

³⁰ Parliamentary document II 2013/14, 170 50, no. 450.

importance of a hardline approach towards fraud. Fraud should be fought not just through the use of criminal law, but by means of all possible methods.

Ms Belhaj: *The committee was supposed to be involved with a ‘close down and seizure’ programme covering the whole government. The memorandum says that it concerns seizure using all the available resources – criminal law, administrative law, and private law. Did you support that line?*

Mr Weekers: *Yes, I supported that line. [...] Criminal law alone was not the only solution. That is why the instruments of administrative law had to be expanded.*

Another starting point set down by the committee was that of citizens’ and companies’ own responsibility when using central government schemes and allowances.

Ms Belhaj: *The first starting point is: citizens themselves are responsible. Last week, a witness pointed out that placing that type of responsibility on citizens in relation to the complicated matter of childcare allowance was in some cases asking a lot and that it could lead to high repayment demands. How did you view that, at the time?*

Mr Weekers: *At the time, citizens being themselves responsible was accepted as a given. Looking at it with the benefit of hindsight, then you can say, yes, you are asking a lot of people, not just in terms of everything they were supposed to supply, but also in terms of the estimates and assessments they had to make, especially given complex legislation. But at the time it was simply a given: with rights come obligations. Yes.*

The tightening of the anti-fraud approach by the Tax and Customs Administration/Benefits had already started taking shape when the ministerial committee was launched. The ministerial committee had virtually no influence over this.

Mr Rutte: *We never discussed the CAF cases there. We never spoke in any detail at all about any of the ministries.*

In his evidence to the hearing, prime minister Rutte did recognise that the emphasis the ministerial committee placed on the hardline approach towards fraud may have given people involved in implementing the policy an incentive to deal with fraud vigorously.

Mr Rutte: *The first point in your remarks touches on the Bulgarian fraud and before that, the personal budgets fraud. Is the balance right there? [...] Yes, I continue to maintain that. This really is reflected in the committee. Between providing services to citizens and tackling fraud, people carrying out the work perhaps got the feeling “what we are doing is very important, so we can now cross boundaries”. [...] Even to the extent that what happened with the CAF could happen. That could never be a justification for what happened. But it did happen.*

Chapter 3 Signals about the consequences for parents

This chapter deals with several signals about the far-reaching consequences for parents in the 2013–2016 period.

X. August 2013 – signals from Ministry of Social Affairs and Employment officials: repayment in full is a harsh penalty for uninformed parents

Before the ministerial staff meeting of 19 August 2013, minister Asscher of Social Affairs and Employment was informed by the Childcare directorate that childcare organisations were increasingly advertising ‘free childcare’ for parents on low incomes or those who had lost their jobs. Parents did not have to pay a personal contribution, which was against the law. Once this had been noticed by the Ministry of Social Affairs and Employment and the Tax and Customs Administration, they immediately contacted the businesses, who responded positively. During the public hearing, Mr Asscher affirmed that the regulations for parents and professional childcare organisations alike are complicated.

Mr Van Aalst: *Would that then not have been the time to amend the legislation, instead of just explaining it again?*

Mr Asscher: *There was a widespread desire to amend the legislation. In August 2013, an examination was made of the introduction of a household benefit, designed to simplify the other benefits. With regard to the childcare allowance, consideration was given to ways of abolishing it altogether. [...] Even the idea that you should just get rid of all benefits was alive*

at that time. But like it or not, the complicated rules were in place, so the obvious thing to do was to say: “warn people and inform them clearly of how it all works”.

The Ministry of Social Affairs and Employment officials also stated that they would discuss the need to communicate and provide information not only with the Tax and Customs Administration, but also along existing policy lines. They wrote to minister Asscher: *“The levying of a personal contribution has been confirmed by the Council of State, but there is an equally strong sentiment internally that recovering a benefit in full in cases where people acted out of ignorance is a very harsh penalty.”* During the ministerial staff meeting, minister Asscher underlined the importance of properly informing parents and businesses, but he did not address the signal about the very harsh penalty.

Mr Asscher: *I don’t know if we talked about this, but I do know ... Look, it was seen as an effect of how the law works. So as soon as there was no entitlement to child allowance, it had to be repaid. That was the interpretation of the Tax and Customs Administration, which was confirmed by the Council of State. Obviously I wanted to prevent people ending up in that situation, which explains the emphasis on providing information. I completely agree with you: in hindsight, it would have been a good moment to say, “yes, but is this actually not unjust, the way it is set out in legislation?” I did not have that conversation at the time. I was focused on preventing parents and businesses from being unaware of this and from having to face this problem.*

Mr Van Aalst: *But again you get this signal about proportionate repayments, and yet you disregard it.*

Mr Asscher: *I took that signal to mean that this is how the law operated, so we should prevent people getting into this situation. There was at the time ... The ‘free childcare scam’ – as it was called – we knew from De Appelbloesem. It was regarded as ‘grandma and grandpa crime’. Incorrectly, as we know now. [...] I was not aware that so many parents had been so unfairly affected by this. My attitude was this: prevent people from breaking the rules, because the rules are complicated, and let’s try – though it didn’t last long – to get this whole system, with its mountain of recovery demands, which in my eyes was just a small part ... The largest portion, 90%, 95%, affected people who had to repay large sums without having violated any of the rules, but because that’s how the system worked. Let’s try to do something about this.*

Y. December 2013 – June 2014: letters to minister Asscher

In December 2013 and June 2014, minister Asscher received several letters from and on behalf of parents who were victims of the De Appelbloesem affair.³¹ The parents in question had to repay very large sums of childcare allowance they had received, between just over €8,000 to more than €30,000. In his response, the minister showed understanding for the requests for help, but explained that he could not act in respect of individual cases. Minister Asscher confirmed that he saw at least the first letter.

Mr Asscher: *Reading it back now, it fills me with shame that I left it at that and that I didn’t ask, what if these people are right? What would happen? I was told that the highest court had found in favour of the Tax and Customs Administration, so the only thing I could do was refer people to legal aid etc. Nonetheless, my instincts should have been different and I should have said, “sure, but I’m not happy with this”. But I did not do so. [...]*

Mr Van Wijngaarden: *Yes, because of course that letter could have given rise to reviewing the legislation rather more quickly. You have already mentioned the long-term options and we will be talking about that soon, but reparative legislation is obviously an option as well.*

Mr Asscher: *I know now that it was the tip of the iceberg of many more people finding themselves in difficulties through absolutely no fault of their own. It didn’t help either that we discovered it in the context of a fraud case. That was particularly true of De Appelbloesem. The fraud there was committed by the owner of the childminder centre. That makes you even more cautious about intervening, but I should have done so here. If I had, I may have discovered what effect it was having on people ...*

Mr Van Wijngaarden: *You would then have seen the iceberg.*

³¹ The final report of the Ministry of Social Affairs and Employment investigation into childcare allowance signals makes mention of three letters.

Mr **Asscher**: *I would then have seen the iceberg and could at least have had a discussion – what part of the legislation could we amend? Is there anything we can do for these people? Can the Ministry of Finance do anything, can we do anything?*

Z. Direct funding

On 24 September 2014, during the committee debate on childcare, minister Asscher announced the development of an alternative system for funding childcare allowance – direct funding. During the debate, minister Asscher gave the following reasons: *“With this proposal, we want to make the system less susceptible to errors and to fraud. It also means we can tackle the sometimes – I could almost say frequently – painful problem of the repayments, which have seen people sometimes having to repay enormous sums of money at a time when they were barely able to do so.”*

During the public hearing, Mr Asscher explained that he was referring to correctly applied repayments, which for parents were often very distressing:

Mr **Van Wijngaarden**: *But we now know that a very large proportion of the repayment demands were not correct at all, don't we?*

Mr **Asscher**: *The repayment of personal contributions was not correct, but I was talking here about correct repayments, which are also distressing. The language is confusing, when you read that sentence. I still think that at that time, the bulk of the problem consisted of people who had placed eight ticks and entered however many options it was in good faith, but who, it later turned out, were less entitled to childcare allowance than they seemed at the time, which meant they had to pay it back.*

However, the Ministry of Social Affairs and Employment had at that time officially long been aware of the setting of childcare allowance at zero³² in the case of parents who had not paid their personal contributions in full, as was indicated in August 2013 in a report for the ministerial staff meeting:

Mr **Van Aalst**: *The standard response by the ministry was that childcare was indeed not free and that parents must pay a contribution. But if we look back, that also automatically means that parents who had not paid their contribution sometimes had to repay up to 25 times their own personal contributions, because the full childcare allowance amount ...*

Mr **Boereboom**: *Yes, that was the line taken. It was also upheld by the courts. That was how childcare allowance was administered. When I saw that, it was partly what prompted the idea to stop childcare allowance and change over to direct funding; that was one of the arguments.*

Childcare director Maaïke van Tuyl, who at the time of her appointment in March 2016 was given the task of working out the details of direct funding, said that it was not until February or March 2018 that she became aware of the ‘all or nothing’ approach in relation to childcare allowance and the problems surrounding it. She explained the problem to which direct funding should provide a solution as follows:

Ms **Van Tuyl**: *Looking back, it astonishes me as much as it does you that I was never told there was an ‘all or nothing’ approach in childcare allowance in its current form. We focused on what would happen if you properly did what you were supposed to do, but made an incorrect estimate at the start of the year. I'll give an example using some figures. If, as a parent, you miscalculated by half an hour a day on average – and that is not much – the difference by the end of the year could be as much as €1,200. The lower a person's income, the greater the amount of childcare allowance they receive, so every tiny discrepancy in their estimate is therefore also greater. People in this category have the greatest difficulty in paying that back. Even if you meet all the criteria, you may still have to face a high repayment demand, and that was the case with 15% of the parents.*

During the committee debate on 24 September 2014, MP Tjitske Siderius (SP) pointed out to minister Asscher that the development of a new funding system would be no solution for the parents who were facing large repayment demands there and then; she also asked the minister what he was doing in the short term to resolve the problems affecting these parents. Minister Asscher referred her to the state secretary of Finance, who was working on solutions to the

³² This refers to the demands for repayment in full of previously awarded childcare allowance.

problems. A motion by Siderius³³ to have an independent body examine the issue was not adopted.

At the time of the move to direct funding in September 2016, the scale became clear: because of the childcare allowance repayment, 20,000 parents were at that time struggling with debts that they could not pay off in a normal manner. Mr Asscher confirmed that both in 2014 and later, when the direct funding was under development, the problems facing this group of parents had not been properly examined:

Mr Van Wijngaarden: *How was the system that you were working on going to help these people, this group that you yourself had highlighted?*

Mr Asscher: *The people who were affected did not stand to benefit from the new system at all. It was more about preventing problems of this kind.*

Mr Van Wijngaarden: *You indicated that this group existed, but at the same time you were working on a solution or on a new system, about which you are now saying, that it would not actually be a solution for them. Did you not think then that you should have been doing more than just making a new system?*

Mr Asscher: *I did not think there were ways within the system of doing anything about it, because I was much more focused on the correctly applied repayments than on the phenomenon under investigation by this committee. But you are right. Of course I should have dug deeper and considered whether at the time I couldn't do something for this acutely affected group. So, yes, I was perhaps too preoccupied with solving the whole problem instead of with these particular people. Indeed.*

Director general Boereboom stated that a dual-track policy should have been introduced at the time so that help could be given to parents in difficulties:

Mr Van Aalst: *I understand what you are saying. You say: there should have been a change to the law for a solution for just repayments of personal contributions, perhaps with a penalty. But a change to the law, that takes a lot of time and we were facing an immediate problem. Looking at it, how do you see the two in relation to each other? Did you envisage other solutions for the short term?*

Mr Boereboom: *No, not at the time. If you are asking me where we stand now in 2020, I could and perhaps should have assessed things differently. But I acted honestly and sincerely. Initially, we had a very ambitious plan to scrap childcare allowance completely in 2018. Now in 2020, nearly 2021, I think that, weighing up everything with what we know now, it would have been sensible to have what you refer to as a dual-track policy. We wanted to get rid of childcare allowance, but at the same time we should have brought in emergency legislation to deal with the most severe aspects of childcare...*

AA. Proportionate repayments in the wake of De Parel, 2014–2016

In the summer of 2014, the Benefits management team received signals from the work floor about the high level of repayments in cases where part of a parent's personal contribution had not been paid. On 2 September 2014, the Benefits management team decided that in relevant cases, a proportionate allocation could be made. The former Benefits director, Blankestijn, said in the public hearing that he reported this decision to the director general of the Tax and Customs Administration, Veld.

On 12 November 2014, a discussion took place between the director general for Employment (Ministry of Social Affairs and Employment) and his Tax and Customs Administration counterpart. A preparatory memo by the ministry states: *"In the view of the Tax and Customs Administration, the personal contribution is too oppressive for the implementation of the childcare allowance. The Ministry of Social Affairs and Employment believes that a means-tested personal contribution towards the cost of childcare is compatible with the importance attached to good-quality childcare; childcare is not free."* It also gave an example: *"When setting the level of the allowance, it appears that parents have not paid a personal contribution. The Tax and Customs Administration finds itself obliged to demand repayment of the whole allowance (many tens of thousands of euros). According to the Tax and Customs Administration, case law precludes the*

³³ Parliamentary document II 2014/15, 31 322, no. 256.

possibility of demanding repayment of unpaid contributions (and possibly a penalty) only." Fraud is also one of the agenda items for the meeting.

On 20 November 2014, director general Veld presented a memorandum to state secretary of Finance, Wiebes, about the De Parel case. The reason stated for this memorandum was a discussion in late September between director general Veld and a delegation from the Capelle a/d IJssel city council. The memorandum stated that the Tax and Customs Administration/Benefits had decided not to further investigate definitively fixed allowances dating up to and including 2012. *"This decision could lead to a political and wider discussion about why repayments were not demanded in every case where this was possible. There will still be substantial repayments for the 2013, 2012 and 2011 benefits years in cases where the amounts are still to be definitively set"*. Of this, state secretary Wiebes said during the public hearing:

Mr Wiebes: [...] in the memorandum that I received in late 2014, and in which I was warned about what I took to mean "we are a bit too soft; bear in mind, this is politically sensitive", the explanatory notes stated that talks were taking place with the Ministry of Social Affairs and Employment about a more proportionate system.

Elsewhere, the memorandum stated: *"The directorate general for the Tax and Customs Administration and the Tax and Customs Administration/Benefits have indicated to the Ministry of Social Affairs and Employment on several occasions that the rules in relation to repayment of the whole allowance when no personal contribution has been paid could lead to parents getting into major financial difficulties."* State secretary Wiebes wrote in the margin: *"Speaking as less of an insider, I wonder why the whole amount must be repaid rather than the personal contribution amount."* During the public hearing, Mr Wiebes said that the December 2014 proposal for proportionate repayments was a detailed version of this remark.

On 21 November 2014, the meeting of experts took place, involving officials from the Ministry of Social Affairs and Employment and the Tax and Customs Administration, about the personal contribution. On 5 December 2014, a report was issued by the Ministry of Social Affairs and Employment of the meeting of experts in a report to the ministerial staff. The Tax and Customs Administration advocated an adjustment of the 'all or nothing' approach in relation to the personal contribution, for the sake of proportionality and because of ignorance among citizens. *"This and other arguments will be assessed in the near future in terms of their effectiveness, tenability, and necessity. The aim is to inform you before the Christmas recess about the various solutions being explored."*

On 11 December 2014, state secretary Wiebes received another memorandum about De Parel. It informed the state secretary about an official course of action being taken with the Ministry of Social Affairs and Employment and a proposal for amending the legislation that the Tax and Customs Administration had sent to the ministry. *"The Tax and Customs Administration was proposing that, in cases where no personal contribution had been paid (with the exception of fraudulent cases), the level of childcare allowance be set according to the costs that had actually been paid. This would lead to the parent making a repayment that would de facto amount to a personal contribution."* And *"The officials at the Ministry of Social Affairs and Employment would like to put the proposal to the minister in his Christmas bag."* State secretary Wiebes was also requested to call minister Asscher if the Ministry of Social Affairs and Employment decided to maintain the current rules in relation to the personal contribution. The state secretary agreed to do this.

In a report for the ministerial staff meeting at the Ministry of Social Affairs and Employment on 8 December 2014, minister Asscher was informed of the concerns of the Tax and Customs Administration about the personal contribution and their arguments for amending the relevant legislation. It was also stated that the aim was to inform him before the Christmas recess about the various solutions being explored, and that they were to be assessed in terms of their effectiveness, tenability, and necessity. Minister Asscher does not believe it was discussed at that point, because reference is made to a later time. The officials at the Ministry of Social Affairs did not put the proposal by the Ministry of Finance into minister Asscher's Christmas bag.

On 30 January 2015, discussions were held between officials from the Ministries of Finance and Social Affairs and Employment. During the discussion, the childcare director, Martin Flier, made it clear that the Ministry of Social Affairs and Employment was not proposing to amend the legislation. During the public hearing, Mr Asscher stated that such a proposal by the Ministry of

Finance had never been presented to him by officials of the Ministry of Social Affairs and Employment, and nor had any proposals ever been put to him for amending the legislation.

Mr Van Wijngaarden: *During your period in office as a minister, did you ever seriously consider abandoning the ‘all or nothing’ approach and instead setting payments and repayment on a proportionate basis?*

Mr Asscher: *No. [...] Because I was never given that as a possible route to explore. [...] It has sometimes been asked in the House of Representatives why that not did happen. And then you had me explaining how the law operates. [...] Sure, but nobody asked whether the law should not be changed. It was more like, “why does it operate in that way?” I then explained that this was the interpretation by the Tax and Customs Administration based on our combined legislation, and also upheld in case law.*

This was also reported at the meeting of the anti-fraud management team at the start of February 2015, as a result of which director general Veld was aware of the situation. However, state secretary Wiebes was not informed and therefore did not call minister Asscher about the proposal.

Mr Wiebes: *Well, unfortunately things were actually more complex, because I had promised to phone as soon as I heard that he might not agree. I never received any such message. But again, I sometimes think, looking back, “if only I had kept my own parallel version of the records of all the undertakings and of everything going on”. As a minister, though, that would not be feasible. But it is clear: no indication was given that Lodewijk ... that Asscher would not agree to this. But it would have been great if I had remembered and wondered after some time, “what’s the situation on this? Should I not call Asscher?” But I was relying on the organisation to report back to me and that I would be given the signal: “you should call now”.*

The Benefits management team decided in early February 2015 to maintain proportionate allocations, because the Ministry of Social Affairs and Employment did not wish to change the legislation. It is not clear what happened to this management team decision. Minister Asscher was informed in July 2015 in an official document that the option to moderate repayment demands in applicable cases was no longer a priority as far as state secretary Wiebes was concerned. It is not clear what this sentence was based on. Former Tax and Customs Administration director general Veld said of this:

Mr Van Wijngaarden: *We read in an official document for the Minister of Social Affairs and Employment from July 2015 that proportionate repayments are no longer a priority for the state secretary of Finance – your state secretary, let’s say. Was that also the impression you had?*

Mr Veld: *No, I can’t imagine what that means. [...] I certainly never heard about it. It was not my opinion, and I never heard it from the state secretary. So what it’s based on? Perhaps an interpretation of the fact that the definitive benefits letters for De Parel had already been sent, so that in that sense it was done and dusted. But as far as I remember, there was in no way any kind of change in what we wanted, and that at Finance we thought that, actually, things were fine as they were.*

In January 2016, a document was presented to state secretary Wiebes that was due to be sent to the House of Representatives. He wrote on the document, “would like to have another meeting on this matter” and “I know that it is not in line with the law, but I still think it’s reasonable to reclaim only personal contributions”. During the public hearing, he stated that he had misgivings about the matter and had called the team dealing with it to a meeting.

Mr Wiebes: *As I remember it, something occurred at a given moment about De Parel that involved the repayments. That’s when I wrote on that document: please come and discuss it. It was a situation in which I began to have misgivings due to signals I had received from external sources – members of parliament, to be honest – there are many members of parliament who have helped me in this regard because they were hearing things that they thought I was unaware of – or external organisations or the media. I had my doubts about how things really were. I then asked for an official meeting about De Parel. After giving undertakings on several occasions that we would not examine specific cases or specific taxation obligations, a way was found of telling me what was the matter with De Parel, without informing me of specific taxation obligations. This relieved my misgivings, incorrectly as it turns out in retrospect [...], because what I heard from the people around the table who were working on the case was an appalling stream of vitriol, [...] that actually quite shocked me, [...]*

I came out of the meeting. My suspicions had been removed and I came out of the meeting with the impression that the parents were thoroughly malicious. I then went to the committee debate and there I read the answers given by the state secretary, who was clearly thoroughly familiar with the subject, had answers to every question, knew all the figures, had fully got to grips with it and perhaps had become too bogged down in it all; I know now that the answers were all technically correct, but something about the overall picture was not right. I only discovered that relatively recently.

From presentations that were probably given³⁴ to state secretary Wiebes, it appeared that after objections had been assessed, 87% of De Parel parents had no entitlement to childcare allowance. The behaviour of parents that had led to it being established that they had no entitlement to childcare allowance was also described.

During the committee debate about De Parel, the Ulenbelt/Siderius³⁵ motion was submitted requesting the government to reclaim only the personal contributions of parents who had been the victims of the fraudulent actions of the De Parel childcare organisation. The motion was not carried by the House of Representatives and the course of action it contained was therefore not taken any further.

BB. 2016-2017 – The run-up to the “Geen powerplay maar fair play” report by the National Ombudsman

In November 2016, the National Ombudsman reported to the Ministry of Finance that he was going to set up an investigation as a result of information from the lawyer of parents in the CAF 11 affair and the response by the Tax and Customs Administration/Benefits to a complaint she had submitted. With regard to the course of events leading to her complaint, the lawyer in question, Ms González Pérez, stated the following during the public hearing:

Ms González Pérez: *I have obviously had various discussions with the Tax and Customs Administration. At a certain point, I involved the Ombudsman. He referred me to the complaints department. I tried to run through the whole course of events with the complaints department. It was impossible to get anywhere. In March 2016, I went back to the Ombudsman: “I’m not making any progress – can you really not launch that investigation, because things are not moving at all.” He again referred me back to the complaints department. We eventually met in September 2016. He started his investigation in November.*

During the hearing, Benefits director Blankestijn stated that he immediately reported to his director general – at the time, Mr Hans Leijten – that the investigation was underway. State secretary Wiebes was not informed at this time. In his testimony to the public hearing, he stated not to have been informed about the complaints or the investigation by the National Ombudsman until 9 August 2017, the date on which the report was published.

Shortly after the announcement of the investigation by the National Ombudsman, the Benefits management team asked the new technical coordinator in mid-November 2016 to carry out an in-depth examination of the CAF 11 affair. To carry out the examination, the technical coordinator received documents from the management team member who had asked her to carry it out. During the public hearing, she described the initial impression she got from the documents:

Ms Palmen-Schlangen: *It was sufficient for me to form an initial impression, but whether it was sufficient in terms of the completeness of the file, I expect not. [...] What I noticed from it, was that the lawyer kept asking the same questions and that the answers she got from my colleagues were not always answered correctly or fully.*

Ms Leijten: *Okay, well that concerns the process. But what about the actual substance of the matter?*

Ms Palmen-Schlangen: *Hmm, yes, the substance ... What I understood was that it concerned a file where parents had to deal with having their benefits stopped at once, for a year. If you stop parents’ benefit for a year, it has a huge impact.*

On 8 March 2017, the Administrative Jurisdiction Division of the Council of State (hereinafter the Council of State) gave its ruling in a CAF 11 case. The ruling also features in the memo that Ms Palmen wrote and sent to her management team member on 13 March 2017. In the memo, Ms

³⁴ After the hearing involving the Ministry of Finance, these presentations were sent to the committee, who remarked that it was not clear from the systems whether it was these presentations that were given.

³⁵ Parliamentary document II 2015/16, 31 322, no. 295.

Palmen adjudged that the Tax and Customs Administration/Benefits had acted reprehensibly. The management team member sent it on to Mr Blankestijn for discussion for the management team meeting that was taking place the next day.

In the memo, Ms Palmen referred first to the proceedings at and the ruling by the Council of State. It was pointed out that another choice could have been made when taking the case to appeal. It also stated that the ruling by the Council of State established that the Tax and Customs Administration, when stopping the advance payments, had not exercised the required level of precision and had acted in contravention of the prevailing rules on suspension. Ms Palmen then dealt in her memo with the objections and appeal procedures, commenting that objections were disregarded for long periods of time, documents had to be requested repeatedly, non-valid reasons for stopping payments were given, and that various legal principles were violated.

With regard to the complaint by the lawyer of parents involved with the CAF 11 investigation, Ms Palmen advised that the complaint be upheld and that a form of compensation be offered. The possibility of a settlement agreement was mentioned in this context. On this, she also gave a follow-up recommendation: *"In addition, I advise in the strongest terms that the processes at the Tax and Customs Administration/Benefits be reviewed and coordinated. The management team was responsible for the whole process, including the substantive aspects. How could it have been possible to set up an investigation without any work instructions or operating parameters? How could it have been possible to stop the benefits to 300 citizens in this way, on the basis of a non-valid reason, to have had no regard for legal protections, to fail to observe the required level of precision, justification, or burden of proof? How could it have been possible for objections to be ignored for two years? How did the management team come to the conclusion that an appeal was desirable, despite the high risk factor? How could the management team give its approval to the standard of the answers?"*

With regard to the complaint submitted by the Dadim childminder centre, it was said that declaring it inadmissible was in question because of the ruling by the Council of State. Ms Palmen advised that the matter be coordinated with legal affairs.

Her memo concluded with the request for information by the National Ombudsman as a result of his investigation. He asked for internal instructions or guidelines on how taxation employees were supposed to act in cases of possible fraud or irregularities relating to existing childcare allowance payments, and for the reports of the visits paid to childminders in November 2013. Ms Palmen concluded that there was no evidence of such work instructions having existed up to that point and that the Tax and Customs Administration/Benefits had acted reprehensibly.

The following day, in the management team meeting the memo was only discussed at the process level. In his testimony to the public hearing, Mr Blankestijn stated:

Ms Leijten: *Did you discuss it that day in the management team?*

Mr Blankestijn: *Yes, we discussed it as in, what's in it? And we said what we were going to do about it: we were going to discuss it in the groups. [...] Other than that, we did not discuss the content of the memo.*

Mr Blankestijn also stated that the management team viewed the ruling by the Council of State differently. He was unable to explain how the memo subsequently remained under the radar. According to Mr Blankestijn, the memo should have been filed with the management team minutes, after having been discussed in the management team.

The Benefits management team decided to hold more discussions with the lawyer. The recommendation by Ms Palmen to enter into settlement agreements was not taken up. However, this was apparent not from the management team minutes, but from the way in which a solution by the Tax and Customs Administration/Benefits was presented to the parents.

In April and May, the lawyer of parents in the CAF 11 case, Ms González Pérez, was invited to discuss a solution. However, the discussions covered different ground than had been expected.

Ms González Pérez: *What really annoyed me during that discussion was that it clearly had not been organised for the purpose of talking about the stopping of payments. The solution that I was told about during a phone call from the Tax and Customs Administration was that I would get a fair solution to the problems that had arisen. But what did I notice once we were around the table? It wasn't about that at all. The responsibility and liability for the stopping of payments rather disappeared into the background. What did the Tax and Customs Administration want at that time? They just wanted me to provide yet more details. And then I*

had to deal with the period after that, because I had to provide everything that covered that time – all that was going on instead of looking at the stopping of payments, at what had happened, with nationalities, the blockage, and the material and immaterial damage. [...] I did say, “I’m here about the stopping of payments and the other people round the table apparently were not”. It’s very annoying having to deal with someone avoiding the conversation...

During the public hearing, Ms Palmen confirmed this version of events:

Ms Palmen-Schlagen: *I did not get the feeling that there was an attempt to find solutions at the meeting.*

Ms Leijten: *Was the intention to find a solution?*

Ms Palmen-Schlagen: *That’s hard to answer, because the attitude of the management team and the relevant management team member was that each case should be looked at individually. That was very much in contradiction with my recommendation.*

Ms Leijten: *Because what you said was in fact: “regardless of whatever procedures”, but the line taken was: “we are again going to look at each individual case”.*

Ms Palmen-Schlagen: *Yes, exactly. The line taken in that discussion was, again, that we wanted to see documentary evidence.*

After two discussions which, in her assessment, offered no prospect of a solution in the wake of the ruling by the Council of State, Ms González Pérez decided not to take part in any further discussions, in anticipation of the report by the National Ombudsman. According to Ms González Pérez, it was not until December 2019, after the recommendations by the Benefits Administration Advisory Committee, that the ruling by the Council of State was actually implemented.

Mr Van der Lee: *Ms González Pérez, I would like you to take us back to the discussion you had after winning the appeal – that is, to March 2017. You stated that you had been given an undertaking that a letter would be sent setting out what information was still lacking. Did you actually receive that letter?*

Ms González Pérez: *I received it on 8 May 2017.*

Mr Van der Lee: *What happened then? Did the Tax and Customs Administration actually implement the Council of State ruling?*

Ms González Pérez: *That letter, of 8 May 2017, was actually just another request for information. Because they kept hammering away in that way, I eventually wrote them a letter saying that I was abandoning the negotiations because I was not getting anywhere. That was the result. I then approached MP Pieter Omtzigt.*

Mr Van der Lee: *Was the Council of State’s ruling ever implemented?*

Ms González Pérez: *You have a ruling and then a discussion on how it should be interpreted. The way in which they carried out the decision – that is, by looking at it for an entire year, then going back and then finally looking to see whether there was another law, was no way to come to an overall solution. [...] Anyway, at a particular moment, Donner came on the scene and decided on what is fair. And I still have forty people who do not agree.*

Mr Van der Lee: *I’m concerned about this specific case. There was a Council of State ruling, but in this specific case it was not acted upon by the Tax and Customs Administration, except via the Donner route. And that route is now being taken in relation to multiple other cases. Is that correct?*

Ms González Pérez: *Yes, that’s correct.*

The handling of the Palmen memo

The Palmen memo was written on behalf of the Benefits management team and was the result of four months of investigations. The memo was sent to the management team on 13 March 2017 via the management team member who had requested that it be written.

On 14 March 2017, the memo was examined during the management team meeting, after which, according to Mr Blankestijn, it should have been added to the file where the records of the management team meetings were kept. That did not happen, however.

On 4 June 2019, the national benefits technical coordinator, who during the preparation of the memo in 2017 had spoken with Palmen, sent the memo to Cleyndert and two colleagues. They incorporated it in the first set of factsheets, more specifically factsheet 6, which were sent the following morning, 5 June 2019, to state secretary Snel and briefly discussed that same morning.

After the discussions (between officials and with the state secretary), there were a number of action points with regard to factsheet 6, namely:

“- *Re factsheet 6, clarify where exactly the memo was discussed other than in the management team and at the ministry [director general of Tax and Customs Administration]*

- *Furthermore, investigate with whom exactly the memo has been discussed, and clearly write that down and record it [director general of Tax and Customs Administration].”*

A new series of thirteen factsheets were then worked on. There was no reference to the Palmen memo in them. The committee has been unable to establish who is responsible for that.

The memo was subsequently not sent to Uijlenbroek, Leijten, or state secretary Snel. This was not considered necessary by Benefits director Cleyndert, because the Council of State had since issued its ruling and because a report by the National Ombudsman had been published.

The memo was not shared with the Benefits Administration Advisory Committee either. Ms Cleyndert stated that the Ministry of Finance had offered to provide several items of documentation to the Benefits Administration Advisory Committee, but that the advisory committee indicated that the ministry was not supposed to offer documents at its own instigation.

The Central Government Audit Service received the memo on 9 March 2020, several days before the publication of its report on 12 March 2020. The report made no mention of the memo.

The House of Representatives did not receive the memo until 20 October 2020, after a request by MP Omtzigt that it be sent during the committee debate on the progress of the childcare allowance recovery operation on 15 October 2020. The most important passages in the memo were not included in the version provided to the House of Representatives on 20 October 2020. It was only after the passages in question, containing legal advice, had been read out during a public hearing of the inquiry committee that the whole of the memo was sent to the House of Representatives, on 4 December 2020.

XXIII. Chapter 4 Problems come into view

This chapter looks at the report by the National Ombudsman about the CAF 11 affair, the stopping of direct funding, the awarding of limited damages in the CAF 11 affair, the investigation into other CAF cases, the proportionate allocation of childcare allowance, and the establishment of the Benefits Administration Advisory Committee.

CC. Report by National Ombudsman – the CAF 11 affair was seen as an isolated case, the problems of which had been resolved.

Report by the National Ombudsman – “*Geen powerplay maar fair play*”

On 9 August 2017, the National Ombudsman published the report “*Geen powerplay maar fair play; Onevenredig harde aanpak van 232 gezinnen met kinderopvangtoeslag [“No powerplay but fair play; Disproportionately hardline action against 232 families with childcare allowance”]*”. The report covered what would subsequently become known as the CAF 11 affair.

In the report, the Ombudsman described how in 2014 the Tax and Customs Administration/Benefits terminated the childcare allowance being paid to 232 parents who used childcare services from the same childminder centre. The Tax and Customs Administration/Benefits had a suspicion that the parents were not entitled to childcare allowance. The Tax and Customs Administration/Benefits asked the parents to provide documentary evidence. The Tax and Customs Administration/Benefits then confirmed, in almost every case, the termination of the parents’ current childcare allowance entitlement; moreover, the parents

had to repay the childcare allowance they had received for the years 2012, 2013, and 2014. From 1 September 2014, the parents were unable to reapply for childcare allowance. Many of the parents submitted objections to the Tax and Customs Administration/Benefits, but because the Tax and Customs Administration/Benefits had not stated which documents were missing or were inaccurate, it was difficult for parents to state the reasons for their objections. The Tax and Customs Administration/Benefits fell seriously behind schedule in dealing with the objections, but those who had submitted objections were not notified about the delay. The Ombudsman observed that the actions of the Tax and Customs Administration/Benefits had, for a long time, put the parents in an impossible position, causing them major financial difficulties and a high degree of uncertainty. The Ombudsman ruled in this case that the Tax and Customs Administration had taken insufficient account of the citizens' perspective, that there was a lack of fair play during and after the termination procedure, that the Tax and Customs Administration/Benefits had shown a lack of urgency in dealing with the objections, and that the Tax and Customs Administration/Benefits should restore the trust that had been damaged. The Ombudsman recommended that (1) the Tax and Customs Administration/Benefits, when terminating and investigating the legitimacy of benefits in future, should follow the procedure envisaged by legislators, and that it should meet the requirement of soundness and fair play, (2) when refusing a benefit, the Tax and Customs Administration/Benefits should state clearly in its decision which documentary evidence is missing or which documents do not meet the relevant requirements, (3) the Tax and Customs Administration/Benefits should apologise and offer compensation to the parents adversely affected by its actions, and (4) the Tax and Customs Administration/Benefits should within three months reassess the previously rejected objections in the light of the ruling by the Council of State, if the parents have provided the information required of them.

In the spring of 2017, the director general of the Tax and Customs Administration at the time, Mr Uijlenbroek, was aware of the ongoing investigation by the Ombudsman and the CAF 11. By his own account, he gave the then Benefits director, Mr Blankestijn, as much leeway as he needed to resolve the matter. Mr Blankestijn is unable to remember receiving a substantive response from Mr Uijlenbroek or his predecessor to the report by the Ombudsman. State secretary of Finance Wiebes was informed about the report by the National Ombudsman on 9 August 2017. The proposed line to be taken by the Tax and Customs Administration was that it recognised the conclusions, that it regretted the adverse effect on those parents who had had their childcare allowance stopped incorrectly, and that the problems that had been identified could no longer occur as it had altered its work practices since 2016. State secretary Wiebes commented that he found this line very much a one-sided *mea culpa*. He made this comment because he regarded it as important to explain why the Tax and Customs Administration had opted for a hardline anti-fraud approach at the time. On 8 September 2017, state secretary Wiebes received a memorandum about sending letters of apology to the parents. He wrote, with regard to the memorandum, that he was not against apologising, but that "*we should not be too humble and that we should also explain why we took the decisions that we did at that time*".

On 15 September 2017, state secretary Wiebes responded to a parliamentary question by MP Omtzigt about the suspension and cessation of childcare allowance payments.³⁶ One of the questions was: "*Are there any parents, childcare or childminder organisations that have suffered unnecessarily significant harm as a result of the abrupt cessation of childcare allowance payments and childcare allowance repayment demands in 2014? If so, how many people and organisations have been affected?*" The answer was: "*There is no evidence of that. I should also point out that anyone who believes they have been harmed as a result of unlawful actions may submit a request for compensation. Any such requests will then be assessed in accordance with prevailing legislation.*"

In his testimony to the hearing, Mr Wiebes described this answer as incomprehensible, astonishing, wrong, and idiotic.

³⁶ Answer to questions by MP Omtzigt about the suspension and cessation of childcare allowance payments to a group of parents in 2014. Appendix to Proceedings II 2016/17, 2720, p. 4

State secretary of Finance Snel took office on 26 October 2017 and received the official memorandum of 20 October 2017 about the response to the recommendations in the report by the Ombudsman. In the memorandum, his officials proposed that, in the light of the comment about apologising by state secretary Wiebes, apologies should only be offered to those parents who were apparently entitled to childcare allowance. In response to the recommendation by the Ombudsman to compensate the parents, officials wrote that it had previously been decided that this would not be paid in the form of damages. The officials also commented that the procedure for stopping payments was careless, but that it also appeared that the grounds for monitoring the population were sound. They pointed out that any individual party was free to apply for compensation themselves. State secretary Snel endorsed to this response. During the public hearing, he gave the following explanation as to why the recommendation to offer parents compensation had not been followed up:

Ms Van Kooten-Arissen: *The National Ombudsman also recommended that parents be offered compensation for the harm they had suffered. Why did you decide in November 2017 not to carry out this recommendation?*

Mr Snel: *That was indeed part of the recommendation that we did not carry out in full. The question was, what do you mean by compensation? I remember that it was explained to me, and it sounded logical, that ultimately if people have been treated wrongly – there are all kinds of legal remedies, but they take too long or whatever – then it is also possible to ask for compensation. It is then up to the courts to award it or not. We expressly kept that route open and said to give careful consideration about that option. But we did not talk about a type of compensation of the kind we devised much later on. At that time, we were not thinking about it, because we did not have the idea that at that time ... At the time, we could not see, how shall I put it, the suffering that we saw later on.*

Former Benefits director Blankestijn explained this as follows:

Mr Blankestijn: *Believe me, we did everything to find out what the options were for finding a type of compensation different to what was given, but we could not find an option as there were no legal possibilities for doing so. It was not without good reason that the regulation was created deliberately in 2019 to provide a form of compensation. It could not be done without an appropriate regulation in place.*

In the memoranda that went to state secretary Wiebes and state secretary Snel about the report by the Ombudsman, no reference was made to the advice given by Ms Palmen, although the Benefits director was aware of this advice. Mr Blankestijn gave the following explanation for this:

Ms Van Kooten-Arissen: *Yes, but the state secretary received a memorandum from you about the report by the Ombudsman, which notes, among other things, the stopping of the benefits and the reprehensibility of the action taken. You then made no mention of the memo from Ms Palmen. That is very strange.*

Mr Blankestijn: *Well, I don't find it strange, because it was simply a recommendation that was made to us. We said about that, if we look at the content, then we are doing exactly what the Ombudsman says, and that covers all the points raised by Ms Palmen.*

Mr Uijlenbroek, state secretary Wiebes, and state secretary Snel stated that they initially regarded the CAF 11 case as an isolated one, the problems of which had already been resolved. They did not seek to find out whether the problems set out in the Ombudsman's report existed on a wider scale:

Mr Uijlenbroek: *The information was that the group-based cessation of payments had been abandoned in 2016. So I found myself in a situation where the National Ombudsman said, well, things have not gone well with this case. One of the factors was the group-based cessation of payments. That problem had actually been sorted out, generically speaking, in 2016, but the case itself had not, because it predated that. That has given me cause to reflect on my actions. I could of course have asked if there were many more ... But at least you've rectified at a generic level the group-based cessation of payments in 2016. This is one case where things did not go well. I could also have asked whether there were any more cases that had been the victims of those actions up to 2016.*

In his account to the public hearing, state secretary Wiebes gave a similar response:

Mr Wiebes: *My impression at the time was that it concerned one case of one childminding centre where things went completely wrong. I read in the memorandum ... Because that's what Eric Wiebes is obviously going to do. If he finds a problem, he will look around: where is*

the solution? The documents stated that we had long since abandoned these working methods. Since 2016, it stated. And secondly: we are going to resolve this with the parents in question on an individual basis. I was thinking at the time, this case has gone completely wrong, but at least we have acknowledged the fact; it cannot happen again. That was also what was said in the memorandum – it cannot happen again. And we were going to resolve this with the parents, on a case-by-case basis. [...] I then doubtlessly discussed it with the director general, but even last week I was thinking, what do I now think I should have done with the Ombudsman's report? What I should have done with the Ombudsman's report was what I did do in other encounters with the Ombudsman – make an appointment with the Ombudsman and discuss the matter with him ... You don't know the scale of the problem, but something went wrong at the childminder organisation to the extent that you should have said, "whatever the circumstances, let me first talk about this with the Ombudsman". The Ombudsman would probably then have said, "you know, there are three parents; if you go and talk to them, you would get an idea of what this is about." And I did not do that.

Finally, his successor, state secretary Snel, said of this:

Mr Snel :I remember reading it and thinking, "this is powerful stuff". But the good news was that we were putting all the recommendations made by the National Ombudsman into practice. I apologised to the parents that it had all taken so long. That may sound strange, but it meant, so we thought, that we had largely identified a problem, weighed up and accepted the recommendations by the National Ombudsman – and there were some recommendations, the details of which we still had to sort out. My feeling was that this had gone badly wrong, people had not been treated properly, and it all took far too long. In the meantime, solutions had been found. We all signed off on it, and to me it seemed at that time that the whole thing had become less important.

DD. Involvement of Ministry of Social Affairs and Employment with the report by the National Ombudsman

The Ministry of Social Affairs and Employment was not directly involved with the report by the National Ombudsman and the response to it, but did take official cognisance of it. As Childcare director Van Tuyll said:

Ms Van Tuyll: I read the report. I was very shocked by what was in it, because the Ombudsman was effectively saying that the administrator had not acted in accordance with its own rules, which had caused people to be in terrible difficulties. It really annoyed me that something like that could happen. [...]

Ms Van Tuyll discussed the report with her employees and during a management team meeting of the directorate general for Employment, stated that she regarded this as a very unpleasant way of treating people. She did not report this to her state secretary, but did contact the Ministry of Finance:

Ms Van Tuyll: I got in touch with the person in Finance with whom we were in contact about policy – "tell me, what is going on here?" We had since noticed that the Tax and Customs Administration director general had responded and said what he was going to do about it. We had another discussion on the matter at policy level. On one of the occasions when I first spoke with the Benefits director, in March 2018, we also discussed it: had this now changed? [...] I was assured that it could not happen again.

Ms Van Tuyll was also told then that each of the points mentioned by the Ombudsman in his report had been followed up. Although Van Tuyll was appointed Childcare director in March 2016, it was only two years later that she was in contact with the Benefits director:

Mr Van der Lee: So you took up your position as the new Childcare director, and it was not until two years later that you spoke for the first time with the Benefits director, who was in charge of administering childcare allowance?

Ms Van Tuyll: Yes.

Mr Van der Lee: Why was that?

Ms Van Tuyll: We maintained contact with the policy part of the Tax and Customs Administration.

Mr Van der Lee: There was absolutely no direct contact with the administrators?

Ms Van Tuyll: No.

Mr Van der Lee: *What is your view on that?*

Ms Van Tuyll: *Looking back, I regard it as stupid, to put it as plainly as possible. In working with others in relation to the direct funding, I have noticed how important it is to actually sit and hold discussions with the administrator, because you then get to understand what works in practice, and what does not. When it was finally decided that direct funding was not going ahead and we at the Tax and Customs Administration had launched the improvement process, we also said "I would like us to have at the Tax and Customs Administration what we had with DUO [Education Executive Agency]" – that is, actually discussing with the administrator, hearing what works, about the problems you face, and what is and is not feasible, without an extra layer of policy between us. So I did that differently.*

The state secretary of Social Affairs and Employment, Van Ark, who took office in October 2017, two months after the issuing of the report by the National Ombudsman, was not aware of the content of the report.

Ms Leijten: *We will deal shortly with the substantive choices in relation to direct funding, but that was obviously an important subject when you took office. You previously mentioned that. It was a prominent topic in your handover file. Do you believe that not involving the report by the National Ombudsman, which was about high repayment demands and enforcement by the Tax and Customs Administration, was a missed opportunity?*

Ms Van Ark: *Yes, in retrospect that is certainly so. I think it really was a missed opportunity. Perhaps that would have been a good time, right at the start of my period of office as state secretary, to embark on a direction that I did not embark on, but which could have spared those parents much suffering. I very much regret that.*

EE. Abandonment of development of direct funding

On 26 October 2017, state secretary Van Ark was appointed at the Ministry of Social Affairs and Employment. Among her responsibilities was that of the childcare portfolio. One of the tasks arising from the coalition agreement was to carefully examine the introduction of the alternative direct funding system.

Although work had been underway on the development of direct funding for more than three years, including on the part of the Tax and Customs Administration, a counter proposal was made by the Tax and Customs Administration in late 2017/early 2018:

Ms Van Tuyll: *We had launched direct funding in cooperation or in dialogue with the Tax and Customs Administration. The Tax and Customs Administration said, at least in the discussions I had in relation to part of the policy, that they found childcare allowance very difficult and terribly complex to administer, so as far as we're concerned, you can have it. That picture was turned on its head. Rather unexpectedly – to us – a counter proposal came from the Tax and Customs Administration. They said they could make a number of improvements internally and then the number of repayment demands would decrease. So suddenly there was an alternative, whereas until then the line had been that there was not a great deal they could do with regard to childcare allowance. On the other hand, the sector itself [childcare organisations] were not considered reliable enough to be able to supply the correct information on time for the invoices to be paid.*

Mr Van der Lee: *What form did that alternative take? What were these brilliant new ideas for reversing the enormous tide of benefit repayments within the existing system?*

Ms Van Tuyll: *They mostly involved the Tax and Customs Administration itself attempting to obtain the details of the childcare organisations, on a voluntary basis, and by giving parents timely warnings, along the lines of "what you estimated in advance and the information that is now coming in are not compatible, so should you not amend your application and should you not be telling us about a change?"*

Mr Van der Lee: *But the heart of the system meant that you were still talking about years, did it not?*

Ms Van Tuyll: *Yes.*

Mr Van der Lee: *In other words, in the case of very large repayments, even if with that extra step, things did not resolve themselves over time. To me, then, the conclusion seems that whatever the main purpose of direct funding was, it could not be covered simply by an*

adjustment to the existing system, right? Because you continue working with years, those enormous sums still stand?

Ms Van Tuyll: *Yes, in my estimation at least it would have a more limited effect than direct funding.*

State secretary Van Ark was not aware of the problems with the 'all or nothing' approach, which her Childcare director also only learned about in February 2018:

Ms Van Ark: *When I recall how it went, then I see I quickly got down to work on this file. In November and December, I had a number of in-depth discussions with my own policy directorate, in particular about the analysis of the problems. As I already stated, they consisted of a number of components: the complex system, the fact that you had to apply in advance, the advance payments system, the late determination of income and the division of responsibilities. These were the elements that I started to analyse. The 'all-or-nothing' method was not among them. So when in due course I started to talk with my fellow state secretary about the Tax and Customs Administration, and he said, "I can offer the Tax and Customs Administration all the solutions that DUO offers," I was initially a little surprised because in the official memorandum that I had, it said that the Tax and Customs Administration was not able to do that. I then said: "you'll have to explain that to me." I had many conversations on this matter. [...]*

If at that time – I wish it were so – I had seen the 'all or nothing' approach as part of the problem, then I think the conversation I had with the Ministry of Finance would have been very different. [...]

It is irksome to note that the weighty matter that your committee is investigating was not part of the information I had at the time or was presented. I simply find it dreadful. I started work on a whole range of themes. I tried all kinds of ways to take steps on the problems of debt and those relating to childcare allowance, but I missed the first exit.

State secretary Van Ark explained for which group she was looking to find a solution, either with direct funding or through improvements in the benefits system:

Ms Van Ark: *Looking back now, knowing what I now know, I realise there are actually three groups of parents. Parents relevant to the problem analysis that I was carrying out. Parents dealing with CAF problems, if I may call it that. And parents dealing with the 'all-or-nothing' approach. I started work on the first group of parents, the ones affected by regular problems in the system, in accordance with the coalition agreement. Clarity about the CAF problems came later. That was really part of the administration at the Tax and Customs Administration, that was my impression. [...] That latter group of people, who had been affected by the 'all-or-nothing' approach, were not really at the forefront of my mind in December 2017 or in the following year. I very much regret that.*

The official advice from the Ministry of Social Affairs and Employment to the state secretary remained the introduction of direct funding:

Ms Van Tuyll: *I argued fairly passionately for the implementation of direct funding because I really felt that it would resolve so much more.*

In an official memorandum for state secretary Van Ark, Ms Van Tuyll gave the following arguments on 27 March 2018:

- *"The Tax and Customs Administration/Benefits states it has the interests of citizens more closely at heart than a few years ago and that it is seeking to achieve a balance between being an enforcement agency and a service provider (A0 Fin 14 Dec 17).*
- *The Tax and Customs Administration/Benefits is of the view that current methods for administering childcare allowance are running so well that a significant argument in favour of direct funding no longer applies.*
- *From a policy perspective, we view things differently: an argument for direct funding lies in the complexity of the current childcare allowance scheme itself, which is based on a system of advance payments. This is in keeping with the results from earlier policy reviews (such as the IBO Vereenvoudiging Toeslagen [interdepartmental policy investigation on simplification of benefits] 2008-2009)*
- *The problems in relation to the childcare allowance scheme are still with us. Even now, childcare allowance is causing problems (see under the heading 'Allowances in the media')."*

Social Affairs and Employment secretary general Loes Mulder also advised state secretary Van Ark to introduce direct funding:

Ms Mulder: *I did discuss the matter with the state secretary. It was difficult to get the right balance. Direct funding was a good proposal. We were pleased that it was still an option after the formation of the government. There was some doubt as to whether it would still be around post-formation. However, it was certainly a major ICT operation. It was also an exciting one. We had made extra checks to see whether DUO could do this. Buy anyway, at the same time, we knew we had had many ICT operations in government that had been far-reaching and sizeable, and where things had nonetheless gradually gone wrong. So carrying on did entail an element of risk. I felt that that was the most important consideration to put to the state secretary: bearing everything in mind, ... And the Tax and Customs Administration had since brought out an alternative, namely that we could significantly reduce the repayments within the current system. She eventually made that considered choice.*

Ms Belhaj: *So there were no financial considerations that played a role? [...] Not even the investments in ICT, in whatever form?*

Ms Mulder: *No, that was not a crucial factor as I saw it, no. [...] Although you cannot talk about this type of operation without mentioning the financial aspects, but as I remember things, it was not crucial, it would be one thing or the other. The crux was this: do you dare do it, with all the attendant risks, or is there a ready alternative that is safer? [...] Officially, we dared to do it. My final recommendation was to introduce direct funding, because of the debt issue. [...] I meant to say that risks were seen. We saw them at the ministry as well. It was difficult to get the right balance, it was a close call deciding what the best option would be, because there was also the risk that it would get complicated. All things considered, the official advice was to push ahead with direct funding.*

On 25 April 2018, state secretary Van Ark informed the House of Representatives that the development of direct funding was stopping and that the decision had been taken to make improvements to the existing benefits system.

Ms Van Ark explained her decision:

Ms Van Ark: *In November, I held discussions with officials about the system. In December, I had a discussion because it was advised that direct funding should be delayed by one year. 2019 was supposed to be the year in which it was introduced. In 2020, it was supposed to be completely up and running. Discussions with people on the ground were still taking place. Things were not going very well, so it was recommended that the introduction be delayed by one year. Around that time, I also had a discussion with my fellow state secretary at the Ministry of Finance. [...] He said: "The coalition agreement says direct funding. That would be a solution to the problems in the childcare system, but at the Tax and Customs Administration we are several years down the line with childcare allowance. I'll be very pleased to discuss it with you, because I would like to keep it." He also said: "it may sound strange, but Benefits is actually the best-running part of the Tax and Customs Administration." At the time, committee debates were taking place about the Tax and Customs Administration in the House of Representatives. I was informed about them by officials. So the impression I had did not entirely square with what he said. But I think that if a colleague approaches you and says that, you have to listen. [...] You encounter many files when you're a minister, but I can tell you that this one was quite something. It was in the coalition agreement and I regarded it as a heavy responsibility. So I had been dealing with this subject from the very beginning because I wanted to make the right decision in relation to the problems I encountered and which were presented to me. That meant I was firmly getting to grips with the subject when my colleague from the Ministry of Finance contacted me and said, "I may be able to do this better than DUO and with fewer risks." During the first ministerial committee meeting, we agreed that the state secretary of Finance would be given a presentation by DUO and that I would be given a presentation by the Tax and Customs Administration. The presentations were duly given and I paid a working visit to DUO. We then had a second ministerial committee meeting, because a decision had to be taken. And I can tell you that it was difficult right up to the last moment, because it really was a choice between a big change with far-reaching implications, and therefore also with sizeable risks as well as possibly major advantages, and a development that may well have had slightly fewer advantages, but which in time would have a greater*

effect, as a result of the t-2 system, for example, because you would be able to calculate all the allowances, but with fewer ICT-related risks.

I held those discussions. I then had a discussion with the state secretary of Finance because, when we had taken the decision, I really wanted to be certain that he was going to deliver what we had agreed upon. That's because at the front of my mind were the many parents facing repayments. That discussion took place in April and when he assured me of that in the discussion I knew that this way, although it remained a dilemma, the decision would be taken. And that is the decision I put to the council of ministers. [...]

Ms Leijten: *Your solution in the letter to the House of Representatives of 25 April was actually to opt for the Tax and Customs Administration. It was clearly set out. The 80%³⁷ was also mentioned, and everything else. But what were the two initiatives taken by the Tax and Customs Administration for giving you certainty that that choice was the best one?*

Ms Van Ark: *It was mostly about keeping parents informed about the hours for which they had applied for childcare allowance. That information changes very often. Parents on low incomes in particular receive a relatively high level of childcare allowance, but it is also people on relatively low incomes who often have temporary or flexible contracts. If any errors are made in this regard, the result can be high additional payments later on. So this was a very important one. Another important one was the exchange of data with the childcare organisations. For example, there were a number of improvement measures that I attached a great deal of importance to, and which were designed to help us resolve the problems relating to such later additional payments.*

During his testimony to the public hearing, Minister of Finance Hoekstra said that he was in favour of introducing direct funding:

The chairman: *Yesterday, we had the current minister and the then state secretary Van Ark. She told us how she eventually took the decision not to introduce direct funding. To put it in slightly graphic terms, she went to the Ministry of Finance specially for that reason, and spoke to state secretary Snel in his room. He looked at her straight in the eye in order to get a kind of personal confirmation that the Tax and Customs Administration was up to the task. I understood that he said: "We can do it. We will do it, not DUO; don't go there, don't start that experiment. The Tax and Customs Administration can do it." Were you involved with that decision?*

Mr Hoekstra: *No, but it does take me back to the exchange I had with Ms Belhaj at the start. My intrinsic line was different. My intrinsic line – forgive the detailed explanation – was that issuing so many benefits to between half a million and one million citizens without a professional administration, in a system where you know you have to correct, either upwards or downwards, more than half of all payments, was probably a worse system than one in which you pay out to several thousand childminding centres that do have professional administrations. That was my firm conviction. At the same time, I did understand the position of the state secretary, who saw some merit in the advice he received.*

Minister Hoekstra accepted the decision not to proceed with direct funding:

Mr Hoekstra: *Well, I accepted the conclusion that they had drawn, and which in my view was politically sound as well. As everyone does at some stage, I thought ... You rarely get – we all know that – your own way completely in politics, and you have to bear in the mind the possibility that you have got the wrong end of the stick. So I thought, if they are now deciding, having weighed everything up, then I am not going to discuss the whole thing all over again.*

FF. Investigation of the options for proportionate repayments

The Tax and Customs Administration's improvement plan of 2 March 2018 contained, among other things, a 'proportionate repayments' section, for which a change in the law was needed. It was expected that having proportionate repayments was a way of preventing high repayments. Proportionate repayments were discussed for the first time in February 2019 by the Childcare director of the Ministry of Social Affairs and Employment and the Benefits director of the Tax and Customs Administration:

³⁷ 80% of the parents were then faced with a repayment demand or demand for a further payment.

Ms Van Kooten-Arissen: *Between 2015 and 2019, did the Tax and Customs Administration discuss concerns about the proportionality of the repayments and the strictness of law with you and if so, when?*

Ms Van Tuyll: *It was discussed with me on one occasion. [...] Once, and that was in February 2019, by the current Benefits director. The childcare allowance improvement plan already existed. Among the items in the plan were proportionate repayments. I remember that Agaath [Cleyndert, Benefits director] had had a conversation at which we made our acquaintance. We talked about how the improvement process was going, whether it was succeeding. Did we have the feeling we were on the right track? Then she said: "One thing is bothering me and that is that I've noticed that proportionate repayments are not yet completely up and running. There is some hesitation as to whether that really is that important, whether it's really necessary." Then she said to me: "I feel that it is necessary, because there are people who have nowhere to turn to." We talked about that and we both agreed that it should not be allowed to recede into the background and that it needed to be tackled immediately.*

Proportionate repayments also featured in the presentation given by the Tax and Customs Administration to state secretary Van Ark on 29 March 2018. Despite this, the letter to parliament dated 25 April 2018, which explained the reasons for not going ahead with direct funding as well as the improvement measures for the benefits system, did not go into proportionate allocations and repayments. Ms Van Ark stated that it was only later that it moved into her line of vision:

Ms Leijten: *The proposal by the director general of the Tax and Customs Administration, Mr Uijlenbroek, which we have also discussed here, is also about proportionate repayments. Were you informed about this when subsequent decisions were made?*

Ms Van Ark: *For me ... No. The first time I saw "proportionate repayment" was in the report of the written consultation that I had with the House of Representatives on 9 July 2018. [...] For me, it was not a factor in the decision I made. I have set out the four problem analyses I had clearly in my line of vision from the beginning. That is what I based my decision on. I was pleased that it emerged from the conversations and that it was included in the letter, because that made sure it ended up being tabled. But for me, the first time was in the letter of 9 July. So it could have been done much earlier and even if I had persisted in my questioning on 9 July I could have done something about it before 9 October 2019. And that is very frustrating. It angers me. It upsets me. It's not about me, it's about the people who have been affected by all this.*

On 10 July 2018, the state secretary responded in a written reply to questions in the House of Representatives about the cessation of direct funding and the problems surrounding the high repayment demands. The state secretary mentioned proportionate repayments to the House of Representatives for the first time and undertook to examine whether it was possible to set entitlement to childcare allowance proportionately, thereby reducing the full repayments of advance payments that had been made.

Ms Van Ark: *After sending the letter about the direct funding and the House of Representatives saying, "but how?", I was keen to show how. One of the matters to arise from that meeting was proportionate repayments, a term that at the time did not mean anything to me. I really believe that I should have probed more deeply at the time. But because the matter was being explored, I thought: "That seems fine, as the problem that exists looks enormous. It's good that we're going to resolve this."*

However, this exploration of the options for setting childcare allowance entitlement proportionately was not undertaken with any urgency by the Ministry of Social Affairs and Employment or the Tax and Customs Administration:

Mr Van der Lee: *In December 2018, it emerged from a letter to parliament about the improvement process that the exploration of proportionate allocation options had not yet started. Why had no progress been made since the undertaking in July 2018?*

Ms Van Tuyll: *Because the initial focus on the childcare allowance improvement process project was on the very large group of parents facing high repayment demands. My deputy had been working on this and had asked several times how many people were affected and how large the repayments were. These questions remained unanswered. At the time, the Tax and Customs Administration and we were initially focused on the 15% of people facing high repayment demands. There was a risk that they would recede into the background. In February 2019, the Benefits director and I said that this must not recede into the background.*

So it is correct that it had not yet started. We then focused on the entire group of people who were trapped.

In the letter to parliament dated 11 June 2019, state secretary Snel again announced that, together with state secretary Van Ark, he was going to examine the options for proportionate allocations.³⁸

Ms Van Kooten-Arissen: *We are still talking about the letter from state secretary Snel. Social Affairs also commented that Finance perhaps meant the issue concerning the proportionate repayments of the benefits. Social Affairs then proposed to write in the letter that the options for proportionate repayments, especially with regard to the vulnerable groups, should be further investigated. But hadn't your state secretary given such an undertaking a year previously?*

Ms Van Tuyl: *Yes, we were already working on it. I think it should have said that they were currently investigating it. It seems strange that it's in the future tense.*

GG. No compensation for CAF 11 parents – only limited damages

On 11 October 2018, the state secretary for Finance, Snel, sent a letter to the House of Representatives about the CAF 11 case. In the letter, state secretary Snel offered his apologies to the parents and to the House of Representatives. He wrote that he took the problems in the CAF 11 very seriously. One of the measures he was taking was improving the integration of technical aspects at Benefits. On this, Mr Snel stated the following:

Mr Van der Lee: *Another element in that letter of October 2018 was an order to Benefits to strengthen its technical structure. We have since learned that that meant that judicial conscience should be more soundly integrated. We also know that there was a quadrant structure at Benefits and that, apart from the management line, there was no technical vertical line. When you issued that order in the wake of the report by the Ombudsman, were you also told that Benefits had made a previous attempt at introducing that vertical line, but had given up within six months?*

Mr Snel: *No.*

Mr Van der Lee: *That is what we have heard from Ms Palmen, who had been appointed as the coordinator. You were not told of that earlier attempt?*

Mr Snel: *No. I do know that that technical integration really was an important point. If you look at the process steps that we ... during that year, where so much apparently went wrong, ... I was gobsmacked, if I can put it that way. There was then some investigation or other. Then a question – this will end up in the courts. And then help was asked for: who can help us with this? And that took us back to the anti-fraud team. There was something completely wrong there. I know the situation at the 'Blue' department – that is, the Tax and Customs Administration minus Benefits – much better. There was an entire system there: if there was something you disagreed with, you took it to the inspector or you asked someone to go to the inspector.*

Mr Van der Lee: *Yes, we know that system at Blue. Things are actually organised vertically there.*

Mr Snel: *That was not the case at all at Benefits. I thought that inconceivable. We have previously talked in terms of a factory without the human dimension. Well, this was an outstanding example and that became clear to me over the course of that year. You have to be able to call colleagues and say, "I have a complicated problem here, perhaps you have experienced something similar in the north of Groningen; how did you resolve it?" That whole structure did not exist, it had never been incorporated into Benefits.*

In his letter of October 2018, state secretary Snel also awarded damages to parents who had been involved with the CAF 11 affair and whose objections had been in the hands of the Tax and Customs Administration for more than two years. The damages amounted to €500 for each six-month period by which the processing of the objections exceeded two years. Both former state secretary Snel and former director general of the Tax and Customs Administration Uijlenbroek regarded this amount as low, but stated that they saw no available options for doing anything about it:

³⁸ This report examines the letter of 11 June 2019 elsewhere in greater detail.

Mr Van Wijngaarden: Yes, okay. Did you regard these damages, if they are still clear in your mind, as appropriate in relation to the problems in the CAF 11 affair that were mentioned in the letter?

Mr Uijlenbroek: That's the €500 for each six-month period, you mean?

Mr Van Wijngaarden: Yes, for each six-month period beyond the deadline for deciding on objections.

Mr Uijlenbroek: That is a fixed standard. The problem with fixed standards is that they are sometimes very generous and sometimes a drop in the ocean. If you look at how the parents have been affected, in this situation it is obviously a drop in the ocean. But that is an inherent aspect of applying fixed standards.

At the time, state secretary Snel did not look for ways of awarding more generous damages:

Mr Van der Lee: In your letter, you wrote that you wanted to give compensation, damages of some kind – not compensation, but damages – to parents who had been affected, but actually only to parents who had had to wait for more than two years. Did you think that was in proportion to the reasons why damages were being paid? Because it's not very much.

Mr Snel: No, that is true. It's good that you are asking about this. I was astonished when I asked the lawyers what the maximum statutory permissible amount was that I could award for this. I think their answer was €500 for each six-month period, or thereabouts.

Mr Van der Lee: Exactly, that's correct.

Mr Snel: Before that we had said, "they can have it". But now we were saying, "no, it must be the maximum permitted by law". That was €500. I remember thinking, "that's not much". [...]

Mr Van der Lee: One last question on this point. You were yourself astonished about the limited maximum amount that you could award. Did you give an order for an exploration of other routes by which more generous damages could have been awarded?

Mr Snel: No, not then, because the main problem we were dealing with was how long it all took. That was ... No, and in any case, it would not have been within my remit to say, "I think that from now on everyone should get damages whenever they are involved in legal proceedings with the government".

Mr Van der Lee: No, but issuing an order to examine all the possible options would still have been a first step, wouldn't it? That doesn't mean immediately having to break the law, but ...

Mr Snel: Well yes, perhaps at that time ... I do know that I remembered it, and that the hows and whys were explained to me. It hopefully planted a seed for the discussions about damages I was to have more than six months later.

HH. Investigation into other CAF cases

In March 2019, state secretary Snel gave an undertaking to have investigations carried into other CAF cases and to enter into dialogue with parents. A clearer picture began to emerge, in that the problem extended beyond CAF 11.

On 21 March 2019, state secretary Snel had a debate with the House of Representatives about the CAF 11 case. During the debate, state secretary Snel undertook to have the Central Government Audit Service investigate the other CAF cases. In his testimony to the hearing, state secretary Snel said that he did not initially have the impression that the problems in the CAF 11 case were more widespread, but in the period that followed started to have his doubts:

Mr Van der Lee: In the plenary debate on 21 March 2019 – if we can make a leap in time – you gave an undertaking that the Central Government Audit Service would be investigating other CAF cases. CAF is the 'Combiteam Aanpak Facilitators' [combined team for tackling facilitators]. Why did you not take the initiative to have other CAF cases investigated at an earlier stage?

Mr Snel: That is really at the heart of where things started to go wrong. I and the team were concentrating very much on CAF 11. I should also point out that I believe it was months before I knew that this was called CAF 11. It was another search to find any parliamentary questions about CAF 11 Hawaiï. I believe I only found out during 2018 what the situation was. By that time there were more cases, but it was made clear to me: no, CAF 11 is the case that the Ombudsman is also dealing with. That's where things went badly wrong. It was only when we ... That was in March, but actually fairly soon after there were signals along the line of: "might it be possible that ...?" That was actually the first question that you would normally ask.

Something happens, you hear about something, something goes wrong, and you think, “oh, could that be part of a pattern?” At first, the idea was that it could not, but later I, and I think also the people in the department, began to doubt whether that was correct. At a certain point I said we must get this cleared up, so I wanted to see whether this was happening in other cases.

In this debate, on 21 March 2019, state secretary Snel also undertook to hold discussions with the parents who were affected by the CAF 11 case. State secretary Snel recognised that the House of Representatives had encouraged him to talk with the parents. The discussion took place on 11 June 2019. Because of this discussion, state secretary Snel became even more convinced that he wanted to compensate the parents. According to state secretary Snel, he may well have come to this conclusion at an earlier stage if he had spoken earlier with the parents:

Mr Van der Lee: *And if that discussion had taken place earlier, would you then have acted upon it?*

Mr Snel: *Suppose, hypothetically, that I had had these discussions in May and that I had all that information in May that I had at the start of June. We will shortly be looking at why that was. If that moment had been a year earlier, if that moment had been in January 2018, that could also have happened. But it never did happen. That discussion with the parents was poignant, convincing me even more that we should leave no stone unturned in doing the right thing for those parents, not just with apologies, which I obviously offered at the meeting, but more than that and also more than just the €500. Parents facing all those problems for years, who time and again were not listened to and who came up against a brick wall in their dealings with the government. From that moment, it was clear to me: “I’m going to do something about it.”*

II. Council of State ruling leading to establishment of the Donner Committee

The Council of State gave a ruling in a case concerning childcare allowance on 24 April 2019. The ruling concerned, among other things, the obligation on parents to pay a personal contribution for childcare. Until the April 2019 ruling, the Tax and Customs Administration was very strict in its imposition of this obligation on parents. If a parent had not paid just a small proportion of their personal contribution towards childcare, they lost their entitlement to childcare allowance in that year completely. The Council of State upheld this strict application until the April 2019 ruling. For example, the Council of State ruled as late as 2018 that no right to childcare existed because €190 had not been paid towards the total childcare costs of €17,062.

In its April 2019 ruling, the Council of State modified this strict application. The Council of State ruled that the Tax and Customs Administration could no longer demand repayment of childcare allowance in full if only a small proportion of the costs had not been paid.

On 3 May 2019, state secretary Snel received a memorandum about this ruling by the Council of State. Until then, he had not been aware that the Tax and Customs Administration demanded repayment of the childcare allowance in full if the parent in question had not paid the whole of their personal contribution. He had assumed that the Tax and Customs Administration would deal with situations of this type more kindly. Because of the ruling, state secretary Snel was able to see the role played by legislation in this matter.

State secretary Snel wanted the Tax and Customs Administration to take a more flexible attitude towards parents who had paid only part of their personal contributions. He also wanted to consider whether this more flexible approach could be applied in cases where childcare allowance levels had already been set.

His officials pointed out to the state secretary the risks if the Tax and Customs Administration were to adopt a more flexible approach in these cases. It would be laborious to implement and it could lead to much discussion about what constituted a relatively low outstanding payment. Despite this, state secretary Snel was willing to take these risks:

Ms Van Kooten-Arissen: *On the same memorandum it states ... Regarding the amendment to the ruling by the Council of State, your officials wrote that the creation of a sliding scale must be prevented. “That means the definition of a relatively small outstanding payment is a narrow one, one reason being to avoid inconsistency in how people were dealt with.” You commented: “It’s still a question of looking how we can make this feasible.” Can we deduce*

from this that you wanted a more flexible approach with regard to the 'all-or-nothing' approach, but that your officials made a priority of pointing out the risks that that would entail?

Mr Snel: *Yes – and that is also their role, to point out risks – but I nonetheless wanted to run that risk. So I knew ... That happened often: if there was something we wanted to do, the response was lots of legal arguments as to why – often, in all honesty – it was not possible. And I know that there have been meetings when I said, can anybody tell me for once how something can be done legally? That of course is more complicated and you take the risk, because you get case law and it all gets very complicated. My way of thinking here was that it was perfectly logical that we tried not to make an issue of this – let's just do it, and if the courts find later that we were in the wrong, we will find out. I understand that there response would be, "What is a rounded off amount? Is that €50, €100, or €150 ...?" Yeah, I don't know. I just said: "try and get it to work".*

The Benefits director, Cleyndert, stated that the Tax and Customs Administration then started to apply this more flexible approach.

On 8 May 2019, state secretary Snel received a memorandum about how the CAF 11 case might be dealt with appropriately. He was given two options about the setting up of an external advisory committee chaired by Mr Piet Hein Donner. The narrow option would focus on the question of how the Tax and Customs Administration should deal with the ruling by the Council of State on 24 April 2019. The broad option would focus on the entire CAF matter and the related childcare cases. The aim of the broad option would be "to reach a suitable and defensible policy line for all CAF and related cases, whether they were irrevocably fixed, currently ongoing, or in the future. This could put a line under the past and would demonstrate to the House of Representatives and to society a proactive approach to a subject that continues to generate interest and new information." State secretary Snel chose the broad option and presented his decision to the council of ministers for their approval. The council of ministers gave it their approval.

Mr Van Wijngaarden: *I would just like to go back to your role vis-à-vis state secretary Snel. Your offices were close to each other and you regularly spoke to each other, so it was never hard for either one of you to find the other. I assume that, starting that spring, you increasingly functioned as a sort of sparring partner for him, in relation to this matter. Is that a correct assumption?*

Mr Hoekstra: *Yes, but I don't want to convey the notion that it was more significant than it actually was. I was becoming increasingly involved with a number of matters at the Tax and Customs Administration in any case. I think the state secretary did not always find that easy, but understood it because of its importance.*

On 29 May 2019, state secretary Snel informed the House of Representatives of the setting up of the Benefits Administration Advisory Committee, consisting of Piet Hein Donner, Willemien den Ouden, and Jetta Klijnsma. The letter followed several discussions between state secretary Snel and Mr Donner about the remit, from which it appeared the state secretary preferred the broad option. In the letter to parliament, state secretary Snel stated that the request for advice amounted to three questions:

1. In the judgement of the advisory committee, what scope for policy and assessment does Benefits have in its subsequent actions in relation to what is known as the CAF 11 and related cases as a result of the ruling by the Council of State of 24 April 2019, and what could be regarded as a solution that is suitable for every party involved? The advisory committee is expressly asked to consider the effects on ongoing cases and on cases that have already been irrevocably settled.
2. What is the judgement of the advisory committee in more general terms about the actions of Benefits in other cases where suspicions of organised fraud exist? Has the position of those entitled to benefits been adequately safeguarded, what scope for policy and assessment does the Tax and Customs Administration have within the existing legal parameters, and what conclusions can be drawn from this regarding the administration of benefits in the future?
3. In the view of the advisory committee, what in general terms is the situation in practice regarding the legal protections of those entitled to benefits, and what improvements should be made in this area? Among the factors that may be considered here is the fact that benefits can involve vulnerable groups who may not fully understand what is expected of them. The

work of the advisory committee will also involve special categories of personal data – especially nationality – at Benefits.

Mr Snel stated that, when setting up the Donner Committee, he had no clear idea of whether the problems in the CAF 11 affair were more widespread:

Ms Van Kooten-Arissen: *You were advised to ask the committee you were setting up to look at every CAF case involving Benefits. At that time, what did you know about all the cases?*

Mr Snel: *[...] But about those CAF cases – were there other CAF cases where the same things had gone so badly wrong? [...] Later – I don't know exactly, but I don't think it was until after Donner and that whole business in June – there was CAF 16, or CAF 1601, and the other CAF case, which was the subject of court proceedings, which did involve elements that appeared very similar to those in the CAF 11 case. That was, shall we say, a portent of what came later, that there were other cases as well. But at the time, it did not seem as though there was this, and this, and this case, with so many parents affected. We were still very much focused on solving the problems affecting the more than 300 parents in the CAF 11 case.*

Ms Van Kooten-Arissen: *But on 9 May 2019, you had no idea of the numbers involved in the other cases?*

Mr Snel: *No, not at all. No, I don't think we had a fully clear picture right up to the last.*

On 13 May 2019, state secretary Snel received an official memorandum in which comparisons were drawn between the CAF 11 and the CAF 16 cases, prompted by questions by MP Omtzigt. The memorandum also stated that benefits had been stopped with immediate effect in the CAF 16 case as well, that it was not clear to parents what information was lacking, and that the Tax and Customs Administration had not produced all the documentation in court proceedings. According to the officials, one difference with the CAF 11 case was that many parents in the CAF 16 case were subsequently found to have committed benefit fraud. In the CAF 16 case, there were fewer instances of the deadline for appeals and objections being missed than in the CAF 11 case.

XXIV. Chapter 5 The difficult road to compensation

This chapter describes the origin of the intention to compensate parents in the CAF 11 case, the decision to wait for the Donner Committee to finish its work before awarding compensation, the decision to make the change to proportionate allocations, the continuance of demanding repayments in other CAF cases, and the designation of 'malice/gross negligence'.

JJ. Origin of the intention to compensate

In late May and early June 2019, the developments in the CAF 11 case came thick and fast. The inset below shows the most important moments at that time, which are dealt with in greater detail elsewhere in this chapter.

Most important developments, 28 May – 13 June 2019

- 28 May 2019: Questions by RTL Nieuws about evidence and signals in the CAF 11 case
- 29 May 2019: The Ministry of Finance notes that stopping benefits in the CAF 11 case is indiscriminate and that the dates of the signals are incorrect
- 29 May 2019: RTL Nieuws and Trouw: The Tax and Customs Administration used fake evidence to demonstrate fraud
- 4 June 2019: State secretary Snel is informed that benefits in the CAF 11 were stopped unlawfully
- 5 June 2019: First set of factsheets, including reference to Palmen memo
- 5 June 2019: Establishment of CAF 11 crisis team
- 6 June 2019: Memorandum to ministers about individual settlement agreements in the CAF 11 case
- 6 June 2019: Snel to address the council of ministers about compensation; an investigation is launched to see whether and how parents might be compensated
- 7 June 2019: The State Advocate advises waiting for the Donner Committee before deciding on compensation

- 7 June 2019: Council of ministers on compensation for CAF 11 parents
- 7 June 2019: Second set of factsheets, no reference to Palmen memo
- 10 June 2019: Contact between Ministry of Social Affairs and Employment and Ministry of Finance about draft letter to parliament
- 11 June 2019: Discussion between state secretary Snel and parents, letter to parliament sent, and press conference
- 13 June 2019: State secretary Snel receives definitive set of factsheets

On 28 May 2019, journalists from Trouw and RTL Nieuws sent an email containing questions about the CAF 11 case to the Ministry of Finance, because they were preparing to bring out a publication on the subject. The questions were about whether there was any fraud at the childminding organisation that was investigated in the CAF 11 case, and when signals indicating that there were were available. Internally, the Ministry of Finance talked about a serious allegation, as the journalists were stating that forgery may have been committed. As a result of these questions, officials drew up a chronological overview of the events in the CAF 11 case. They came to the conclusion that the previous assertion by the Tax and Customs Administration that signals had been received from the municipal health service (GGD) in 2013 about the childminding organisation had not been correct and that the House of Representatives had not been properly informed of the matter. It also emerged that there had been a lack of precision in the way that the group-based stopping of benefits to parents in the CAF 11 case had been carried out. On 29 May 2019, RTL Nieuws and Trouw reported that the Tax and Customs Administration had used false evidence in dealing with a childminding centre and to unlawfully stop childcare allowance payments to hundreds of parents.

Minister Hoekstra emphasised the important role played by external parties in this matter:

Minister **Hoekstra**: *The really pernicious thing about this matter is that something had been wrong for so long and that it found its way so emphatically on the agenda in 2019 as a result of a ruling by the Council of State, but also through a combination of reports in the media and questions by MPs.*

On 4 June 2019, a discussion was scheduled between director general Uijlenbroek, the state secretary for Finance, Snel, and others about a letter to parliament about the CAF 11 case. During a preparatory meeting of officials at the Ministry of Finance about the draft letter, it again emerged that the stopping of childcare allowance payments in the CAF 11 case had been careless and illogical. Director general Uijlenbroek concluded from this that the parents in the CAF 11 case had been right, and that therefore a different letter should be sent to the House of Representatives. Up to that point, it had been assumed at the Ministry of Finance that the Tax and Customs Administration had made errors in the process relating to the CAF 11 case, but that the stopping of the benefits at the time had been correct. Mr Uijlenbroek informed state secretary Snel of this change of view. The state secretary also came to the conclusion that the parents had been correct.

Officials subsequently started drawing up factsheets about the CAF 11 case. On 5 June 2019, the state secretary received a first set of factsheets. One of the factsheets described how it came about that this view had only now been reached. "This view" refers to the Ministry of Finance coming to the conclusion that the case against the childminding organisation and the parents involved with the CAF 11 case was much less strong than previously thought. The factsheet contained a reference to the memo by the then Benefits technical coordinator from March 2017, which stated that Benefits had acted reprehensibly. The factsheet erroneously stated that the Benefits management team had not taken a decision on this signal. The factsheet also stated that Tax and Customs Administration/Benefits employees involved at the time with the CAF 11 affair had received orders to check documentary evidence from the parents very critically: "We had to find something".

Officials then continued working on a new set of factsheets. In the new set of factsheets, which were sent to the state secretary on 7 June 2019, there was no reference to 2017 memo from the then technical coordinator, Palmen. Nor was there any mention of the order to inspectors at the time being to find something. Benefits director Cleyndert and director general Uijlenbroek stated that they did not know why a reference to the memo was not included in the new set of factsheets.

Mr Uijlenbroek said that the state secretary did not realise that high-ranking officials and the state secretary could have come to the same view about the CAF 11 case two years earlier:

Mr Van Wijngaarden: *You were present at the discussion with the state secretary about the factsheets. How did the state secretary respond to this factsheet, which referred to the memo by Ms Palmen?*

Mr Uijlenbroek: *I can't really recall to any level of detail. The reprehensible action had been established the day before, as it were, based on the information that at the time was new to us. It still didn't sink in; we didn't say, "blimey, we could have known this two years previously!" That realisation did not happen.*

On 13 June 2019, the state secretary received the final set of factsheets. Here too, there was no reference to 2017 memo from the then technical coordinator, Palmen.

On 5 June 2019, the Ministry of Finance set up a CAF 11 crisis team. Control of the matter shifted from director general Uijlenbroek to the deputy director general of Fiscal Affairs, who was appointed crisis manager. The reason for the setting up of the crisis team was the ongoing public scrutiny, the many parliamentary questions, the poor provision and sharing of information, and the change of course in the CAF 11 case. The crisis team operated until 4 July 2019.

On 6 June 2019, officials drew up a memorandum on various options for compensating parents in the CAF 11 affair. A range of options were explored, such as an official review of benefits, generous awarding of previously rejected benefit applications by CAF 11 parents, or corrections made possible through emergency legislation. The officials envisaged major objections to these options and therefore advised ministers to reach individual settlement agreements with all CAF 11 parents. Part of any settlement agreement would be the repayment of outstanding childcare allowance, of interest paid, of legal costs, and damages of €5,000. It is not certain whether this memorandum reached the state secretary, but he was aware of the option of reaching settlement agreements with parents. As a result of a discussion with the state secretary on 6 June, officials looked at which alternative party outside the Tax and Customs Administration/Benefits could conclude the settlement agreements with parents.

On the same day, state secretary Snel received another memorandum from his officials about compensating parents in the CAF 11 affair. The line taken in this memorandum was more cautious. There was no longer any explicit mention of concluding individual settlement agreements with parents. This is the same line as the text to be spoken that the state secretary was given for the council of ministers on 7 June 2019: *"Lawyers are currently exploring – together with the State Advocate – whether to compensate these parents and if so, how. It is particularly complicated because of case law and the strict prevailing legislation. We will try to see whether dealing with/assessing individuals is to be preferred. Depending on the outcome, I will consider what steps I myself can take or how the remit of the Donner Committee could be expanded."*

The memorandum advised Snel to contact other ministers about this line in advance of the meeting of the council of ministers on 7 June 2019, but during the public hearing he said he was unable to remember whether or not he actually did so. From his notes on the memorandum, it appears the state secretary realised that preliminary discussions should still take place with prime minister Rutte and minister Wouter Koolmees and that the members of the Benefits Administration Advisory Committee still needed to be informed.

On 7 June 2019, officials from the Ministry of Finance drew up a memorandum about the advice by the State Advocate on compensating parents involved in the CAF 11 affair. Because of legal risks associated with compensation, the State Advocate advised waiting for the recommendations of the Donner Committee. Legal risks included, among other things, the risk of setting a precedent. It would not be easy to make a sufficiently clear distinction between parents in the CAF 11 case and those who were not part of the CAF 11 case who had had a similar experience. The State Advocate advised the state secretary, if he was prepared to accept the legal risks, to opt for concluding individual settlement agreements with the parents involved in the CAF 11 affair.

KK. Compensation must wait for Donner

On 10 June 2019, state secretary Snel received a memorandum in which he was advised to call Mr Donner, ministers, the National Ombudsman, and MPs on how he would like to compensate the parents in the CAF 11 case. The line being taken implied asking the Donner Committee how

the parents in the CAF 11 case could be compensated. The option of concluding individual settlement agreements was no longer part of the line being taken. Mr Uijlenbroek explained that his assessment was that in deciding to wait for the Donner Committee before paying compensation to the parents, the legal risks outweighed the interests of citizens.

Benefits director Cleyndert said that the lack of clarity on who would be entitled to compensation played a role in the decision to wait for the Benefits Administration Advisory Committee before compensating parents:

Mr Van der Lee: *What kind of precedent were people afraid of?*

Ms Cleyndert: *Because an investigation was being carried out at the time into whether there were other similar cases. The question was very much about how to delineate groups – who is entitled to compensation, and who isn't? You have to be able to state that very clearly. We were very much at the stage of identifying what exactly had happened, both in the CAF 11 and the other CAF cases – in fact, the investigation still had to get underway.*

Mr Snel stated that he was initially in favour of reaching settlement agreements, but that he was persuaded by lawyers that the disadvantages outweighed the advantages:

Mr Snel: *And I remember thinking, initially, that that type of settlement agreement would be a good thing to do. It would mean that, as the state secretary, I could actually do something myself, rather than having to consult with everyone. So that appealed to me, but there were also ... Ultimately we, I think it was the State Advocate ... The lawyers envisaged things differently. One said, "you'd better off doing it this way" while another said, "you'd be better off doing it that way". There were pros and cons, a lot of legal stuff; I can't remember it all exactly, but I that I do recall. We then had the State Advocate who – I think before the 11th, around that time, 6, 7, 8, at the council of ministers I think, but that will presumably be in your files – told me that neither were attractive propositions, because the negative aspects would be played out, but why didn't I simply wait for Donner? [...] It was my call: things were not ready yet, but fortunately very soon would be, and then we could move things forward. [...] And I also remember that during the conversations about the settlement agreements, there were many people who said, take care, because you could end up potentially depriving the parents of all kinds of rights and if you frame it wrongly – and the likelihood of that happening was quite high – imposing a confidentiality clause on them. Or something of that nature, but in any case: you could end up forcing them into a corner and forcing them to decline.*

Minister of Finance Hoekstra said that the relationship with the House of Representatives was also an important reason for asking an external advisory committee for its advice on compensating parents:

Mr Van Wijngaarden: *Did you think at the time, "We cannot mark our own paper?"*

Mr Hoekstra: *Yes. The person who came up with the idea that we had to deal with this objectively was, I think, the secretary general, possibly in collaboration with the director general of the Tax and Customs Administration. I thought that very sensible, otherwise you would end up in a discussion where people would say – "hmm, the Tax and Customs Administration has again made things very easy for itself". But with everything that had happened, I thought we owed it to the citizens who had been affected by this whole sorry affair, as well as to the House of Representatives, that there should be no further discussion about objectivity on how to proceed. And that is reflected in the discussion on 4 June about the settlement agreements.*

On 6 June 2019, the Minister of Social Affairs and Employment and the state secretary for the same ministry, Van Ark, were informed about state secretary Snel's intention to compensate the CAF 11 parents. Officials from the Ministry of Social Affairs and Employment warned their ministers that compensating the CAF 11 parents and backdating the awarding of benefits could set a legal precedent. Reference was made in this context to other childcare allowance cases from 2013 and 2014, but also to other areas of the government, such as the UWV Employment Insurance Agency and the SVB. With regard to setting precedents, the Ministry of Social Affairs and Employment officials wrote the following to the Minister and state secretary: *"The Tax and Customs Administration would also like to compensate parents whose case has been previously closed or cancel their repayments. This could set a significant precedent. This could have far-reaching consequences for the other childcare allowance cases from 2013/2014 (when the Tax and Customs Administration took a hard line in response to indications of fraud) and across other areas of government (such as UWV/SVB, but also other ministries). To further clarify the risk of*

setting precedents, the proposal by the Tax and Customs Administration should be clear and the extra investigations that have been announced should be carried out.”

The officials from the Ministry of Social Affairs and Employment also pointed out to their high-ranking officials that, as far as they were concerned, there was no agreement that the compensation bill should be footed by their ministry. Various high-ranking officials said about this that the costs associated with compensation and which ministry would pay the costs ultimately played no part in the decision about compensating the parents that was taken.

On 10 June 2019, the secretary general of the Ministry of Social Affairs and Employment sent an email to the secretary general of the Ministry of Finance regarding the draft letter to parliament about the CAF 11 case. The Ministry of Social Affairs and Employment believed, among other things, that the Ministry of Finance was too ready to take the blame and did so using too generalised terms, and made comments about careless actions and breaches of fundamental principles by the government in its dealings with citizens. The Ministry of Social Affairs and Employment also took issue with the following sentence: *“Rigid legislation offered and offers very few options for responding to any sense of social justice in these cases.”* They believed that this incorrectly stated that legislation was to blame and proposed that only the examination of options for proportionate repayments should be mentioned in the letter. The Ministry of Social Affairs and Employment also stated that it assumed the compensation costs would be covered by the Ministry of Finance. Some of the comments by the Ministry of Social Affairs and Employment were incorporated into the letter to parliament that was eventually sent.

On 11 June 2019, the state secretary for Finance, Snel, sent a letter to the House of Representatives entitled, *“Richting een oplossing voor ouders in de CAF 11-zaak [‘towards a solution for parents in the CAF 11 case’]”*.³⁹ On that same day, the state secretary spoke with a number of parents who had been affected by the CAF 11 case. In his letter, the state secretary recognised that much had gone wrong since 2014, when a group of parents had their childcare allowance stopped, and that many of the families affected had found themselves in great difficulties. Snel wrote that he had come to the view that too great a focus had been directed at tackling abuse, that part of the legislation was too rigid, that Benefits had acted too slowly and too carelessly, and that too little account had been taken of the human dimension throughout the process. In his letter, the state secretary announced that he had asked the Benefits Administration Advisory Committee to help him on the question of compensating the parents. Together with the state secretary of Social Affairs and Employment, he was going to investigate how a more proportionate approach could be adopted when determining entitlement to childcare allowance.

The press conference with state secretary Snel on 11 June 2019 caused tensions between the Ministry of Social Affairs and Employment and the Ministry of Finance. According to the Ministry of Social Affairs and Employment, the state secretary placed too much of the blame on the policies and legislation of the Ministry of Social Affairs and Employment and too little on the anti-fraud teams and the efforts at detecting fraud on the part of the Tax and Customs Administration in previous years. After the intensive work on coordinating the letter of 11 June, this did not go down well with the officials at the Ministry of Social Affairs and Employment.

The House of Representatives placed the letter on the agenda for a committee debate on 4 July 2019. In advance of the debate, the House of Representatives asked a large number of questions in writing. These also contained requests for internal documents from the Tax and Customs Administration to be provided to the House of Representatives. However, state secretary Snel responded that it was standing cabinet policy that documents drawn up for the purpose of internal consultations should not be the subject of political debate.⁴⁰ Prime minister Rutte received a text message on this matter beforehand, from one of his officials:

Ms Kuiken: On 1 July 2019, you received a text message from one of your advisors. I quote it word for word: “Rob indicated that Omtzigt keeps asking for certain documents to be made public, but that Menno cannot give them to him.” This was because of the Rutte doctrine, it

³⁹ Parliamentary document II 2018/19, 31 066, no. 490.

⁴⁰ Answer to questions by MP Omtzigt about the CAF 11 case.
Appendix to Proceedings II 2018/19, 3380, p. 2

was said. “Kajsa” – in this case, minister Ollongren – “will take it up with Menno.” “Menno” refers to state secretary Snel. My question to you is, what is the Rutte doctrine?

Mr Rutte: Well, that isn't what I call it, but I believe that between officials among themselves and between officials and ministers, as long as no decisions have been taken, documents being passed between them in preparation of decisions being taken – and I'm not talking about the minutes of meetings, but about decisions that have not yet been taken – should be allowed to happen freely. That is my view. There was a big discussion about this in the context of the Open Government Act and many others, but my view is that if you want sensible decisions taken in this country, it is very important that documents can be shared among officials and also between officials and ministers without the fear of these documents reaching the outside world, until a decision has been taken and unless it concerns the minutes of meetings, for example.

LL. Discussions in the council of ministers and dealings with the House of Representatives

In 2019, the subject of childcare allowance was on the agenda of the council of ministers on several occasions. The preparatory documents for the council of ministers showed that there was a strong focus on the political process in relation to this subject. MPs were referred to by name, for example, there was talk of “political probing”, and mention was made of when debates in the House of Representatives were taking place or when documents were to be sent there. In response to a question by Ms Kuiken on whether the priority in the council of ministers was to help parents or to manage a political problem, prime minister Rutte said:

Mr Rutte: I understand entirely what you are saying; actually, both are true. [...] Everything that was done was intended to repair the damage as effectively as possible. That of course is down to the relevant ministry. That's what Menno Snel is doing and he is working on it day and night. There is also a House of Representatives, which has had debates on the matter and which is working on it, the reports of which he is presenting to the council of ministers. That is only logical. You have to discuss that. They both have to be dealt with. They are part of the same story. But that does not mean the former is not the priority: the former is the priority. The latter is the background music against which it is all taking place – the political context and what goes on in society.

Ms Kuiken: But that background music is loud.

Mr Rutte: Yes, because it's not for the council of ministers to discuss how we are going to organise compensation. It's the Ministry of Finance that does that. We – 24 colleagues – are not going to advise him on how to do that. He came up with proposals that we liked, because they essentially are what Donner said. He set up Donner and then accepted what Donner said. If you then come to the council of ministers to discuss it, it doesn't turn into a kind of collective brainstorming session on different compensation options. That was tasked to Donner and was accepted. Then there was the question of what else to do in relation to this matter, in the House of Representatives and in society at large.

MM. Repayments in other CAF cases

On 11 June 2019, the state secretary for Finance, Snel, reported to the House of Representatives that he was suspending the demands for repayment of childcare allowance in the case of the CAF 11 parents. On 28 June 2019, he reported that the repayment of benefit and tax debts by CAF 11 parents was also being suspended. State secretary Snel was informed about this on 8 August 2019. It appeared from the official memorandum that the ministry was aware at the time that 8,000 to 10,000 parents were affected by other CAF cases. Of this group, 4,000 to 5,000 had tax or benefit-related debts. Unlike the parents in the CAF 11 case, the repayment demands on the parents affected by other CAF cases were continuing. The officials wrote the following to the state secretary about this matter: “It can be assumed that the different treatment of CAF 11 and other CAF cases is not justifiable in some cases, the number of which cannot currently be quantified. The differing methods could entail substantive risks as well as the risk of adverse publicity if cases prove to be similar to that of CAF 11; the Tax and Customs Administration asks that consideration be given to these risks, especially in distressing situations such as the enforced sale of homes due to claims being made by the Tax and Customs Administration.”

On 9 August 2019, the Tax and Customs Administration's Landelijk Incassocentrum ['country-wide debt collection centre'] drew up a memo for the Tax and Customs Administration's Uitvoerings- en Handhavingsbeleid ['implementation and enforcement policy'] directorate about the repayments. The memo stated that the secretary general of the Ministry of Finance had taken the position on 24 July 2019 not to suspend in any way any repayments in relation to other CAF or non-CAF cases. Any citizens who applied would be referred to the Donner Committee and would be contacted as soon as the committee had issued its report. During the hearing, the former secretary general, Leijten, said of this that she was not responsible for repayment measures and that the passage in the memo referring to her position was based on an error:

Ms Renske Leijten: *But the recovery of the repayments in those other cases continued. The people involved reported to the Landelijk Incasso Centrum, which is tasked with this. On 24 July 2019 you adopted the position not to suspend ongoing repayment demands in the other CAF cases. Why did you do so?*

Ms Manon Leijten: *[...] There was a memo from one department in the Tax and Customs Administration to another that referred to me. I have to say, that meant nothing to me, because that wasn't my area of responsibility. I arranged to have that checked out today. In conclusion: someone thought they heard it being said. That was a mistake. A conversation was held on 12 July – when I was cycling on Corfu – with the state secretary on what to do with the other repayment demands. The state secretary then decided that he first needed more information on the matter and would then decide on the basis of a memorandum. They very kindly found this out for me, and I understand that emails were sent on 24 July and that they resulted in confusion. So I never took a decision on this and it really is not part of my remit anyway.*

On 23 August 2019, state secretary Snel received a memorandum about the repayment measures. The memorandum stated that there were currently known instances of 8,405 parents who were affected by the other CAF cases, of whom 4,527 had outstanding tax or benefit debts. At the time, the Tax and Customs Administration was unable – in relation to the other CAF cases – to make any distinction between cases where benefits had been unlawfully stopped and those where they had not.

In the memorandum, the state secretary was accordingly presented with three choices for his approval regarding repayment measures in relation to the other CAF cases:

1. *“Compulsory recovery orders in the other CAF cases will not be unilaterally suspended. Irrevocable steps taken in that context, such as attachment of earnings and compulsory offsetting, will be deferred.*
2. *No new compulsory recovery orders will be implemented. Centrally produced repayment documents such as reminders and enforcement orders will be sent, as it is technically not possible to stop this.*
3. *Parents who contact the Tax and Customs Administration about the legitimacy of their treatment by the Tax and Customs Administration will be given an undertaking that their case is being investigated, that they will be informed about the outcome, and in the meantime do not have to make any payments.”*

The Tax and Customs Administration regarded these measures as restrained, because no action was being initiated that could have indicated that there had been any careless, improper, or unlawful action on the part of the Tax and Customs Administration. For the Tax and Customs Administration, the biggest drawback was that there would be more distressing cases because of the continuing recovery orders and because debtors would not be able to get hold of the Tax and Customs Administration in time. The state secretary was advised not to decide to suspend the payment recovery orders relating to the other CAF cases, as with the CAF 11 case. The memorandum stated: *We advise you not to take this option because such a measure could be interpreted as meaning that the Tax and Customs Administration had concluded that in the other CAF cases things had gone wrong as well. Such a conclusion would be untimely given the request for advice to the Donner Committee and the ongoing investigation by the Central Government Audit Service. In addition, there are other significant disadvantages in this scenario, such as the previously mentioned demarcation problem, the risk of setting precedents, the loss of tax revenues, and the labour-intensive nature of the work that it would involve.*

During the public hearing, Mr Snel said he had not decided to suspend the repayment orders in the other CAF cases, as it was not sufficiently clear at the time whether this group of parents were similar to those in the CAF 11 case:

Mr Snel: *The question then was, would you press the same stop button for those other parents ... But it had to be clear how the boundary around these parents was demarcated. And we simply didn't have that information. That was precisely what we asked the Central Government Audit Service and Donner: help us with this, because we don't know what we should do. That's the line I believe I took – okay, we should do it that way. What I particularly remember is that we wanted to treat every parent who had suffered the same fate in the same way. I had already told the House of Representatives that. The only question was whether, for the 4,000 to 8,000 ... Just imagine: 4,000 to 8,000 parents. We really didn't know. We knew that there were more than with CAF 11, but we didn't know to what extent the parents were similar. [...] Yes, I understand you. I had the choice ... I could also have said then, "it doesn't matter, push the pause button for everybody". Except at the time we were very much thinking we were close to knowing which group was affected; payment plans already existed for most people. I followed that official advice because I understood it clearly at that time.*

On 4 November 2019, MPs Omtzigt, Lodders, and Leijten submitted a motion during the committee debate on the 2020 Taxation Plan, requesting the government to immediately stop the recovery of payments in CAF-related benefit cases. In response to the motion, state secretary Snel undertook during the debate to suspend current payment recovery orders in every benefit-related case. He said pressure from the House of Representatives was needed for this decision.

Ms Van Kooten-Arissen: *Let's just move ahead to 4 November 2019. As a result of a motion, you announced a stop to all attachments of earnings and offsettings. Why did you decide then to suspend the payment recovery orders? Was pressure of the House of Representatives needed for this?*

Mr Snel: *Yes, it was. This was several months later. Donner kept us waiting for a long time. The Central Government Audit Service did not yet have its results. My hope that we would quickly get to the stage where we had clear knowledge of which group of parents we could compensate had, by that time, faded somewhat. So I therefore adopted the call by the House of Representatives – "for everyone".*

NN. Decision to change to proportionate allocations

On 2 October 2019, state secretary Van Ark and state secretary Snel received the results of the initial exploration of proportionate repayments. The exploration had been carried out by a group of officials from the Ministry of Social Affairs and Employment, the Ministry of Finance, and the Tax and Customs Administration. The advice by state secretary Van Ark was to agree to work out the details of the "*proportionate allocations based on the childcare costs paid*" option and to specifically consider the risks of fraud associated with this. While waiting for the details of this option to be worked out, the state secretary was advised to take two measures: to formalise the practical applications of payment plans, and a campaign aimed at better informing parents about paying the costs of childcare (including personal contributions). State secretary Snel was advised by the Tax and Customs Administration to accept the proportionate allocations option, as this was said to be the most promising and the one that the Tax and Customs Administration expected would be the most feasible.

On 9 October 2019, state secretaries Van Ark and Snel decide to pursue further the proposed option on proportionate allocations. Proportionate allocations were laid down on 25 December 2019, in the Benefits Joint Decree.

OO. Rulings by the Council of State on the 'all or nothing' approach – October 2019

On 23 October 2019, the Council of State delivered rulings in two childcare allowance cases.⁴¹ In issuing these rulings, the Council of State reconsidered previous rulings, vacating the 'all or nothing' approach that it had previously upheld. The key consideration of the Council of State was:

"Section 1.7, first paragraph, of the Childcare Act stipulates that the level of compensation depends on the ability to pay and the costs of childcare in the benefit year. In the light of the foregoing, the Division now interprets that provision as such that it may be deduced, in its own

⁴¹ ECLI:NL:RVS:2019:3535 and ECLI:NL:RVS:2019:3536.

right and in conjunction with Section 1.52, first paragraph, that the Tax and Customs Administration/Benefits has the scope in law to determine entitlement to childcare allowance if the applicant has paid part of the costs of childcare. This means that, unlike in a previous ruling by the Division (such as in the ruling of 8 June 2016, ECLI:NL:RVS:2016:1610), the Tax and Customs Administration/Benefits, when determining entitlement to advance childcare allowance payments, can assess the level of payable childcare allowance if part of the costs have been paid. When making such assessments, the Tax and Customs Administration/Benefits must consider the interests directly involved with the decision, in accordance with Section 3:4, first paragraph of the General Administrative Law Act. In so doing, any deleterious consequences of a decision may not, in accordance with Section 3:4 of the General Administrative Law Act, be disproportionate in relation to the purposes served by the decision. [...]

The result of this new interpretation of the statutory provisions is that the Tax and Customs Administration/Benefits acquires more options for providing solutions tailored to individual cases, in relation to childcare allowance. At the same time, the importance of preventing abuse and improper use and the legitimate interests of citizens are better balanced.”

The considerations by the Council of State were contained in the rulings. Professor Zijlstra summarised these considerations in his paper for the committee as follows:

“The termination of the ‘all or nothing’ precedent in 2019 was, according to the ruling, prompted by the onerous negative consequences for the financial position of the affected parties, with the Division basing its ruling on reports by the National Ombudsman and the Scientific Council for Government Policy. It can be assumed that criticism in the literature and social and political unrest also played a role, although I cannot assess how great a consideration that was.”

In general, the substance of the rulings by the Council of State of 23 October 2019 can count on approval in legal literature, observes Professor Zijlstra. However, Professor Marseille is critical of the Council of State, in his article in the monthly journal, *Ars Aequi*.⁴² He explained this in his testimony to the public hearing:

Ms Van Kooten-Arissen: *You have written an article in the monthly journal *Ars Aequi*. This is an article containing a legal commentary written in the wake of the new rulings of 23 October 2019. You are rather critical in your article. Can you explain exactly what this criticism refers to?*

Mr Marseille: *I was critical of two things, but in any case because I had the impression that the Division reasoned its change of heart on the basis of societal developments. If you read the ruling with an open mind, without examining it in any depth, you get the impression that we have always properly observed the law, but now we see that the consequences of doing so are very far-reaching, so for that reason we have decided to interpret that legal provision differently – in fact, an interpretation that the literal text of the law does not permit, but which from a social point of view is very desirable. But examining it more deeply, my conclusion was that for at least half of it, for the interpretation of the provision of the law on childcare allowance, the reasoning was incorrect. If they had been honest about it, they should have said, up to now our interpretation of the law has been wrong.*

Ms Van Kooten-Arissen: *But they didn’t say that.*

Mr Marseille: *No, they did not say that. As far as the other half is concerned – Section 26 of the General Act on Means-Tested Benefits – I can imagine that, because reading that provision, I feel that it is strict. Here, the reasoning, the picture set out in the ruling, is in line with the legal reality. And as far as the provisions in the law on childcare allowance are concerned, that reasoning does not hold up and there is a discrepancy. My accusation, if I can put it that way, is actually that the Division has wilfully adopted a position of helplessness, even though it had the possibility of keeping closer tabs on the Tax and Customs Administration.*

For the Tax and Customs Administration, the rulings presented a major task, because the Council of State also stated that decisions had to be taken on how to deal with past cases: *“It is up to the Tax and Customs Administration/Benefits to decide how to deal with other cases in which it previously decided there was no entitlement to childcare allowance due to a failure to demonstrate that the costs had been met in full.”*

⁴² A.T. Marseille, *Kinderopvangtoeslagen: wel of geen beleidsvrijheid voor de Belastingdienst/Toeslagen?*, *Ars Aequi*, April 2020, p. 393-399

PP. State secretary Snel informed about malice/gross negligence

Personal repayment plans are not available to citizens deemed by the Tax and Customs Administration/Benefits to have acted maliciously or grossly negligently and who have to repay benefit they have received. This means that parents have to repay their benefit-related debts within 24 months, regardless of their ability to pay. Any parent who fails to make repayments in accordance with this standard repayment regime will face compulsory recovery orders from the Tax and Customs Administration, such as seizure of cars or the enforced sale of homes. Parents can also encounter problems gaining access to debt counselling if it is clear that the Tax and Customs Administration has deemed them to have acted maliciously or grossly negligently.⁴³ Since mid-2016, the Tax and Customs Administration has investigated all benefit-related debts of more than €10,000 per year and, for each type of benefit, whether malice or gross negligence are factors. Before that, the threshold was €1,500. The Tax and Customs Administration increased the amount due to reasons of efficiency.

On 6 February 2018, state secretary Snel received information from his officials about malice/gross negligence, prompted by the meeting at which he was due to make the acquaintance of the National Ombudsman the next day. The memorandum stated that for anyone accused of malice/gross negligence, it was not the case that the Tax and Customs Administration stopped its payment recovery efforts after two years. It was pointed out to him that the consequences of being accused of malice/gross negligence could mean people spending many years living at the minimum social security level of income. In a letter dated 5 February 2018, the National Ombudsman asked the state secretary to give greater publicity to a scheme by which parents can request that the offsetting of their current child allowance payments against outstanding child allowance debts be alleviated or discontinued. The Ombudsman pointed out that parents would otherwise have too little money for their basic needs. The state secretary was informed that the Tax and Customs Administration would take a transparent and proactive stance in this case. Benefit service providers and parents eligible for this scheme were to be contacted about the scheme and the Tax and Customs Administration would examine how the scheme was to be communicated on its website.

On 16 May 2018, state secretary Snel responded to questions by the Finance committee about malice/gross negligence, and other matters. Among the questions asked were what parents who had been wrongly accused of malice/gross negligence could do, and whether the Tax and Customs Administration would be less quick to make accusations of malice/gross negligence in other cases where payment obligations had not been met. The state secretary did not respond in specific terms to all the questions about malice/gross negligence.

On 28 August 2019, state secretary Snel took receipt of the Socialist Party catalogue of cases, based on information from the discontinued child allowance hotline. The catalogue of cases gave several instances of parents who had been accused of malice/gross negligence and of the effects this had had on them. On 17 September 2019, the state secretary received an official memorandum as a result of the catalogue of cases. The officials wrote, among other things, that the Tax and Customs Administration/Benefits was aware of the sometimes far-reaching effects of the designation 'malice/gross negligence'. They reported that the Tax and Customs Administration/Benefits had since introduced a procedure with a particular focus on careful processing, referring to the four-eyes principle in establishing malice/gross negligence. The state secretary was advised to wait for the Benefits Administration Advisory Committee before responding, as the committee was expected to focus on malice/gross negligence in its interim report.

In October and November 2019, state secretary Snel was informed by his officials about the designation of malice/gross negligence. State secretary Snel found the explanation about malice/gross negligence that he received in an official memorandum on 28 October 2019 far too technical and asked a number of questions to clarify matters. He also wrote that he felt the hairs standing up on the back of his neck. State secretary Snel explained that he had not previously been aware that being designated malicious/grossly negligent would have such an impact:

Mr Snel: My impression was that we had agreed some months previously that in legal proceedings we would be more lenient with regard to what evidence we required. We have

⁴³ Parliamentary document II 2019/20, 31066, no. 680. Appendix "Copy of letter to National Ombudsman".

just had an example of how a case was concluded. And then suddenly I'm shocked to hear about this: there is another group of parents who have been impacted by being designated as malicious/grossly negligent, because for example they hadn't paid their personal contributions, or not paid them in full. They suddenly found themselves not covered by that leniency. That made the hairs on the back of my neck stand up.

Ms Van Kooten-Arissen: *Just to be clear: it was to do with non-payment of a very small amount and then having to repay tens of thousands of euros?*

Mr Snel: *I believe it was mostly about a very small personal contribution. The law was explained to me – you gain entitlement to the allowance only when you have incurred costs yourself and paid your personal contribution – in other words, only when you have paid all your costs. If you have not paid your personal contribution in full and if you should have known about that, then you were accused of malicious behaviour. My reaction, my feeling, was that that was not the case at all. I mean, there may have been differences between what should have been paid and what was paid, but I didn't equate that with gross, culpable, or outrageous behaviour on the part of the parents and that you could simply say, "well, they don't need any repayment scheme".*

On 3 November 2019, director general Uijlenbroek received a memorandum about recovery of payments to the Tax and Customs Administration/Benefits from before 2013. The advice in the memorandum was to drop old repayment claims to allow those entitled to benefits to start with a clean slate. At the time, this concerned 93,000 outstanding claims that predated 2013 and where the Tax and Customs Administration had determined malice/gross negligence. The outstanding sums amounted to up to 192 million euros, of which 142 million euros related to childcare allowance. It was proposed in the memorandum that this information and points for discussions should be added to a wider memorandum about malice/gross negligence for the state secretary. State secretary Snel stated that he did not know whether he received this information.

On 5 November 2019, state secretary Snel received a modified memorandum proposing several options to him on adjusting the policy regarding malice/gross negligence. The memorandum also stated that the four-eyes principle had not been applied on a structural basis whenever the malice/gross negligent designation was imposed. It was also stated in the memorandum that compulsory recovery orders run for a maximum of eight years, because of automation-related restrictions. On 15 November 2019, the state secretary announced his willingness to reconsider the policy regarding malice/gross negligence. He wanted to examine in any case the efficiency limit of €10,000 and the criteria for imposing the designation of malice/gross negligence.

On 13 March 2020, state secretary Van Huffelen informed the House of Representatives that the Tax and Customs Administration had designated 25,000 to 35,000 people as malicious/grossly negligent since 2012.⁴⁴ State secretary Van Huffelen carried out an investigation into whether such designations had been issued correctly. On 4 December 2020, she informed the House of Representatives that, on the basis of a random sample, it had been concluded that 94% of the designations issued could no longer be adjudged to be correct – because the reason had not been properly recorded, or because there was no evidence of abuse, or because the parent in question had not been properly informed about why abuse was deemed to have occurred.⁴⁵

On 27 November 2019, state secretary Van Huffelen sent a letter to the House of Representatives about malice/gross negligence.⁴⁶ It was apparent from the letter that, for the year 2017, the Tax and Customs Administration was able to qualify people facing repayment claims of less than €1,500 as malicious/grossly negligent. There were also indications that in a certain period, the Tax and Customs Administration qualified everyone facing repayment claims of more than €3,000 as malicious/grossly negligent. This latter information was derived from a memorandum, the status of which is not clear. The Central Government Audit Service is will be carrying out an investigation into malice/gross negligence and is due to issue a report on the matter in February 2020.

⁴⁴ Parliamentary document II, 2019–2020 session, 31 066, no. 613

⁴⁵ Parliamentary document II, 2019–2020 session, 31 066, no. 754, Appendix "4^e voortgangsrapportage Kinderopvangtoeslag [4th progress report on childcare allowance]"

⁴⁶ Parliamentary document II, 2019–2020 session, 31 066, no. 739

QQ. Publication of report by Benefits Administration Advisory Committee and decision on compensation in relation to CAF 11

The rulings by the Council of State on 23 October 2019 resulted in a delay to the date of delivery of the report by the advisory committee. On 1 November, the council of ministers discussed the imminent publication of the report. Journalists from RTL Nieuws and Trouw had submitted an extensive freedom of information request under the terms of the Public Access to Government Information Act to the Ministry of Finance as long ago as July 2019. However, the requested documents had not yet been provided. State secretary Snel wished to make the documents public at the same time as the response by the cabinet to the report by the advisory committee. Prime minister Rutte was officially advised to support the state secretary in that proposal, even though that meant that the deadline for the freedom of information request would be missed by a considerable margin. That could lead to a penalty, but the official advice underlined the view of the Ministry of Finance that a penalty was preferable to issuing the information requested before the report by the advisory committee had been published. State secretary Snel had “*already discussed the delay with spokespersons*”, stated the advice. Prime minister Rutte agreed with the advice.

Mr Rutte: *I know that the advice reached me and I regard it as sensible advice – that is, to make everything public in one go. It resulted in a limited delay, but it did at least mean that all the freedom of information requests, the Donner report, and the response to Donner were all released in one go.*

On 14 November 2019, the Benefits Administration Advisory Committee issued its interim report, “Omzien in verwondering”.⁴⁷ The Benefits Administration Advisory Committee was of the opinion that there was institutional bias in the CAF 11 case. By that, the advisory committee meant that, from the very beginning, the Tax and Customs Administration/Benefits operated on the assumption that CAF 11 parents had committed fraud. This suspicion was not based on the personal actions of the parents, but simply on the fact that they had been checked in the context of the CAF 11 affair. The advisory committee described how the Tax and Customs Administration, after discontinuing the benefit, conducted an extensive and meticulous investigation into whether the parents were entitled to childcare allowance in 2014 and the years before that. This investigation (sometimes referred to as the ‘zero tolerance approach’) was designed primarily to detect failings that could then be used to deny entitlement to childcare allowance. Parents received no clear information about what was expected of them and were given no opportunity to rectify any irregularities, which meant they had almost no means of escaping this approach. The result was that parents had to repay all the benefits they had received, which in some cases ran into the tens of thousands of euros. The advisory committee also noted that this bias found its way into work instructions and was also incorporated into objections and appeals procedures, in payment recovery orders, and in new applications by the parents in question for childcare allowance. The advisory committee proposed a compensation scheme for parents in the CAF 11 case that roughly amounted to 125% of the amount of childcare allowance that was adjusted downwards for the years 2012, 2013 and 2014 as a result of the CAF 11 investigation, and €500 for each six-month period since the first correction was made. State secretary Snel responded to the report by the advisory committee on 15 November 2019. He embraced the report and adopted its recommendations. Following the resignation of state secretary Snel on 18 December 2019, minister Hoekstra became temporarily responsible for carrying out the compensation scheme. During the public hearing he said, of this:

Mr Hoekstra: *After everything that had gone wrong, I said, “listen, we have to sort this out now for those 300 parents”. It was my view that they should be paid before Christmas. I said, “nobody here is going on holiday if we have not sorted it and if the payments have not been made”. Even that did not go smoothly.*

On 24 December 2019, minister Hoekstra reported to the House of Representatives that 280 of the 287 CAF 11 parents had received compensation.

⁴⁷ J.P.H. Donner, W. den Ouden, J. Klijnsma, *Omzien in verwondering. Interim-advies*. 14 November 2019

XXV. PART III

XXVI. Accountability

RR. Background

On Tuesday 2 June 2020, the House of Representatives adopted the Snels motion calling for a parliamentary inquiry in which ministers and high-ranking officials would be heard in order to gain a picture of the political decision-making processes surrounding the anti-fraud policies in relation to childcare allowance.⁴⁸ As a result, the Finance committee decided to set up a preparatory group which would prepare an investigation proposal. In a very short period of time, the group prepared an investigation proposal for holding a parliamentary inquiry. On 2 July 2020, the House of Representatives agreed to the investigation proposal to hold a parliamentary inquiry with the aim of gaining a clearer picture of the political decision-making processes and the responsibilities and involvement of high-ranking officials that had an effect on the childcare allowance anti-fraud policy, as well as of the political response to the indications about the far-reaching impact of the anti-fraud policy and the 'all or nothing' approach. This was the third time the parliamentary inquiry instrument, laid down in the temporary parliamentary inquiry protocol, had been sanctioned by the House of Representatives, on the understanding that the options for the investigation with regard to obtaining information and documents were specific and limited.

SS. Composition of committee

At its inaugural meeting on 2 July 2020, the committee appointed Mr C.J.L. van Dam (CDA) as its chairman and Ms A.H. Kuiken (PvdA) as its vice-chairman. The Childcare Allowance Parliamentary Inquiry Committee consisted of the following members:

- J. van Wijngaarden (VVD)
- R.R. van Aalst (PVV)
- C.J.L. van Dam (CDA)
- S. Belhaj (D66)
- T.M.T. van der Lee (GroenLinks)
- R.M. Leijten (SP)
- A.H. Kuiken (PvdA)
- F.M. van Kooten-Arissen (vKA).

TT. Preparatory phase

Immediately upon its inauguration, the committee used its powers to demand information and documents. While waiting for a response, it continued its preparations by dealing with information that was already available in parliamentary documents and documents made public as a result of freedom of information requests. The committee used the information that emerged during the course of its investigation as much as possible, wherever relevant. In the run-up to the public hearings, the committee also held various conversations with relevant parties, including parents, lawyers, the National Ombudsman, and journalists.

During the preparatory phase, the committee reached agreements with the Public Prosecution Service, as laid down in its terms of reference, with a view to the ongoing investigation resulting from the declaration by the minister. Working agreements were made with the Public Prosecution Service in which the responsibilities would be respected. The result of the working agreements was that the committee was able to ascertain that its inquiry would not disrupt any ongoing criminal proceedings.

The committee requested Professor Sjoerd Zijlstra to write a paper about the rulings by the Administrative Jurisdiction Division of the Council of State about the 'all or nothing' approach in relation to childcare allowance. The committee received the paper in early October and incorporated it into its preparations for the public hearings. It also used it when writing this report. The paper is appended to this report. The committee would like to thank Professor Zijlstra for his valuable contribution to the inquiry.

⁴⁸ Parliamentary document II 2019/20, 31 066, no. 652.

UU. Demands

Given the powers invested in its terms of reference, the committee issued eight demands immediately upon its inauguration. These demands were issued to:

- The Ministry of Finance
- The Ministry of Social Affairs and Employment
- The Ministry of General Affairs
- The Ministry of Justice and Security
- The Ministry of Education, Culture and Science
- The Ministry of the Interior and Kingdom Relations
- The Ministry of Health, Welfare and Sport
- The Ministry of Economic Affairs and Climate Policy

The demands related to the ministerial anti-fraud committee and about the follow-up to the “*Geen powerplay maar fair play*” report by the National Ombudsman. Given the terms of reference, the committee demanded only information that had reached the level of deputy director general or higher.

The committee deemed it useful and desirable to reach working agreements with the relevant ministries, with a view to respecting each other’s responsibilities. This meant the committee was adhering to its starting point that it could at any time take cognisance of any information relevant to its investigation and that, in accordance with the Parliamentary Inquiries Act 2008, it could determine which documents would remain confidential after the conclusion of the inquiry. The committee gave the ministers concerned the opportunity to provide reasoned requests for continued confidentiality in relation to each document demanded by the committee.

In accordance with these working agreements, the Ministries of Finance, Social Affairs and Employment, and General Affairs, with two officials from each ministry, had the opportunity to view the reconstruction – Part II of this report – in order that they could comment on any factual inaccuracies and the use of information about which confidentiality requests had been made or in relation to which the interests of the State were at stake. The ministries made comments about possible factual inaccuracies. The committee assessed the comments and incorporated them in part in its report.

VV. Supply of information

The committee has several comments to make about the process by which information was supplied. Its experiences of how information was supplied prompted it to express its concerns about the management of information at various ministries and to state its doubts about whether some of the ministries are actually observing the law with regard to record keeping.

Supply of information by the Ministry of Finance

The committee noted that the supply of information by the Ministry of Finance did not proceed as expected, partly as a result of the working agreements that were made. The demands for information dated 14 July 2020 stated that the information should be received by 1 September 2020. During the discussions on working agreements, it emerged that the Ministry of Finance and the Ministry of Social Affairs and Employment would not meet this deadline for all the information that had been requested. In view of the short lifespan of the inquiry, the committee insisted on the 1 September 2020 deadline for most of the information. On 27 August 2020, the chairman and vice-chairman of the committee of inquiry spoke with the state secretary of Finance – Benefits and Customs, who was acting as the coordinating minister for the committee. During this discussion, the chairman emphasised that it was not feasible for the committee to receive the information that had been requested until 1 October. Eventually, the following passage was added to the working agreements: “*The ministers shall supply any information and documents that have been requested to the committee no later than 1 September 2020. If it is not feasible to supply certain information or documents by 1 September 2020, the ministers shall make every possible effort to supply the information and documents to the committee by 15 September 2020, and no later than 1 October.*”

In a letter dated 28 August 2020, state secretary Van Huffelen stated that a significant proportion of the requested information would be supplied on 1 September 2020. However, the committee is obliged to note that the Ministry of Finance supplied only six folders on 1 September, fourteen

folders on 15 September, and another ten folders on 1 October, which means a large proportion of the information was not supplied until after 1 September. Another small batch was eventually supplied as late as 10 November 2020. The committee strongly deplores the use of this provision in the working agreements in this way.

The letters accompanying the information and documents stated that the delay was caused by the size and timing of the demands, as well as the availability of the documents. The committee would like to point out that its demand had been limited and specific, and did not contain any unexpected elements. Because the House of Representatives had been asking for information for some time and because several investigations⁴⁹ into this matter had already taken place, the committee's view is that it was impossible for the documents requested not to have been available. The committee also assumes that previous experiences inside the ministry with the supply of information as a result of poor information management in 2019 would have had some effect on how information was managed from that time. The committee is very disappointed that these reasons were put forward in this way.

As a result of the public hearings, the committee received additional information from the ministry; it was reported that officials had put forward the information for the purpose of giving it to the committee. The committee is grateful to these officials for their involvement.

Parts of many documents were redacted because, in the view of the ministry, they fell outside the scope of the demand by the committee. However, this was also the case with sections that did concern the committee's investigation. The committee therefore considers that the extent of the information supplied was sparse.

The committee also notes that on several occasions during the course of its investigation, new information appeared that was relevant to the committee's investigation. This concerned information resulting from requests from the House of Representatives, such as the memorandum by Ms Palmen, for which the committee sent a supplementary demand, newly discovered information sent by to the House of Representatives by state secretary Van Huffelen, but mostly information gained as a result of freedom of information requests (made under the terms of the Public Access to Government Information Act). Just before the public hearings, for example, documents were published following freedom of information requests that had already been received on 12 June 2020 (Benefits management team – on 10 November 2020) and on 1 July 2020 (Tax and Customs Administration management team – on 17 November 2020). The committee was not informed of this beforehand. Most of the freedom of information requests had been for some time at the ministry, where the connection between the requests and the committee's investigation is clear. The committee notes that the legal deadline relating to the first two freedom of information requests had been missed by a considerable margin. It would have done the ministry more credit if it had decided on these requests at an earlier stage and not just because of its possible impact on the committee's investigation. With this in mind, the committee would like to express its astonishment at the timing of the decisions on these freedom of information requests.

Furthermore, a newly discovered memorandum about malice/gross negligence was sent to the House of Representatives on the day after the public hearings. And then, two weeks before the publication of this report, a letter was sent to the House of Representatives stating that the compensation scheme was to be extended to people who had been wrongly treated in relation to healthcare allowance, housing benefit and the child-based budget, even though during the public hearings it had been stated that there were no indications that any errors had occurred in relation to any other benefits. Finally, it was reported to the committee that yet more documents that could be relevant to the committee would be published in the short term as a result of a freedom of information request about the Benefits Administration Advisory Committee. This committee regards this with great dismay.

In addition, a week before the publication of its report, and as a result of the latter freedom of information request, the committee received documents from officials, on an informal basis, bearing handwritten comments by the state secretary of Finance. Draft versions of these documents – that is, without handwritten comments – had been sent to the committee previously. In its demand for documents, on 14 July 2020, the committee had explicitly requested that any

⁴⁹ The committee is referring here to the work of the Benefits Administration Advisory Committee, the various reports by the Central Government Audit Service, and various internal reconstructions.

such comments by ministers be included. After all, the purpose of the investigation was to examine the political decision-making process and interaction with high-ranking officials. This concerns only those documents that came within the committee's demand. The committee was therefore very puzzled that these versions of the documents appeared as a result of a freedom of information request and not because of the demand by the committee, which was based on the constitutional right of inquiry of the House of Representatives. This creates the impression that the ministry paid insufficient attention to responding fully to the committee's requests. The committee notes that, at the time of writing this report, these documents have still not been officially supplied to it by state secretary Van Huffelen.

The committee points out that its requests were specific and limited and that it expected every document that formed or forms part of documents released under freedom of information requests to be supplied to the committee in September 2020, or by 1 October 2020 at the latest, if such documents were covered by the committee's request. If they are not, the committee, or the House of Representatives if the committee has been relieved, may consider taking steps regarding the meeting of the committee's demands on this point.

One of the recurring themes in this matter is that the supply of information has fallen short of the justifiable expectations of parents, ministers, high-ranking officials, the House of Representatives, and the Senate. It is therefore highly regrettable to note deficiencies in the provision of information to the committee. In the light of the many shortcomings, the committee cannot assume that all the information it has requested is actually in its possession. The committee is very dismayed that the supply of information by the Ministry of Finance has been conducted in this manner, as it is impossible to exclude the possibility of omissions in its reconstruction of events.

The supply of information by the Ministry of Social Affairs and Employment

Although the committee is understanding of the pressures facing the Ministry of Social Affairs and Employment in connection with COVID-19, it notes that this ministry, like the Ministry of Finance, has not honoured the intentions contained in the working agreements. It was not until 1 October 2020 that the committee received a large proportion of the documents it had asked for. Here, too, the committee notes that the ministry has already held an investigation, which yielded some of the information requested by the committee. For the committee, it is a matter of concern that the management of information at the Ministry of Social Affairs and Employment too is such that specific information cannot readily be obtained.

After receiving the first and second batches of information, the committee also noted various deficiencies. Very few of the documents bore comments by ministers or high-ranking officials. Nor were any minutes of meetings involving high-ranking officials and politicians present. In other words, the documents lacked any kind of receiver-to-sender information, which means no information about the political decision-making process was included at all. However, the request for information of 14 July 2020 explicitly included the following: "*For each document, the response of the addressee – if applicable – should also be sent, regardless of whether it is a comment (handwritten) on the document itself or one on a separate document.*"

The committee noted that this required information was missing and was therefore forced to conclude that its request for information was not honoured, or not honoured in full. The committee also noted that the quantity of supplied documents was limited. As a result, the committee was obliged to repeat its request in a letter dated 21 September 2020. State secretary Bas van 't Wout stated, upon the delivery of third batch of information, to have taken proper cognisance of the letter. The committee eventually received sufficient information, in the context of its requests. However, it regrets that it had to repeat its request before receiving sufficient information.

Supply of information by the Ministry of General Affairs

The Ministry of General Affairs responded willingly to the requests it received and provided the committee objective summaries of the ministerial anti-fraud committee, even though this actually went beyond what the committee had asked for.

Additionally, the Ministry of General Affairs supplied, at the request of the committee, documents on which comments by prime minister Rutte were missing. On this matter, too, the committee sent a letter, which was answered two weeks before the public hearings. The answer took the form of several documents with underlined sections, accompanied by notes stating that no comments had been found on the documents. During the public hearing, prime minister Rutte said of this:

Mr Rutte: This is a very small ministry, with one, one-and-a-half person following it for each ministry in The Hague; at the Ministry of Social Affairs and Employment, for example, where thousands of people work, there is one chief counsel for advocacy, sometimes with one assistant counsel for advocacy, who follows it. They are obviously only involved when matters become really very important. We don't have the time to put it all on paper, so indeed almost everything is done verbally.

Prime minister Rutte also stated that the Ministry of General Affairs had conducted a thorough search for information relevant to the committee and that the committee had received everything that was found. It was with amazement that the committee took cognisance of the statement by the Prime Minister that hardly any record keeping takes place in his ministry.

Supply of information by other ministries

The remaining ministries that received requests for information from the committee responded within the stated time. It should be pointed out that the Ministry of Economic Affairs and Climate Policy, the Ministry of Health, Welfare and Sport, and the Ministry of Education, Culture and Science did not find any documents in their archives that were covered by the terms of reference of the request, and have therefore not supplied any documents. The committee would like to thank these ministries for their cooperation.

WW. Choice of witnesses and the course of the public hearings

In October, the committee decided who they would be calling to attend a public hearing, with evidence to be given on oath. In deciding who to call, the committee used the information available that showed that the individuals in question had been involved with the childcare allowance issue. As a result of the emergence of the Palmen memorandum, the committee decided to hear Ms Palmen as a witness. The committee also withdrew an invitation to a witness when the person in question gave notice that they would not be able to testify before the committee due to urgent personal circumstances. The committee invited another witness instead.

The public hearings went well and yielded much useful information for the committee for this report of its findings.

XX. Other duties of the committee

During its investigation, the committee focused its activities on high-ranking politicians and officials. It did not investigate the role of the House of Representatives, as this fell outside its terms of reference. However, where any part played by the House of Representatives was relevant to gaining a picture at any particular time, this did not exclude the possibility of its inclusion in the report. The same applies to facts pertaining to the period outside that being investigated by the committee, but mention of which are relevant to the overall picture.

As a result of its requests for information, the committee has a small archive, as compared to inquiries generally. For the committee, the point of departure of the Parliamentary Inquiries Act 2008 that as much of the information used by committee as possible will be made public after publication of the report is paramount. There were relatively few requests for information obtained by the committee to be kept confidential. When archiving the documents that had been entrusted to it, the committee gave careful consideration to which documents would be made public and which would remain confidential. In this context, the committee would like to point out that much weight was given to requests for confidentiality in reaching this decision.

The objective summaries that the committee received for viewing purposes from the Ministry of General Affairs will, in accordance with the relevant legal provisions and the agreements made, form no part of the archive. The decisions by the ministerial committee and the Council of Ministers, as well as the reasons for these decisions, have been included in the report where relevant. The committee is keen to emphasise that the content of the objective summaries has not otherwise been used in the report or at the public hearings. Any information referring to the ministerial committee or the Council of Ministers is based on relevant preparatory documents, which can be found in the committee's archive.

The committee would also like to point out that the working agreements with the cabinet stated that the personal data of officials below the rank of director and of external parties, such as parents, would be redacted and shown in coded form. The committee noted at an early stage

that this had not been carried out carefully on the documents supplied by the Ministry of Finance and, with a view to publishing the archive, gave the Ministry of Finance the opportunity to send a new set of documents in which the relevant information was redacted. These documents form part of the committee's public archive. The poorly redacted set of documents formed the official basis of the investigation by the committee, but because of the personal data they contain, they have been deemed confidential by the committee.

This means that the committee's archive consists of a public section and a confidential section, in accordance with Sections 39 and 40 of the Parliamentary Inquiries Act 2008. The public section of the committee's archive was made available for public viewing one day after the publication of its report. After the report has been dealt with in full by the House of Representatives, the complete archive of the committee will be transferred to the House of Representatives. The committee emphasises the importance of the House of Representatives upholding the status of the confidential section of the archive.

During its investigation, the committee received many letters and emails from individuals and organisations. The committee used any relevant information that reached it in this way as part of its investigation. In the interest of the senders, this correspondence forms part of the confidential section of the committee's archive.

YY. Composition of staff

The committee was assisted by a body of staff, consisting of House of Representatives employees:

- Jeroen Freriks, secretary general
- Rob de Bakker, investigation coordinator
- Martijn van Haeften, deputy investigation coordinator
- Anouschka Verbruggen-Groot, legal advisor/researcher
- Willemijn Bernard-Kesting, information specialist
- Arja van Meeuwen, committee assistant.

From the Communications Department, communication advisors Anna Kodde and Barbara Lensen-Goossen assisted the committee. House of Representatives messengers Marja Prins and Carin van der Gaag-Kleijwegt assisted the committee during meetings and hearings.

Finally, a large number of employees of the departments at the House of Representatives assisted the committee during its investigation; particular mention should be made of employees of the Facilities Department, the Communications Department, the Parliamentary Reporting Office, the Catering Department, and the Security Department.

The committee would like to express its deep gratitude to the aforementioned individuals and other departments at the House of Representatives who assisted or supported it in any way.

ZZ. External advisors

In the run-up to and during the public hearings, the committee was assisted by hearings trainers Maria Leijten and Roeland Kooijmans as sounding boards. The committee also engaged the services of Mr Koen van Tankeren to act as its spokesman. The committee would like to express its gratitude to these external advisors for their advice and dedication.

XXVII. Appendix 1. Lessons for witnesses

During the public hearings, the committee asked the witnesses what lessons they had learned from the childcare allowance affair. The lessons learned by the witnesses mostly concern the benefits system, the legal framework, the feasibility of the wishes of politicians, anti-fraud policies, the human dimension and individual circumstances, the Tax and Customs Administration, and having a picture of the consequences of policies. The witnesses sometimes referred not so much to lessons as to important causes of the problems that had arisen. These and other lessons can be read in the reports of public hearings. The reports also contain the more implicit lessons learned during the hearings, a prominent example being "that should have been done differently at the time".

Several lessons that the witnesses have learned are presented below.

System

We embarked on a path – and it certainly contributed to this grim situation – using a system that the Tax and Customs Administration had described in no uncertain terms (and this time it did not get stranded in layers of loam) as bad. (Wiebes)

The whole of the legislation that shaped that system in the way that it is had been around since 2006, if I remember correctly. It is highly complex, involving large sums – especially for people on low incomes. But anyway, these are the lessons that we are now learning. (Rutte)

The benefits system itself. I think everyone now agrees that it does not work, that it entails too many risks. (Asscher)

The current benefits system is very complex and places a lot of responsibility on the shoulders of citizens. There is hardly any room for manoeuvre in administering it. Because this system has to run for several more years, even more improvements will have to be made. (Cleyndert, Tax and Customs Administration)

More than was the case in the past, I think we really need to realise that there are huge differences between people who receive benefits and taxpayers [...] regarding the degree to which you can assume that citizens are able to organise their overall situation with the government without making any errors. Can you assume that citizens are able to meet every obligation and get everything right first time when applying for something? (Blokpoel, Tax and Customs Administration)

Legal framework

Once again, it could not only have been the administration, because the legislation can sometimes be complex too. (Snel)

More responsive legislation – that is, regulations that factor in the possibility that you may be asking questions of a parent who does not see the whole picture, but the consequences of which could be merciless. We must not produce legislation of that kind again. (Snel)

Either that population should be much smaller or you should adapt the law to suit that population, because you need the space to apply the law flexibly according to the individual situation. You need the space for that. You need to add a hardship clause. (Blankestijn, Tax and Customs Administration)

As state secretary, I should have given myself the possibility of including a hardship clause to provide a legal avenue for making exceptions to obviously tight situations and for relieving hardships caused by the law. (Weekers)

The feasibility of the wishes of politicians

Over the years, political priorities have changed – from making speedy payments to coming down hard, from desisting from high payment recovery demands to factoring in the human dimension. It is important that a balance be found between all of these priorities. (Cleyndert, Tax and Customs Administration)

However, I also did that again myself: doing something in a way that you know will be difficult to actually carry out, because it's politically convenient. That's where it starts, and there's a lesson there. (Wiebes)

Human dimension and adaptability

But perhaps the most important thing is that we should ensure that we do not look at what happens with people 'on the outside' from a point of view of mistrust, but see it as a cry for help...

As a government, I think that is what we should learn. We should not look at people as 'cases' or 'files', because they are people with a need for something. (Van Ark)

A standard fine for the whole amount means relying on a skewed notion of justice, because it actually has nothing to do with justice. (Asscher)

Greater adaptability in the provision of services. (Snel)

So scope for adaptability, scope for the person whose name is on the file, and greater readiness to discuss matters with people themselves, so that we have a clearer idea of the consequences at an earlier stage. Things should have been discussed with the people themselves at a much earlier stage. (Leijten, Ministry of Finance)

I really think that our periodic evaluations of laws should not only be concerned with their efficiency and effectiveness, but also with public values. We have an Interior and Kingdom Relations governance code and that includes such values as how to deal with citizens. What is the self-learning capacity of the government apparatus? In other words, how do we deal with people carefully? If we had evaluated this law in this way after five years, then the problems would have been visible. (Mulder, Ministry of Social Affairs and Employment)

The broader lesson is that things should have been done completely differently, both in terms of dealing with parents and in terms of how to design such a system, but I think that's a broader question. (Hoekstra)

Financial incentives when tackling fraud

Unlike a business case, in which you look to see whether it makes sense, setting targets that have to be met in relation to tackling fraud, and where organisations have to make up any shortfalls from the rest of their budgets if they do not reach their targets, is something that should never be done, says Donner. I agree with him on that completely. I also wrote that in the cabinet response. After all, that creates an additional institutional interest. (Rutte)

Tax and Customs Administration

Reviewing anti-fraud policies throughout the Tax and Customs Administration. (Snel)

There are several lessons to be learned, but one of those is certainly how you approach such matters and how you instruct an administration in the various steps to be taken. (Veld)

Less complexity in the Tax and Customs Administration organisation.

That the Tax and Customs Administration's span of control is too large. So there's too much going on. It is almost impossible for one director general to do that. (Snel)

The culture and skills at the Tax and Customs Administration must change. (Snel)

A good organisation isn't one that never makes mistakes...

An organisation only becomes a good organisation if anyone can raise their hand and ask: what is going on here? (Wiebes)

How can we properly deal with signals from the people on the ground? That calls for a culture in an organisation that is willing to learn, share dilemmas and work collectively. Together, we are moving in that direction and things have to improve. (Leijten, Ministry of Finance)

The problems with the Tax and Customs Administration are symptoms of the parameters and environment in which it has to function...

It pains me to have to say that the Tax and Customs Administration has played a substantial part in what went wrong. But we also have to look at it from a very broad perspective, as that is the only real solution if you want to make structural improvements. (Uijlenbroek, Tax and Customs Administration)

A clear view of the consequences of policies

How is it possible for government actions to go so wrong and degenerate so badly?

You have to ensure that ministers always have to face up the consequences of their policies. It's about shortening the distance between responsibility and consequences. (Asscher)

I reinforce my own lesson – really get closer to the administrators, just as we do on improvements projects. You will then hear what is really happening. Signals will then really be heard. Do not talk only to your policy colleagues. It's the administrators you should be talking to. (Van Tuyll, Ministry of Social Affairs and Employment)

I feel very strongly that we should invite the administrators to reflect on the kind of things their professionals on the ground come up against when dealing with the people we work for, so that they really are brought to our notice. (Mulder, Ministry of Social Affairs and Employment)

Perhaps the most important lesson from this whole affair – certainly for me – is, if only we had entered into a dialogue with parents, with parents who had to deal with the reality, earlier on. Speaking for myself – but I think the same goes for others – it would have made a much deeper impression as to what it actually meant to people's lives. (Hoekstra)

The tragedy is that, specifically as far as the child allowance is concerned, it only came fully into view – the harshness of the system, the non-proportionate recovery of payments – in 2019. That is also certainly one of the lessons I have drawn from this whole matter... (Rutte)

XXVIII. Appendix 2. Paper: All or nothing

The case law of the Administrative Jurisdiction Division of the Council of State regarding the recovery of childcare allowance payments between 2010 and 23 October 2019

Professor S.E. Zijlstra

Introduction

The Childcare Allowance Parliamentary Inquiry Committee (hereinafter, 'the Committee') of the House of Representatives has asked me to write a paper on the case law of the Administrative Jurisdiction Division of the Council of State regarding the so-called 'all or nothing' approach towards the recovery of childcare allowance payments between 2010 and [23 October 2019]⁵⁰, (the date of the ruling that ended the 'all or nothing' approach).

To that end, the Committee drew up six questions, which are examined and answered below, in separate sections. A concise summary concludes the paper.

§ 1. The most important rulings in the 'all or nothing' approach by the Administrative Jurisdiction Division of the Council of State

What are the most important rulings by the Administrative Jurisdiction Division of the Council of State in relation to what is referred to as the 'all or nothing' approach by the Tax and Customs Administration in its implementation of the General Act on Means-Tested Benefits in combination with the Childcare Act and the quality requirements of nurseries (childcare allowance) from 2010 until 23 October 2019?

1.1 The 'all or nothing' approach

To answer this question, a concise description is given below of what should be understood by the 'all or nothing' approach. According to the Donner Committee, which used the expression to describe the way in which the Tax and Customs Administration/Benefits and the administrative courts applied Section 26 of the General Act on Means-Tested Benefits in combination with Section 1:7 of the Childcare Act and the quality requirements of nurseries, the approach means:

"that, in accordance with the General Act on Means-Tested Benefits, a parent owes the sum of the amount being recovered in its entirety. It may have been possible to arrange a repayment plan, but Benefits and the administrative courts stated firmly that the General Act on Means-Tested Benefits did not permit the amount outstanding to be reduced or waived"; [...] "minor shortcomings [quickly led [...] to the loss of any entitlement to the childcare allowance for year in question. If, for example, an error was detected on a timesheet for one particular week, or if a pay slip was missing for one particular month, or if a signature was missing on a contract, then that could easily lead to entitlement to childcare allowance being stopped for the entire calendar year and then to repayment demands for all advance payments made for that year."⁵¹

The Donner Committee referred to administrative court case law, stating

"that when determining childcare allowance entitlement, and when taking decisions on the recovery of payments, there was no scope for applying any proportionality criteria.⁵² [...] Efforts at ensuring that the costs were actually paid, and paid in full, became increasingly rigorous. The administrative courts agreed to these ever-stricter enforcement measures."⁵³

The Donner Committee gave various examples of the "strict requirements that were derived from the Childcare Act and the General Act on Means-Tested Benefits in case law":

- Relevant legal provisions here are that the childcare should be based on an agreement (Section 1.52 of the Childcare Act). This agreement should be signed by the parent of the child, the childminder, and the childminder organisation.⁵⁴ Any amendments (such as an increase in the hourly rate) must also be signed by all parties.

⁵⁰ The invitation to write the paper mentioned the date of 15 November 2019 in this context. However, the 'turnaround' in the Division's case law was on 23 October of that year.

⁵¹ Benefits Administration Advisory Committee (hereinafter, the 'Donner Committee'), interim report *Omzien in verwondering*, p. 28-29.

⁵² Ditto p. 29, with reference to ABRvS 8 June 2016, ECLI:NL:RVS:2016:1610.

⁵³ Ditto, p. 29.

⁵⁴ Ditto, p. 29. The Donner Committee says of this: "Signing of the agreement, incidentally, is not required by the letter of the law!"

- The level of the childcare allowance depends on the number of hours' childcare per week and the statutory hourly rate (Section 1.7 of the Childcare Act). According to case law, the costs incurred for childcare must be paid in full and on time, with proof required.⁵⁵ If it is not possible to prove that all the costs have been paid, the childcare is said to have not been provided according to the agreements and there is no entitlement to childcare allowance. Also, the costs must be paid shortly after the childcare in order that the level of the allowance can be quickly established.⁵⁶
- If the costs have not been paid in full (or if this cannot be proved), then entitlement to the benefit for that year ceases entirely and all advance payments must be repaid: "As the Division has previously considered (...), there is no entitlement to childcare allowance if the parent of the child is unable to demonstrate that he has actually paid the full cost amount. If it can be demonstrated that part of the costs have been paid, there is no entitlement to a correspondingly lower advance payment or a lower level of benefit. In its ruling of 8 June 2016, (...) the Division also took into consideration the fact that it was only in cases involving the rounding off of figures – that is, where only small differences existed between the overall costs of childcare and the demonstrably paid costs – that Benefits assumed that all the costs of childcare had been paid for."⁵⁷
- There may be exceptional cases in which it is not possible for a parent to pay the costs of childcare on time, such as non-receipt of a childcare allowance advance payment. However, non-receipt of an advance payment is in itself no excuse for non-payment of at least part of the costs, given that part of the costs are in any case payable by parents. These payments should be made on time. If part of the costs are not paid, or not paid on time, the parent will have to provide an explanation.⁵⁸
- Only in cases where a parent discontinues the benefit of his own volition and makes no further claims for the benefit for the rest of the benefits year does the calculation of childcare allowance not have to be based on a full year.⁵⁹

1.2 The case law of the Administrative Jurisdiction Division

1.2.1 General

Several statements from the passages presented in the Donner Committee interim report stand out that, in the view of the committee, should be designated as illustrative, if not indicative.

We have already seen that the Donner Committee quoted the following statements from the 'all or nothing' case law (in chronological order): ABRvS 20 November 2013, ECLI:NL:RVS:2013:2006, ABRvS 16 March 2016, ECLI:NL:RVS:2016:714, ABRvS 16 November 2016, ECLI:NL:RVS:2016:3044, ABRvS 8 June 2016, ECLI:NL:RVS:2016:1610 and ABRvS 17 January 2018, ECLI:NL:RVS:2018:137.

The literature that appeared mostly as a result of the 'turnaround ruling' of 23 October 2019 also made reference to various rulings, both as indicators and as illustrations. Some rulings were mentioned more frequently than others, but it is not possible to derive any consensus.

The most significant rulings mentioned in the literature are (again, in chronological order): ABRvS 24 August 2011, ECLI:NL:RVS:2011:BR5679;⁶⁰ ABRvS 9 July 2014, ECLI:NL:RVS:2014:2473;⁶¹ ABRvS 27 August 2014, ECLI:NL:RVS:2014:3173;⁶² ABRvS 19 November 2014, ECLI:NL:RVS:2014:4179; ⁶³ ABRvS 8 June 2016,

⁵⁵ Ditto, p. 29. The Donner Committee refers here to ABRvS 16 March 2016, ECLI:NL:RVS:2016:714.

⁵⁶ Ditto, p. 29, with reference to ABRvS 20 November 2013, ECLI:NL:RVS:2013:2006.

⁵⁷ Ditto, p. 29, with reference to ABRvS 17 January 2018, ECLI:NL:RVS:2018:137 (officially 5.3).

⁵⁸ Ditto, p. 30, with reference to ABRvS 16 November 2016, ECLI:NL:RVS:2016:3044.

⁵⁹ Ditto, p. 30.

⁶⁰ R. Stijnen, "The Division does a turnaround. There is legal space to determine whether there is entitlement to childcare allowance if the applicant has paid part of the childcare costs. Application of Section 3:4 of the General Administrative Law Act" (annotation under ABRvS 23 October 2019, *Gst.* 2020/29).

⁶¹ A. Drahmman and D.K. Jongkind, 'Revision of advance childcare allowance payment. Principle of proportionality' (annotation under ABRvS 23 October 2019, *AB* 2020/85).

⁶² Stijnen 2020.

⁶³ E.J.E. Groothuis, P.J. Huisman, N. Jak, "Tax and Customs Administration/Benefits allowed to award childcare allowance proportionally. Division does a 'turnaround'" (annotation under 23 October 2019, *RSV* 2020/22).

ECLI:NL:RVS:2016:1610;⁶⁴ ABRvS 8 March 2017, ECLI:NL:RVS:2017:589;⁶⁵ ABRvS 29 March 2017, ECLI:NL:RVS:2017:817;⁶⁶ ABRvS 19 July 2017, ECLI:NL:RVS:2017:1945;⁶⁷ ABRvS 23 May 2018, ECLI:NL:RVS:2018:1702⁶⁸ en ABRvS 29 August 2018, ECLI:NL:RVS:2018:2848.⁶⁹

Finally, the Division is in the habit in those of its deliberations that involve a 'line' that has previously been taken, as it were, of referring to rulings in which that 'line' was first laid down (wording: "as the Division has previously considered..."), or those which for said 'line' are illustrative (wording: "see, for example, the ruling ..."). What stands out here is that reference is always made – with a few exceptions – to different rulings, but subsequent examination of these rulings does not always immediately clarify *why* reference was made to them.

For example, ABRvS 8 June 2016, ECLI:NL:RVS:2016:1610 is often referred to as one of the 'key rulings' in the 'all or nothing' series of case law.⁷⁰ In that ruling, the Division refers to ABRvS 17 August 2011, ECLI:NL:RVS:2011:BR5166 and ABRvS 16 March 2016, ECLI:NL:RVS:2016:714; the latter itself refers to ABRvS 22 June 2011 ECLI:NL:RVS:2011:BQ8833. From this whole range of references, it is not clear where which line was laid down, or in relation to which points the ruling referred to creates anything new.

The foregoing means that the references in the literature and case law can be used at best as helpful resources for answering the question of which rulings have been the most important.

For the analysis below, the following search methods have been used. Searches on the Council of State website were conducted using the terms 'awir' [General Act on Means-Tested Benefits] or 'kinderopvangtoeslag' [childcare allowance], and each of the rulings thus found was analysed. The same thing was done on www.rechtspraak.nl (limited to rulings by the Administrative Jurisdiction Division). Of the rulings that were regarded as the most important, the ECLI numbers were then used as search terms on www.rechtsorde.nl.

The relevant case law here is based largely on the General Act on Means-Tested Benefits. The act also applies – as its name suggests – to other means-tested benefits, such as housing benefit and healthcare allowance. Some important rulings about provisions in the General Act on Means-Tested Benefits concern areas other than childcare allowance, but they are mentioned if they affect childcare allowance in any way. The rulings shown in this paper concern childcare allowance, unless stated otherwise.

Finally, the Administrative Jurisdiction Division of the Council of State was contacted to check whether the most important rulings relating to the 'all or nothing' approach had been identified. This proved to be the case.

1.2.2 Development of case law

Elements

Looking at the structure of the legal decision-making process concerning repayment demands under the terms of the General Act on Means-Tested Benefits, and partly in the light of the interim report by the Donner Committee, the 'all or nothing' approach is legally made up of the following elements:

- a. the person receiving childcare allowance must be able to demonstrate that he has incurred childcare costs and how much these costs amount to (Section 18, paragraph 1 of the General Act on Means-Tested Benefits and Section 52 (former) of the Childcare Act, now 7 paragraph 1 sub of the Childcare Act);

⁶⁴ M. Scheltema, 'De responsieve rechtsstaat: het burgerperspectief', *Nederlands Tijdschrift voor Bestuursrecht* 2019/24; Marseille 2020; Groothuis, Huisman and Jak 2020.

⁶⁵ H.A. Elbert, 'Onrecht en ander te voorkomen fiscaal leed in de wereld van de fiscale toeslagen', *Nederlands Tijdschrift voor Fiscaal Recht* 2018/1201; J.D. Baron and E. Poelmann, 'Principles always ring twice: de menselijke maat is willen en doen', *Tijdschrift voor Formeel Belastingrecht* 2020/2; M.E. Gonzalez Perez, 'Na 12,5 jaar op naar een menselijke maat?', *Tijdschrift voor Formeel Belastingrecht* 2020/3 and A.T. Marseille, 'Kinderopvangtoeslagen: wel of geen beleidsvrijheid voor de Belastingdienst/Toeslagen?' (annotation under 23 October 2019, *Ars Aequi* 2020 p. 393 et seq.).

⁶⁶ Gonzalez Perez 2020.

⁶⁷ Gonzalez Perez 2020.

⁶⁸ Drahmman and Jongkind 2020.

⁶⁹ Stijnen 2020.

⁷⁰ As with the Donner Committee, Scheltema 2019; Marseille 2020; Groothuis, Huisman and Jak 2020. In the Division's rulings from after that date, there are 46 cases in which reference is made to this ruling.

- b. if the Tax and Customs Administration/Benefits establishes that any part of the documentation that the person concerned is supposed to supply is missing, inaccurate, or incomplete, it is authorised to decide to demand repayment of the advance payment (Section 16, paragraph 4 and Section 5 of the General Act on Means-Tested Benefits);
- c. the Tax and Customs Administration/Benefits is also authorised, in cases where the deficiencies in the information are very minor, to review or recalculate the person's entitlement to benefit, to the detriment of the latter;
- d. if a review or recalculation results in a demand for repayment, the person involved owes the full amount (Section 26 of the General Act on Means-Tested Benefits);
- e. the authority to demand repayment is a binding authority – this means that such a demand must be made; the only possible exception is in the event of a very slight difference between the overall costs of childcare and the costs that have been shown to have been paid;
- f. demands for repayment cover advance payments in their entirety – that is, not just the proportion for which proof is lacking, for example. The Tax and Customs Administration/Benefits is not authorised to moderate its repayment demands or to apply any kind of proportionality criteria (Section 3:4 of the General Administrative Law Act);
- g. the administrative courts are not authorised to apply any such proportionality criteria either.
- h.

Provision of proof (element a), authority to demand repayment (element b), and full indebtedness (element d)

Elements a, b, and d emanate directly from the law, and can therefore be found in the Division's case law from the very beginning.

For the *obligation to supply information* (element a), see for example ABRvS 22 June 2011, ECLI:NL:RVS:2011:BQ8833:

“Pursuant to Section 18, first paragraph of the General Act on Means-Tested Benefits, a party concerned, a partner, and a housemate shall provide to the Tax and Customs Administration/Benefits, upon request, all details and information that could be relevant to an assessment of whether entitlement, and to what level, to the benefit exists.”⁷¹

The *authority to demand repayment* (element b) is inherent to the whole of the case law on this subject, which after all would not have arisen if this authority had been denied.

For a confirmation of the *full indebtedness* (element d), see for example ABRvS 24 August 2008, ECLI:NL:RVS:2008:BG8262, a case about housing benefit (which, as mentioned, also comes under the General Act on Means-Tested Benefits):

“Section 16, fourth and fifth paragraphs, of the General Act on Means-Tested Benefits gives the Tax and Customs Administration the authority to review advance payments. Section 26 of the General Act on Means-Tested Benefits also prescribes that if a revision of an advance payment results in a demand for repayment or if an offsetting of an advance payment with a benefit payment results in same, the person involved owes the full repayment amount.”

This standard recital appears in numerous other rulings.

Without any claim that this is a complete list: ABRvS 21 April 2010, ECLI:NL:RVS:2010:BM1759 (housing benefit and healthcare allowance); ABRvS 19 January 2011, ECLI:NL:RVS:2011:BP1353 (healthcare allowance); ABRvS 17 August 2011, ECLI:NL:RVS:2011:BR5166 (housing benefit); ABRvS 19 October 2011, ECLI:NL:RVS:2011:BT8597; 16 March 2016, ECLI:NL:RVS:2016:714 and ABRvS 8 June 2016, ECLI:NL:RVS:2016:1610.

Authority to demand repayments in the event of minor discrepancies (element c)

Element c is not derived from the letter of the law, and therefore requires further examination. It cannot be explicitly found as such in the rulings that have been examined, but can be derived from case histories.

It concerns, among other things, the case law about the agreement between parents and providers (childcare or childminder organisations) that has to be provided. This agreement had

⁷¹ Extensive reference is made to this ruling, for example in ABRvS 30 May 2012, ECLI:NL:RVS:2012:BW6900.

to be signed by the parent of the child, the childminder, and the childminder organisation, and had to include the hourly rates, the number of hours' childcare per child per year, and the duration of the agreement. Any amendments, such as a change to the hourly rates, had to be signed by all parties as well. If any one of these elements was lacking, then no agreement was deemed to exist and no entitlement to childcare allowance was deemed to exist either. The standard ruling appears to be⁷²

ABRvS 27 July 2011, ECLI:NL:RVS:2011:BR3219, in which the Division considered:

"From Section 52 of the Childcare Act, when read in combination with Section 11, third paragraph, preamble and under c, of the Regulation, it follows that the agreement, referred to in Section 52 of the Childcare Act, must in any case contain the information mentioned in Section 11, third paragraph, preamble and under c, of the Regulations. The preliminary agreement of 4 January 2008, provided by [appellant], does not, as correctly pointed out by the Tax and Customs Administration/Benefits during the proceedings, contain the price per hour to be paid for the childminder care, the number of hours' childminding per year, or the duration of the agreement. In view of this, an agreement as meant in Section 52 of the Childcare Act that forms the basis for childcare cannot be said to exist, for which reason no entitlement to an advance childcare allowance payment existed from 1 January 2008."

However, this line had been adopted before this, in a ruling five days previously, namely ABRvS 22 July 2011, ECLI:NL:RVS:2011:BR3217; it has since been applied consistently.

For example, ABRvS 26 March 2014, ECLI:NL:RVS:2014:1062; ABRvS 19 July 2017, ECLI:NL:RVS:2017:1925 and ABRvS 11 July 2018, ECLI:NL:RVS:2018:2282.

This element also includes the requirement that, partly with a view to the "importance of monitoring the correct use of public funds", the payments should be made to the organisation in question immediately or shortly after the relevant period. See ABRvS 17 July 2013, ECLI:NL:RVS:2013:371:

"The background to the scheme for awarding childcare allowance and the issuing of advance payments for same, as well as the importance of monitoring the correct use of public funds, involve the costs for childcare actually being paid at the time that care is provided, or shortly thereafter. Regardless of the exact time within which the payment of costs should be made, payment in 2013 of personal contributions for the 2008 and 2009 allowance years are certainly too late to be assigned to these latter years. In view of this, the court was correct in deciding that the Tax and Customs Administration was entitled to set the advance payment of childcare allowance for 2008 and 2009 at zero."

This line was repeated in various subsequent rulings.

See, for example, ABRvS 19 February 2014, ECLI:NL:RVS:2014:497, ABRvS 19 July 2017, ECLI:NL:RVS:2017:1925 and ABRvS 11 July 2018, ECLI:NL:RVS:2018:2282.

The ruling of 20 November 2013 is also cited in ABRvS 2 April 2014, ECLI:NL:RVS:2014:1114, in which the Division expressly takes into account the interests of the Tax and Customs Administration:

"As the Division has previously considered (ruling of 20 November 2013 in case no. 201210719/1/A2), all payable costs of childcare should be paid at the time the childcare is actually provided or shortly thereafter in order to be considered eligible for application of the Childcare Act. *The reason for this can be found in the importance of the Tax and Customs Administration/Benefits being able to definitively determine, relatively shortly after the end of the calendar year, and based on the information provided about the agreements made between the parties, whether any entitlement to childcare allowance exists for that year and if so, how much*" (italics added by SZ).

Exceptions are possible in cases where the parties concerned had a good reason or reasons for being unable to make the payments shortly after the end of the year in question (see the aforementioned ruling ABRvS 2 April 2014, ECLI:NL:RVS:2014:1114), although appeals made in this context are rarely upheld.

Examples include the rulings ABRvS 19 February 2014, ECLI:NL:RVS:2014:497 (late payment of advance payment), ABRvS 2 April 2014, ECLI:NL:RVS:2014:1114 (payment difficulties) and ABRvS 3 September 2014, ECLI:NL:RVS:2014:3295 (late payment of advance payment).

⁷² This was referred to in subsequent rulings, such as in ABRvS 12 October 2011, ECLI:NL:RVS:2011:BT7381.

Compulsory nature of the authority to demand repayments (element e)

This, too, has been a fixed line throughout the period under investigation. In the previously cited ruling ABRvS 24 August 2008, ECLI:NL:RVS:2008:BG8262, a case about housing benefit, the Division continues, after the passage about the indebtedness in relation to the repayment claims:

“The court further adjudges that the General Act on Means-Tested Benefits contains no provision on the basis of which the Tax and Customs Administration may decide to waive repayment demands.”

In the rulings mentioned above in relation to element b, this standard recital always follows on from the consideration on full indebtedness. The oldest ruling on childcare allowance⁷³ that I found in which this was considered is ABRvS 28 November 2012, ECLI:NL:RVS:2012:BY4444. However, there is scope for not demanding repayments if there are rounding-up differences – that is, very small differences between the overall costs of childcare and the costs that have been shown to be paid (ABRvS 8 June 2016, ECLI:NL:RVS:2016:1610 and ABRvS 13 March 2019, ECLI:NL:RVS:2019:773), and the Tax and Customs Administration/Benefits is also so authorised if “the information has been requested from the parent, if it has been presented, and if it has subsequently been in the possession of the Tax and Customs Administration/Benefits for a long period of time (at least three years) without it taking any follow-up action. If, as a result, any evidence is missing, this will not be contested by the Tax and Customs Administration. In the event of the total amount of advance payments being greater than the overall costs of childcare, no rounding-off differences of the kind described **above are deemed to exist (ABRvS 17 January 2018, ECLI:NL:RVS:2018:137), but this does not alter the fact that in certain circumstances, the difference may be so small that the Tax and Customs Administration/Benefits cannot argue that the costs have not been met in such cases (ABRvS 24 April 2019, ECLI:NL:RVS:2019:1333).**”

The advance payments must be recovered in its entirety: no proportionality criteria are applied by the Tax and Customs Administration/Benefits (element f)

The oldest ruling that I found in which this was specifically considered⁷⁴ concerns ABRvS 17 August 2011, ECLI:NL:RVS:2011:BR5166 (housing benefit). After the ‘familiar’ consideration whereby Section 26 of the General Act on Means-Tested Benefits prescribes that a parent owes the sum of the amount being recovered in its entirety, the following:

“**The General Act on Means-Tested Benefits contains no provision on the basis of which the Tax and Customs Administration may decide to waive *or reduce repayment demands*, as proposed by [appellant]” (italics added by SZ).**

This was repeated in many subsequent rulings.

For example, ABRvS 19 November 2014, ECLI:NL:RVS:2014:4179, ABRvS 11 February 2015, ECLI:NL:RVS:2015:386, ABRvS 15 November 2017, ECLI:NL:RVS:2017:3137 and ABRvS 4 September 2019, ECLI:NL:RVS:2019:3013.

The Division sometimes relies on Section 26 of the General Act on Means-Tested Benefits to rule that an appeal for a reduction is not possible.

See for example ABRvS 14 November 2012, ECLI:NL:RVS:2012:BY3055 and ABRvS 2 April 2014, ECLI:NL:RVS:2014:1114. In ABRvS 3 September 2014, ECLI:NL:RVS:2014:3295, the Division repeated this position when an appeal was made on the basis of the principle of proportionality. “[appellant] contends that the court has failed to recognise that the setting at zero of the advance payment awarded to him is disproportionate. [...] As the Division has previously considered (ruling of 14 November 2012 [ECLI:NL:RVS:2012:BY3055], the Tax and Customs Administration/Benefits is not authorised to waive demands for repayments, now that it has been laid down in Section 26 of the General Act on Means-Tested Benefits that if an advance payment leads to an amount being recovered, the party in question is liable to pay that whole amount. The court therefore correctly assumed that the Tax and Customs Administration/Benefits was entitled to revise the advance payment awarded to [appellant] to zero.”

⁷³ With regard to housing benefit/healthcare allowance, see ABRvS 19 January 2011, ECLI:NL:RVS:2011:BP1353, ABRvS 16 February 2001, ECLI:NL:RVS:2011:BP4722 and ABRvS 2 March 2011, ECLI:NL:RVS:2011:BP6322.

⁷⁴ It was cited by the ABRvS in its ruling of 8 June 2016, ECLI:NL:RVS:2016:1610 (see below) as a standard ruling: see below.

An appeal based on Section 3:4 of the General Administrative Law Act (the principle of proportionality) was also explicitly rejected (ABRvS 21 August 2013, ECLI:NL:RVS:2013:840):

“Finally, the argument of [appellant] that the court has failed to recognise that the Tax and Customs Administration/Benefits, in contravention of Section 3:4, second paragraph of the General Administrative Law Act, has taken insufficient account of her interests, given that as a result of the demands for repayment of the advance payment, she has experienced significant financial hardship, has failed. As the Division has previously considered (ruling of 14 November 2012 in case no. 201202657/1/A2), the Tax and Customs Administration/Benefits is not authorised to waive demands for repayments, now that it has been laid down in Section 26 of the General Act on Means-Tested Benefits that if an advance payment leads to an amount being recovered, the party in question is liable to pay that whole amount.” See previously ABRvS 7 December 2011, ECLI:NL:RVS:2011:BU7020 and ABRvS 25 January 2012, ECLI:NL:RBSGR:2011:BQ8254, *JB* 2012/62: “Given the legal parameters within which the Tax and Customs Administration must assess a request, the appeal of [other party] on the grounds of Section 3:4 of the General Administrative Law Act also fails.”

Article 1 of the First Protocol to the European Convention on Human Rights, which protects property, also contains a form of proportionality criteria (“fair balance”). The way in which the Tax and Customs Administration/Benefits demands recovery of advance payments does not, in the view of the Division, form a breach of Article 1 of the First Protocol, because the advance payments did not constitute property (ABRvS 10 December 2014, ECLI:NL:RVS:2014:4445):

“Now that the courts have correctly adjudged that no fair belief can be derived from an advance payment that an entitlement to that advance payment exists, the Tax and Customs Administration/Benefits has not deprived [appellant] of any property”. See also ABRvS 16 March 2016, ECLI:NL:RVS:2016:691: Furthermore, in demanding the recovery of an advance childcare allowance payment for the year 2010 that subsequently proved to have been awarded incorrectly, the Tax and Customs Administration/Benefits did not deprive [appellant] of any possessions, now that an advance payment is not a possession as meant by Article 1 of the First Protocol to the ECHR.

Finally, the Division sometimes simply notes that a large proportion of costs, although not all, have been shown to be paid. This leads (for example in ABRvS 19 December 2012, ECLI:NL:RVS:2012:BY6772) to the following brief consideration:

“Now that [appellant] has not demonstrated that he has paid in full the childminder costs stated in the agreement, on which the allowance is partly based, the court has correctly adjudged that the Tax and Customs Administration was correct in reviewing the advance childcare allowance payment and in setting it at zero.”

In its ruling of 8 June 2016, ECLI:NL:RVS:2016:1610, the Division set out the foregoing in explicit terms, explaining in detail that this means there is no scope for a corrective effect of the principle of proportionality (Section 3:4 of the General Administrative Law Act):

“The weighing up of different interests that an administrative body should make is limited, to the extent that it emanates from a legal requirement, in accordance with Section 3:4, first paragraph. From the aforementioned provisions, it follows that there is no scope for weighing up different interests when setting the level of childcare allowance if it cannot be shown that all the costs have been paid and, as the Division previously stated in the aforementioned ruling of 17 August 2011,⁷⁵ when recovering payments. When revising advance payments, when setting the level of benefit, and when recovering repayments, the Tax and Customs Administration/Benefits is therefore unable to take any account of the costs that [appellant] has provably paid. The Tax and Customs Administration/Benefits has therefore correctly adopted the position that [appellant] has no right to a proportionate part of the childcare allowance for the years 2009, 2010 and 2011. Nor can the personal circumstances that [appellant] has adduced lead to the recovery of the payments being waived. The fact that no penalty has yet been imposed on [appellant] does not discharge her, as the Tax and Customs Administration/Benefits has rightly stated, from the obligation of repaying in full the advance childcare allowance payments for the years 2009, 2010 and 2011.”

⁷⁵ This ruling had been cited previously.

The Division makes an exception to this if the Tax and Customs Administration/Benefits has not made an advance payment (ABRvS 16 November 2016, ECLI:NL:RVS:2016:3044) or has stopped the benefit during the current year in breach of the General Act on Means-Tested Benefits, and if this has resulted in the relevant party ceasing their payments to the childcare/childminding organisation (ABRvS 8 March 2017, ECLI:NL:RVS:2017:589). In this latter ruling, however, the Division makes it clear that it does not regard this as a proportionality matter:

“In cases of this kind, in which the Tax and Customs Administration, when stopping the advance payments, has not exercised the required level of precision and has acted in contravention of the prevailing rules on suspension, an exception can be made to the rule that the costs for the whole year must have been paid. This means that, for the period prior to the cessation of payments and for the period thereafter, separate assessments must be made as to whether the conditions for eligibility for childcare allowance have been met. Contrary to what the Tax and Customs Administration/Benefits has argued, it cannot be contested in these circumstances that [other party] has not paid childcare costs for September to December in full and that it is sufficient in this case that [other party] demonstrates that she has paid the costs for January to August 2014, for which an advance payment was made. This is not a claim of eligibility for childcare allowance for a proportion of a whole year, based on the number of months for which payments have been shown to be made, but a claim for part of the year prior to the time when payment of the benefit was stopped.”

In rulings of 23 October 2019, ECLI:NL:RVS:2019:3535 and ECLI:NL:RVS:2019:3536), the Division ended the ‘all or nothing’ approach. The key consideration was:

Section 1.7, first paragraph, of the Childcare Act stipulates that the level of benefit depends on the ability to pay and the costs of childcare in the benefit year. In the light of the foregoing, the Division now interprets that provision as such that it may be deducted, in its own right and in conjunction with Section 1.52, first paragraph, that the Tax and Customs Administration/Benefits has the scope in law to determine entitlement to childcare allowance if the applicant has paid part of the costs of childcare. This means that, unlike in a previous ruling by the Division (such as in the ruling of 8 June 2016, ECLI:NL:RVS:2016:1610), the Tax and Customs Administration/Benefits, when determining entitlement to advance childcare allowance payments, can assess the level of payable childcare allowance if part of the costs have been paid. When making such assessments, the Tax and Customs Administration/Benefits must consider the interests directly involved with the decision, in accordance with Section 3:4, first paragraph of the General Administrative Law Act. In so doing, any deleterious consequences of a decision may not, in accordance with Section 3:4 of the General Administrative Law Act, be disproportionate in relation to the purposes served by the decision.

[...].

The result of this new interpretation of the statutory provisions is that the Tax and Customs Administration/Benefits acquires more options for providing solutions tailored to individual cases, in relation to childcare allowance. At the same time, the importance of preventing abuse and improper use and the legitimate interests of citizens are better balanced.

No proportionality test by the courts (element g)

It is conceivable that the administrative courts permit an administrative body to apply a strict line when recovering payments, but that they do not *prescribe* this, thereby leaving scope for the administrative body to apply a more lenient policy. Given that, until October 2019, the Division was of the view that the Tax and Customs Administration/Benefits had no such scope when demanding the repayment of childcare allowance, and therefore had no authority to moderate such demands, it is logical that proportionality criteria would no longer be considered by the administrative courts. Therefore, the conclusion in the previously cited ruling of 8 June 2016, ECLI:NL:RVS:2016:1610, after determining that the Tax and Customs Administration/Benefits has no right to apply proportionality criteria, is:

“[appellant]’s argument that the court should have deemed the decision of 21 January 2015 as being contrary to the principle of proportionality, was unsuccessful.”

1.3 Conclusion: the most important rulings

Elements a, b and d follow directly from the law, and have never been disputed, while element g results unavoidably from element f; I will disregard the rulings that illustrate this.

For each element, the most important rulings are:

1. *the Tax and Customs Administration/Benefits is authorised, in cases where the deficiencies in the information are minor, to review or recalculate the person's entitlement to benefit, to the detriment of the latter.*

Most important ruling/rulings:

- with regard to the agreement: ABRvS 27 July 2011, ECLI:NL:RVS:2011:BR3219
- with regard to the late payment: ABRvS 17 July 2013, ECLI:NL:RVS:2013:371

2. *the authority to demand repayment is a binding authority – that means that such a demand must be made; the only possible exception is in the event of a very slight difference between the overall costs of childcare and the costs that have been shown to be paid;*

Most important ruling/rulings:

- general: ABRvS 24 August 2008, ECLI:NL:RVS:2008:BG8262 (housing benefit) and ABRvS 28 November 2012, ECLI:NL:RVS:2012:BY4444.
- no repayment demand in the case of rounding-off differences: ABRvS 8 June 2016, ECLI:NL:RVS:2016:1610.
- no repayment demand in the case of very small differences: 24 April 2019, ECLI:NL:RVS:2019:1333.

3. *demands for repayment cover advance payments in their entirety – that is, not just the proportion for which proof is lacking, for example. The Tax and Customs Administration/Benefits is not authorised to apply any kind of proportionality criteria (Section 3:4 of the General Administrative Law Act).*

Most important ruling/rulings:

- Generally speaking: ABRvS 17 August 2011, ECLI:NL:RVS:2011:BR5166 (housing benefit);
- No reduction possible: ABRvS 14 November 2012, ECLI:NL:RVS:2012:BY3055;
- Not demanding repayment of everything if an advance payment has not been paid (or paid on time) or if the benefit had been stopped during the year in breach of the General Act on Means-Tested Benefits: ABRvS 16 November 2016, ECLI:NL:RVS:2016:3044 and ABRvS 8 March 2017, ECLI:NL:RVS:2017:589;
- Explicitly setting out the reasons for no proportionality criteria: ABRvS 8 June 2016, ECLI:NL:RVS:2016:1610;
- The Division has a 'turnaround': ABRvS 23 October 2019, ECLI:NL:RVS:2019:3535 and ECLI:NL:RVS:2019:3536.

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§ 2. Role of the Tax and Customs Administration

What was the input of the Tax and Customs Administration/Benefits in these matters and what is its position in the rulings, and the reasons behind the rulings?

Below, I focus exclusively on *the rulings* by the Division – specifically those rulings that were previously (section 1.4) described as the most important. In these rulings, the position of the Tax and Customs Administration/Benefits in the relevant case or in general terms was shown. It is therefore possible to make this clear. Whatever the Tax and Customs Administration put forward during preparatory proceedings or during the proceedings themselves cannot be included in this investigation, unless it was cited as part of the ruling itself.

1. *The Tax and Customs Administration/Benefits is authorised, in cases where the deficiencies in the information are minor, to review or recalculate the person's entitlement to benefit, to the detriment of the latter.*

Here, we saw that the Division, in relation to the requirement that all costs must be paid no later than just after the provision of childcare services, emphasised "the importance of the Tax and Customs Administration/Benefits being able to definitively determine, relatively shortly after the end of the calendar year, and based on the information provided about the agreements made between the parties, whether any entitlement to childcare allowance exists for that year and if so,

how much” (ABRvS 2 April 2014, ECLI:NL:RVS:2014:1114). In the same ruling, the Division made a link with the requirement of a valid agreement:

“In this context, it is important that the Tax and Customs Administration/Benefits sets the allowance on the basis of the agreements between the parties. This is because, in accordance with Section 7, first paragraph of the Childcare Act, the level of the allowance depends on, among other things, the agreements between the parties about the number of children being cared for, the number of hours’ care being provided, and the applicable hourly rate. These agreements should be set down in a written agreement concluded by the parties, pursuant to Section 52 of the Childcare Act, to prevent any lack of clarity regarding the level of the costs of childcare for the year in question.

The Division therefore recognises that the Tax and Customs Administration/Benefits bases (must base) the allowance on the information provided by the relevant party, with an important role being played by the agreement with the childcare or childminding organisation. The verification of the accuracy and completeness of this information is hence very strict.

2. The authority to demand repayment is a binding authority – that means that such a demand must be made; the only possible exception is in the event of a very slight difference between the overall costs of childcare and the costs that have been shown to be paid.

The oldest ruling on childcare allowance in which this was considered is ABRvS 28 November 2012, ECLI:NL:RVS:2012:BY4444. The ruling contains no input from the Tax and Customs Administration/Benefits that is of relevance to this element.

Such input is present in rulings that deal with a correction to this line, namely concerning rounding-off differences and very minor differences.

In the case that resulted in the ABRvS 8 June 2016, ECLI:NL:RVS:2016:1610 ruling, it turned out that the policy applied by the Tax and Customs Administration/Benefits involving the rounding off of figures – that is, where only small differences existed between the overall costs of childcare and the demonstrably paid costs – assumed that all the costs of childcare had been paid for.

If it concerned recovering payments in cases involving very small differences, things were different – here, the Tax and Customs Administration/Benefits sought to recover only a slight difference, but the Division did not permit this (ABRvS 24 April 2019, ECLI:NL:RVS:2019:1333):

Ultimately, the difference between the overall costs and the costs that were paid was (€11,891 – €11,775.56 =) €115.44. This is such a small difference that, given the scale of the payments and regularity with which the payments took place, and the fact that payments were made monthly upon receipt of an invoice, it could not be argued that the costs of childcare had not been paid for in 2013. The fact that the total sum of advance payments that [appellant] received was greater than the overall costs, as was the case in the ruling cited by the Tax and Customs Administration/Benefits of 17 January 2018 (ECLI:NL:RVS:2018:137) does not alter the fact that in the aforementioned circumstances, the Tax and Customs Administration/Benefits cannot argue that the costs have not been met in this case. In the light of the above, the Tax and Customs Administration/Benefits incorrectly calculated and set at zero the childcare allowance for 2013.

3. The demand for repayment covers advance payments in their entirety – that is, not just the proportion for which proof is lacking, for example. The Tax and Customs Administration/Benefits is not authorised to apply any kind of proportionality criteria (Section 3:4 of the General Administrative Law Act).

The first, general ruling on this element concerned a case about housing benefit, namely ABRvS 17 August 2011, ECLI:NL:RVS:2011:BR5166. The ruling shows no input from the Tax and Customs Administration/Benefits on this point. The same applies to the first ruling that was about childcare allowance, where the Division considered the same thing (ABRvS 19 November 2014, ECLI:NL:RVS:2014:4179), and the rulings cited in which the Division rejected an appeal for moderation or the principle of proportionality (ABRvS 14 November 2012, ECLI:NL:RVS:2012:BY3055 and ABRvS 3 September 2014, ECLI:NL:RVS:2014:3295 respectively).

The more-frequently cited ABRvS 8 June 2016, ECLI:NL:RVS:2016:1610 ruling, in which the Division sets out in explicit terms why there is no scope for a corrective effect of the principle of

proportionality (Section 3:4 of the General Administrative Law Act), offers another picture. It set out in detail the position of the Tax and Customs Administration/Benefits concerning the prescriptive natures of the Childcare Act and the General Act on Means-Tested Benefits, and the impossibility of applying proportionality criteria (or even a threshold-based percentage).

“At the second sitting, the Tax and Customs Administration/Benefits explained, when asked, that if it cannot be demonstrated that all the costs of the agreed childcare have been paid, the Childcare Act and the General Act on Means-Tested Benefits give it no scope when setting the level of advance childcare allowance payments, benefit, or repayment demands, to take any account of the proportion of the costs that had actually been paid. The Tax and Customs Administration/Benefits has not therefore set down any policy rules or developed a fixed code of conduct in this regard. It believes that the law does not offer it any scope for acceding to appeals for the principle of proportionality to be applied, so that in cases where it can be demonstrated that part of the costs have been paid, a claim for a correspondingly lower advance payments or lower benefit could be made.

Furthermore, the Tax and Customs Administration/Benefits explained that only in cases involving the rounding off of figures – that is, where only small differences existed between the overall costs of childcare and the demonstrably paid costs – did it assume that all the costs of childcare had been paid. However, this is a matter of evidence according to the Tax and Customs Administration/Benefits, and does not refer to the application of the principle of proportionality. In its view, the same applies in the event of information having been requested from the parent, if it has been presented, and if it has subsequently been in the possession of the Tax and Customs Administration/Benefits for a long period of time (at least three years) without it taking any follow-up action. If, as a result, any evidence is missing, this will not be contested by the Tax and Customs Administration.

The Tax and Customs Administration/Benefits has also explained that it sees no possibility, and indeed regards it as undesirable, to apply a threshold-based percentage in the context of proportionality. Applying such a threshold would mean that if at least a certain percentage – for example, 95% – of the costs of childcare had been provably paid, it would be assumed that entitlement to benefit did exist. Not only does the legislation not provide for this, setting any such percentage would be arbitrary. Moreover, it could lead to anticipatory conduct on the part of parents. Also, partly as a result of the introduction of the cashier role for childminder organisations, making them legally obliged to transfer payments from the parents of the children to the childminders, the number of cases where parents’ appeals for the application of the principle of proportionality has fallen, according to the Tax and Customs Administration/Benefits.”

The Division then considered, referring to previous case law, that there should be no application of such proportionality criteria.

As far as the exceptions regarding repayment demands are concerned, there is a clear difference between a situation in which an advance payment has not been paid (or paid in time) – ABRvS 16 November 2016, ECLI:NL:RVS:2016:3044 – and a situation in which the benefit has been stopped during the year in breach of the General Act on Means-Tested Benefits – ABRvS 8 March 2017, ECLI:NL:RVS:2017:589. In the former situation, the policy of the Tax and Customs Administration/Benefits is not to demand that everything be repaid, but to check rigorously that the party concerned takes action. The Division pursues this theme:

“The Tax and Customs Administration/Benefits recognises that parents may in certain situations not be in a position to pay their costs on time. This may occur where no advance payment has been issued. The Tax and Customs Administration/Benefits expects the applicant to take an active approach, such as reaching a deferment of payment agreement. Any such agreement must be communicated to the Tax and Customs Administration/Benefits. According to the Tax and Customs Administration/Benefits, however, non-receipt of an advance payment cannot be a reason to not to pay any of the costs of childcare. In the case of [appellant], the Tax and Customs Administration/Benefits views as decisive the lack of clarity on whether the payment of 3 February 2014 should be allocated to the year 2013, on whether the payment was made through the childminding organisation, and whether the [appellant] had agreed a deferment of payments or a gift with the childminder.”

In the second situation, the Tax and Customs Administration/Benefits did want to recover the whole of the advance payment, but it was the Division itself that considered this unacceptable in such a case.

“In this case the special circumstance exists in which the Tax and Customs Administration/Benefits, in anticipation of the results of a check, had ceased making advance payments during the course of the benefits year, even though the childcare was continuing and [other party] initially claimed benefit for childcare after said cessation – that is, for the whole of the benefits year. In its letter of 28 October 2016, the Tax and Customs Administration/Benefits responded to questions from the Division by adopting the position that, in this case, the whole of the year should be considered. According to the Tax and Customs Administration/Benefits, it did not matter whether the advance childcare allowance payment had actually been paid as this did not affect the payment agreements with the childminding organisation, which had to be honoured on time in order for continued entitlement to childcare allowance. However, an exception can be made in this latter aspect if a deferment of payments is agreed in time with the childminding organisation, if the advance childcare allowance has not been paid, if the parent is unable to pay, and if the personal contribution has been paid. An exception can also be made if the inability to pay is attributable to the Tax and Customs Administration/Benefits, says the letter. [...] The Division is of the view that the Tax and Customs Administration/Benefits, in stopping the advance payment, did not act in accordance with the General Act on Means-Tested Benefits, as correctly argued by [other party] at appeal.”

In the case that led to ABRvS 23 October 2019, ECLI:NL:RVS:2019:3535, the Tax and Customs Administration/Benefits explained, when asked, why the ‘all or nothing’ policy was so important. It is clear that it was concerned mostly about the preventive effect of the policy:

In similar cases where a subsequent advance payment or definitive calculation was set at zero, the Division asked the Tax and Customs Administration/Benefits what the reason was for such far-reaching consequences being linked to not showing any proof of payment of the costs in full. In summary, the Tax and Customs Administration/Benefits answered first of all that a different approach would result in applicants, when asked about the actual costs, being tempted to overstate the costs of childcare. If the consequence of overstating the costs was no longer that the benefit would be refused, applicants might ‘gamble’ on not having to face checks. If no check took place, then the benefit they would receive would be too high, corresponding to their overstated costs. If a check did take place, then a different approach to the one being followed would entail their benefit being reduced, which would remove any incentive to provide a correct statement of the costs. [...]

In defence of its current line, the Tax and Customs Administration/Benefits has also argued that childcare allowance is intended as a form of reimbursement and that applicants should therefore pay part of the costs, in the form of what is referred to as a personal contribution. If the benefit were awarded on a proportionate basis, this would reduce the likelihood of applicants paying their personal contribution, according to the Tax and Customs Administration/Benefits. [...]

The Tax and Customs Administration/Benefits has also pointed out that applications for advance payments that are too high, and the awarding of same that are also too high, would not have the desired effect of the actually lower costs being met from this. [...]

The Division follows these arguments where they concern a preventive effect, but is of the view that they “should not lead to the most far-reaching consequence that no entitlement to benefit exists if it is established that part of the costs have been paid.” It regards the other arguments as invalid.

§ 3. Nature of the assessment

What is the nature of the assessment carried out by the Administrative Jurisdiction Division of the Council of State in these cases? In what way do fairness, reasonableness, and proportionality in the Tax and Customs Administration’s approach and the consequences for the citizens concerned form part of the assessment?

Assessing fairness, reasonableness, and proportionality in administrative law amounts to assessing the material principle of care or proportionality, as laid down in Section 3:4 of the General Administrative Law Act:

Section 3:4 of the General Administrative Law Act

1. When making an order the administrative authority shall weigh the interests directly involved in so far as no limitation on this duty derives from a statutory regulation or the nature of the power being exercised.

2. The adverse consequences of an order for one or more interested parties may not be disproportionate to the purposes to be served by the order.

If we look at the core elements of the 'all or nothing' approach identified at the end of § 1, then the line taken by the Division for the period under investigation assumes that the 'all or nothing' approach emanates from the law (Childcare Act and General Act on Means-Tested Benefits). The law grants a binding authority to recover payments and offers no basis for modifying or waiving any such recovery. A key consideration in this connection can be found in ABRvS 8 June 2016, ECLI:NL:RVS:2016:1610:

"To the extent that the appeal by [appellant] based on the principle of proportionality should be construed as an appeal based on Section 3:4 of the General Administrative Law Act, the following applies.

The weighing up of different interests that an administrative authority should make is limited, to the extent that it emanates from a legal requirement, in accordance with Section 3:4, first paragraph. From the aforementioned Sections, it follows that there is no scope for weighing up different interests when setting the level of childcare allowance if it cannot be shown that all the costs have been paid and, as the Division previously stated in the aforementioned ruling of 17 August 2011, when recovering payments. When revising advance payments, when setting the level of benefit, and when recovering repayments, the Tax and Customs Administration/Benefits was therefore unable to take any account of the costs that [appellant] has provably paid. [appellant]'s argument that the court should have deemed the decision of 14 August 2014 as being contrary to the principle of proportionality, was unsuccessful."

According to the Division, an appeal based on Section 3:4 of the General Administrative Law Act therefore fails on account of the first paragraph: after all, the relevant legal regulations prevent consideration of the interests of the citizen, in the view of the Division. The administrative authority is therefore unable to even reach the stage of assessing the principle of proportionality of the second paragraph of Section 3:4.⁷⁶ For the sake of clarity, this does not amount to a *marginal assessment*, but to *no assessment* of the principle of proportionality.

Can the principle of proportionality of Section 3:4 entail the breaching of the 'prescriptive' systems of the Childcare Act and the General Act on Means-Tested Benefits? First, a word about the relationship between the General Administrative Law Act and special law.⁷⁷ The General Administrative Law Act, the General Act on Means-Tested Benefits, and the Childcare Act are all formal laws. But because the General Administrative Law Act is a general act, the General Act on Means-Tested Benefits and the Childcare Act, including their 'prescriptive' systems for recovering payments, take precedence, and therefore have precedence over the principle of proportionality of Section 3:4. Against that background, therefore, the fact that the General Act on Means-Tested Benefits and the Childcare Act do not explicitly determine that Section 3:4 of the General Administrative Law Act does not apply, does not matter.

Although Section 3:4 of the General Administrative Law Act sets out the material principle of care or proportionality, this can never be exhaustive: material care and proportionality are general legal principles that relate to the actions of all government bodies, including the legislature.

Against that background, an assessment of the material principle of care or principle of proportionality would amount to a *contra legem* application of the general principles of sound administration. As shown by its case law up to October 2019, the Division did not wish to opt for this.

In its rulings of ABRvS 23 October 2019, ECLI:NL:RVS:2019:3535 and ECLI:NL:RVS:2019:3535, the Division abandoned this line, as already mentioned, and offered scope for the application of the principle of proportionality. The Division does so by no longer regarding the statutory framework (Section 1.7, first paragraph, of the Childcare Act "in itself and in combination with Section 1.52, first paragraph, of the Childcare Act") as prescriptive, but by

⁷⁶ For a criticism of this explanation, see Scheltema 2019.

⁷⁷ For more details about this, see S.E. Zijlstra, 'De verhouding tussen de Awb en de bijzondere wet', *Nederlands Tijdschrift voor Bestuursrecht* 2000 no. 4, p. 94-98.

interpreting it as “the Tax and Customs Administration/Benefits has the scope in law to determine entitlement to childcare allowance if the applicant has paid part of the costs of childcare”. And in the light of this scope, the Tax and Customs Administration/Benefits must also consider the interests of the concerned party, in accordance with Section 3:4, first paragraph, of the General Administrative Law Act; this means also that the principle of proportionality in the second paragraph of Section 3:4 of the General Administrative Law Act must be applied, which makes it possible “to arrive at a different calculation that has less far-reaching consequences”. “The result of this new interpretation of the statutory provisions is that the Tax and Customs Administration/Benefits acquires more options for providing solutions tailored to individual cases, in relation to childcare allowance. At the same time, the importance of preventing abuse and improper use and the legitimate interests of citizens are better balanced.”

§ 4. The nature and tenor of the ruling; scope for the Tax and Customs Administration/Benefits and the Ministry

What is the nature and tenor of the rulings by Administrative Jurisdiction Division of the Council of State? What obligations do the rulings by the Council of State prescribe and what scope do the rulings allow the Tax and Customs Administration/the Ministry when it comes to the ‘all or nothing’ approach? What indications or signals do the rulings contain for maintaining or adjusting policy and/or legislation?

Because the most important elements of the ‘all or nothing’ case law were legally binding as a result of the relevant legislation in the opinion of the Division, it is impossible to conclude from the rulings anything other than that the legal options for the Tax and Customs Administration/Benefits to operate a more lenient policy, even if it had felt so inclined, were more or less⁷⁸ non-existent⁷⁹. But *because* the Tax and Customs Administration/Benefits did not operate a significantly more lenient policy, the question of what the Division’s attitude to it would have been remains a matter for speculation. However, it did appear to be possible in 2019 for the Division to give its own completely different interpretation of the statutory provisions; it is not entirely inconceivable (but in my view, not probable) that the Division would have started doing so earlier if the Tax and Customs Administration/Benefits had taken the view that that was the correct interpretation.

In this connection, it is also relevant that in the aftermath of the ‘all or nothing’ case law, several – albeit modest – options were offered, namely the previously cited questions of the rounding-off differences and non-payment of advance payments (policy of the Tax and Customs Administration/Benefits), the very small differences, and the incorrect cessation of payments (the Division itself).

§ 5. Responses in literature

What was the response in legal literature to the rulings by the Administrative Jurisdiction Division of the Council of State? What are the most significant views or approaches to have been taken in this matter? To what extent has there been criticism in legal literature about the hard line taken by the Council of State with regard to the ‘all or nothing’ approach?

5.1 The period up to the rulings of 23 October 2019

⁷⁸ More or less, because of the possibilities that case law offered in the area of aspects that are not unimportant, but relatively minor (see above, § 2). The following passage from the ‘turnaround’ ruling, ABRvS 23 October 2019, ECLI:NL:RVS:2019:3535, should be understood against that background: “The result of this new interpretation of Section 26 of the General Act on Means-Tested Benefits is that the Tax and Customs Administration/Benefits, for the purpose of recovering benefit payments, acquires *more* options for providing solutions tailored to individual cases” (italics added by SZ).

⁷⁹ See also Drahmman and Jongkind 2020: “According to the Division, the Tax and Customs Authority/Benefits had a binding authority, based on the old case law ‘line’ – it was all or nothing”, and Marseille 2020: “Brief but clear: even though almost every cost can be accounted for, the fact that not every cost can be accounted for means there is no entitlement to the benefit. The Tax and Customs Administration has no freedom of movement in that regard.” Gonzalez Perez is of the opinion that the rulings of 23 October 2019 will be viewed incorrectly as a volte-face, because in earlier rulings since 2013, “there is an identifiably clear line that is characterised by the application of the human dimension.” The suggestion that general principles or the human dimension are absent in case law is, in her opinion, therefore incorrect: “[it was] the Tax and Customs Administration/Benefits [...] that adhered to the line during the period under review that allowed no room for the human dimension.” She bases her comments on several court rulings, but in my opinion this cannot detract from the hard line taken by the Division.

I can be brief about this. Of the rulings by the Division in the period in question, only a few have been published in legal literature. They were sometimes accompanied by comments ('annotations'), but as far as I have been able to establish, none of the published rulings relating to the 'all or nothing' approach, including the other elements identified above in that context, bore any annotations.

During the period in question, and then only towards its end, there were precisely two authors who wrote anything about the 'all or nothing' case law. Both were highly critical of it.

The first is former tax inspector, currently tax advisor H.A. Elbert, in 2018.⁸⁰ In 'Onrecht en ander te voorkomen fiscaal leed in de wereld van de fiscale toeslagen' ['injustice and other preventable tax-related misery in the world of benefits'] she writes:

"Suppose you receive an €18,000 reimbursement for a cost item of €18,001; everything's fine. And suppose that in the following year, you receive the same €18,000, but the cost item this year is €17,999. Is everything still fine? No, it is not! That's because you would have to repay the reimbursement sum of €18,000 in full(!); one of the many examples of this can be found in a ruling by the Administrative Jurisdiction Division of the Council of State [...] of 8 March 2017 [reference to ABRvS 9 July 2014, ECLI:NL:RVS:2014:2519; ABRvS 14 December 2016, ECLI:NL:RVS:2016:3301 and ABRvS 8 June 2016, ECLI:NL:RVS:2016:1610]. In the case of child allowance – because that's what we are talking about here – the Tax and Customs Administration/Benefits is not allowed, if not everything has been paid for in full, to take any account of the costs that *have* been provably paid. In such a case, you cannot claim a corresponding proportion of the childcare allowance. If it concerns minor rounding-off differences, then there are no problems, but in other cases there is no reprieve. This is because, pursuant to Section 26 of the General Act on Means-Tested Benefits, you owe the full amount you have been paid [reference to ABRvS 17 August 2011, ECLI:NL:RVS:2011:BR5166, and 16 March 2016, ECLI:NL:RVS:2016:714]. The General Act on Means-Tested Benefits contains no provision on the basis of which the Tax and Customs Administration/Benefits may decide to waive or reduce repayment demands. But take heart – now that the information about the compulsory personal contribution is shown on the Tax and Customs Administration/Benefits website, even the National Ombudsman thinks you should have known better. However, the blow is softened by the fact that you can arrange a payment plan relatively easily. And yes, I'm being cynical. Try explaining this to your client."

In May 2019, an article by M. Scheltema appeared, entitled 'De responsieve rechtsstaat: het burgerperspectief' ['the responsive State: the citizen's perspective'].⁸¹ The article is a version of a lecture he gave to an audience that included various members of the Administrative Jurisdiction Division on 5 April 2019. In the lecture, and in the article, he also examined the topic of case law in relation to childcare allowance. He remarked:

"A principle in the General Administrative Law Act that affects citizens is Section 3:4, paragraph 2 of the Act. It stipulates that the adverse consequences of an order for a citizen may not be disproportionate to the purposes to be served by the order. There may therefore be no disproportionality between the adverse consequences for citizens and the advantages for the government. Here is a real-life example. Someone receives an allowance of 10,000 euros to pay a childcare centre. However, he has to pay a personal contribution of 1300 euros. A subsequent inspection finds that the 10,000-euro allowance has been paid to the childcare centre, but that only 1,000 euros of the personal contribution can be accounted for, and the remaining 300 euros cannot. What does the government do? It demands repayment of the whole 10,000 euros of the allowance. Is that not disproportionate? What kind of problems will ensue for someone in a weak financial position who themselves could never have paid that sum of 10,000 euros to the childcare centre? Makes no difference, the courts say. So the ruling is to pay it all back [note: cf. ABRvS 8 June 2016, ECLI:NL:RVS:2016:1610; the figures have been simplified somewhat]. What happened to that excellent general provision? Remembering the report

⁸⁰ H.A. Elbert, 'Onrecht en ander te voorkomen fiscaal leed in de wereld van de fiscale toeslagen', *Nederlands Tijdschrift voor Fiscaal Recht* 2018/1201.

⁸¹ M. Scheltema, 'De responsieve rechtsstaat: het burgerperspectief', *Nederlands Tijdschrift voor Bestuursrecht* 2019/24.

by the Scientific Council for Government Policy makes things really distressing: it stated that many citizens lack the capacity to maintain proper financial records. With that in mind, the citizen in this example has done well, given that he is able to account for almost everything.

It is impossible to explain this outcome to the citizen. The purpose of the allowance has been fully achieved – the children of the less well-off have been to the childcare centre. The allowance has been used completely for that purpose. The relationship between not quite complying with a regulation and a requirement for full repayment of the allowance is out of proportion. Moreover, the government is helping create debt-related problems – for a citizen with limited financial means, repaying such a large sum of money means being evicted from his home and having his debts restructured. Worse, this is not an isolated case of a disproportionate imbalance between the advantages and the adverse consequences of an order. Just read the reports by the National Ombudsman.

As already mentioned, there was no further reference in any of the legal literature to this case law in the period up to the October 2019 rulings.

5.2 The period from 23 October to date

That changed when the Division had its ‘turnaround’. First, the rulings of 23 October were published in numerous legal and other journals, and accompanied by annotations by various authors. They also resulted in separate articles and other written contributions.

Assessment of the ‘all or nothing’ approach in literature

When it comes to assessing the Division’s ‘all or nothing’ approach, the tone is mostly⁸² negative.

After analysing the legal texts upon which the Division ruled that the Tax and Customs Administration had no scope for deviating from the ‘all or nothing’ approach, Marseille⁸³ concluded: “Apparently unlike the Division, I was unable to deduce from these three provisions that the Tax and Customs Administration had no policy freedom in setting the level of the allowance in the event of not every cost being accounted for.” Stijnen:⁸⁴ The text of [Section 17, first paragraph, of the Childcare Act] does not, in my view, imply this [strict] interpretation, because the only thing it states is that the level of benefit depends on the ability to pay and the costs of childcare in the year of calculation. Nonetheless, the Division embraced this interpretation for many years, despite it being immediately obvious that such an explanation was completely unfair and that it would inflict major problems on families.”

Assessment of the ‘turnaround’ rulings in literature

In general, the substance of the ‘turnaround’ rulings by the Council of State of 23 October 2019 is met with approval.⁸⁵

Nonetheless, the rulings do come in for some criticism, albeit for legal-systematic reasons. Marseille comments,⁸⁶ for example, that reversing previous case law “required some argumentative acrobatics”. I will not take this matter any further, given that it is not directly relevant to the questions I have been asked to answer.

§ 6. The 2019 ‘turnaround’ – explanations

What explanations could be given for the reversal of previous case law by the Administrative Jurisdiction Division of the Council of State in October 2019? In this analysis, the committee would like to gain an idea of how exceptional it is for the Council of State to reverse previous rulings.

Whatever it was that persuaded the Division to ‘turn around’ in 2019 and to start seeing scope for proportionality-based assessments, it is impossible to say; I will limit myself to what the Division considered in the relevant rulings (especially the rulings of 23 October 2019, ECLI:NL:RVS:2019:3535 and ECLI:NL:RVS:2019:3536) on that point.

After the Division had presented what the line had been up to that point (“that Section 26 of the General Act on Means-Tested Benefits imperatively prescribes that if a revision of an advance

⁸² An exception is the previously cited (§ 4) article by Gonzalez Perez who, as mentioned, is of the opinion that a “human dimension” has existed in the Division’s case law since 2013, and that the 23 October rulings should not be regarded as a volte-face.

⁸³ Marseille 2020.

⁸⁴ Stijnen 2020/29.

⁸⁵ See for example Drahmman and Jongkind 2020, Stijnen 2020/30, and Baron and Poelmann 2020.

⁸⁶ Marseille 2020. See also Groothuis, Huisman and Jak 2020: “Is this perhaps a ‘contrived interpretation’ that is too far removed from the legal text and legal history, thereby making the new interpretation unacceptable?”

payment results in a demand for repayment, the person involved owes the full repayment amount, and that there is no provision in the General Act on Means-Tested Benefits on the basis of which the Tax and Customs Administration/Benefits can halt any such repayment demands, reduce the amount payable, or recover the payments from any party other than the person involved”), it says, quite simply: “The Division reverses previous case law.” It substantiates this as follows:

“Because of the large number of cases concerning demands for the repayment of benefits that have been presented to the Division over the years, the seriousness and scale of the financial consequences of the case law, as described above, have been manifested in multiple cases. During this time, it was not made apparent to the Division that the seriousness or scale of such consequences have diminished. Various publications have confirmed that families in situations of the kind described here can find themselves in significant financial difficulties. In this connection, the Division refers to the publication by the Scientific Council for Government Policy, “Eigen schuld? Een gedragswetenschappelijk perspectief op problematische schulden [‘own fault? A behavioural-science perspective on problematic debts’]” (WRR Verkenning no. 33 of 30 June 2016) and to the report by the National Ombudsman for 9 August 2017, “Geen powerplay maar fair play. Onevenredig harde aanpak van 232 gezinnen met kinderopvangtoeslag [‘No powerplay but fair play. Disproportionately hardline action against 232 families with childcare allowance’]”. The Division also refers to the report by the Scientific Council for Government Policy “Weten is nog geen doen. Een realistisch perspectief op redzaamheid [‘Knowing does not amount to doing. A realistic perspective on self-reliance’]” (WRR report no. 97 of 24 April 2017).

[Appellant]’s family was also placed into serious financial difficulties because of the demand for the return of €34,566 of advance childcare allowance payments.

In the light of what was considered under 5.10, the Division now believes there are grounds for a different interpretation of Section 26 of the General Act on Means-Tested Benefits. Contrary to an earlier ruling by the Division, the provision may contain a payment obligation on the part of the person involved, but it does not imperatively prescribe that the Tax and Customs Administration/Benefits must recover the whole amount from said person. The provision therefore offers the Tax and Customs Administration/Benefits discretion in determining how much of the amount should be recovered. This means that the Tax and Customs Administration/Benefits must consider the interests directly involved with the decision, in accordance with Section 3:4, first paragraph of the General Administrative Law Act, and in special circumstances may waive demands for repayments or reduce the amount to be repaid, even if said circumstances were relevant and known about at the time the level of childcare allowance was set. This is because, pursuant to Section 3:4, second paragraph, of the General Administrative Law Act, any adverse consequences of an order may not be disproportionate in relation to the purposes served by the decision.

The result of this new interpretation of Section 26 of the General Act on Means-Tested Benefits is that the Tax and Customs Administration/Benefits, for the purpose of recovering benefit payments, acquires more options for providing solutions tailored to individual cases.

This means that, in relevant cases, the importance of preventing abuse and improper use is better balanced with the legitimate interests of citizens.”

To summarise, the termination of the ‘all or nothing’ case law was therefore prompted by the onerous negative consequences for the financial position of the affected parties, with the Division basing its ruling on reports by the National Ombudsman and the Scientific Council for Government Policy.

The committee has also asked me how exceptional it is for the Administrative Jurisdiction Division of the Council of State to reverse previous rulings. This cannot be quantified within the remit of this investigation, although there are numerous examples both in and outside administrative case law, including the highest-ranking courts, of certain lines being ended or substituted by others. Reference is made to the case law in the question of the repeated request (Section 4:6 of the General Administrative Law Act), the alcohol lock programme,⁸⁷ the obligation-in-principle of enforcing, and giving legal protection to decisions that involve tolerating certain situations. Such ‘turnarounds’ can have a variety of causes: a better or more consistent system of legal protection,

⁸⁷ Stijnen 2020/29.

criticism in literature, or social or political unease. It occurs to me that these causes could feature in the 'all or nothing' case law, but I would not like to say which will have carried the most weight.

Summary

From the start of the period under investigation, the Administrative Jurisdiction Division of the Council of State set out a firm line, which can be summarised as follows:

- a. the person receiving childcare allowance must be able to demonstrate that he has incurred childcare costs and how much these costs amount to;
- b. if the Tax and Customs Administration/Benefits establishes that any part of the documentation that the person concerned is supposed to supply is missing, inaccurate, or incomplete, it is authorised to decide to demand repayment of the advance payment;
- c. the Tax and Customs Administration/Benefits is also authorised, in cases where the deficiencies in the information are very minor, to review or recalculate the person's entitlement to benefit, to the detriment of the latter;
- d. if a review or recalculation results in a demand for repayment, the person involved owes the full amount.
- e. the authority to demand repayment is a binding authority – this means that such a demand must be made; the only possible exception is in the event of a very slight difference between the overall costs of childcare and the costs that have been shown to have been paid;
- f. demands for repayment cover advance payments in their entirety – that is, not just the proportion for which proof is lacking, for example. The Tax and Customs Administration/Benefits is not authorised to moderate its repayment demands or to apply any kind of proportionality criteria (Section 3:4 of the General Administrative Law Act).
- g. the administrative courts are not authorised to apply any such proportionality criteria either.

The remit of this investigation does not extend to saying what exactly the role of the Tax and Customs Administration/Benefits has been in arriving at this case law. What is clear is that the line taken by the Division offered little or no scope for anything other than an 'all or nothing' approach towards the recovery of payments.

From the point of view of the principle of proportionality, the nature of the Division's assessment does *not* actually amount to an assessment at all.

No mention is made of this case law in any of the legal literature prior to 2018: the first – critical – publication appeared in that year – that is, a year before the Division abandoned its 'all or nothing' line. The literature about the 'all or nothing' approach that appeared after the 'turnaround' of 2019 was predominantly negative.

The termination of the 'all or nothing' case law in 2019 was, according to the ruling, prompted by the onerous negative consequences for the financial position of the affected parties, with the Division basing its ruling on reports by the National Ombudsman and the Scientific Council for Government Policy. It can be assumed that criticism in the literature and social and political unrest also played a role, although I cannot assess how great a consideration that was.