Automated Decision Making & Taxpayers' Rights

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The King accepts resignation of his entire Cabinet, Jan. 15, 2021

The Dutch childcare benefits scandal

- What went wrong?
- What was the role of automated decision making at the Dutch tax authorities?
- Other examples from Dutch practice
- Protection of taxpayers' rights: current state of play
- How can taxpayers' rights be improved generally?
- Outlook

Background

- In 2005, a new childcare act was introduced
- The amount of childcare allowance depends on estimated family income in the current year and the estimated amount of required hours of childcare
- The amount granted is an advance payment; final amount is determined only after the year concerned has passed
- A parent with a relatively low income could e.g. pay € 1.000 in childcare whilst receiving € 960 as advance allowance (meaning that the allowance could well be larger than the net family income)

Background

- From the beginning, the childcare act ran the risk of being gamed:
    - The large amounts of money involved
    - At first, no relationship between hours of childcare and working hours of the parent
    - At first, no qualifications required for the person(s) minding the child
    - ICT of the tax authorities, responsible for the administration of the act, was a mess
- The tax authorities interpreted the relevant legislation such that a (small) mistake in the application for childcare allowance results in retrospective recovery of the full amount
- Combi-team Approach Facilitators (CAF) targeted childcare organizations, followed by recovery from parents

Article 26(1) AWIR

"If a revision of an allowance or a revision of an advance leads to an amount to be reclaimed or a settlement of an advance with a reimbursement leads to this, the interested party will owe the amount of the recovery in full."

Interpretation of the Supreme Administrative Court: in case of a mistake, the whole amount of the allowance must be recovered by the tax authorities. No room for general principles of law, in particular the principle of proportionality.

=> In 2019, the SAC reversed its case law under public pressure

(AB 2020/86)

Conduct of the DTA in legal proceedings

- Suspension of repayment never accepted in case of so-called 'fraud'
- Very serious breach of time limits in the objection phase (exceedance with more than 2 years no exception)
- Refusal to provide the courts with the relevant material underlying the recovery decision (a legal obligation) and no sanction
- In some 4000 cases the DTA settled the case just a few days before the court hearing
- DTA deliberately ignored at multiple, decisive occasions the advice of the State attorney and its internal highest legal counsel

So: citizens were trapped

- Citizens were denied paid legal representation (this is general policy)
- At the DTA nobody would speak to them
- The Supreme Administrative Court sided with the government

"This is how administrative law generally works. It assumes that government agencies are operating lawfully and enforcing the law. The courts do not accept the failure of the entire system."

[President of the Supreme Administrative Court in *Trouw*, 9.1.2021]

More problems

- Whistle blowers were fired
- Experienced staff at DTA were let go due to reorganisations
- New department was, however, set up: 'data fundaments and analytics' (formally know as *Broedkamer* or incubator)
- 2017 report of the National Ombudsman was ignored
- 2019 report of Court of Auditors is being ignored
- Higher, rotating management at DTA does not consist of tax lawyers

More problems

- Absence of an independent oversight body for taxation
- Ministers of Finance and Social Affairs, and parliament, were not receptive and captured by the idea of combating fraud
- Academia was, shamefully, (almost) silent
- Dutch Data Protection Authority (still) very slow with enforcement of GDPR

Three categories

- Apart from the all-or-nothing approach which destroyed a large category of citizens, two other categories can be distinguished
  - Citizens who became subject of a witch hunt by the tax authorities on the basis of a discriminatory, intransparent algorithm
  - Citizens who received the label 'fraudster' in a database ('black list'), the content of which somehow became known to other public authorities and private parties, with enormous consequences
- Mainly citizens affected with originally a non-Dutch background. How come?

Role of automated decision making

The witch hunt

- The tax authorities systematically registered dual nationality in databases, the extent of which is unknown to the present day, and lied about it
- Dual nationality (or non-Dutch nationality) is a risk factor in the 'risk-classification model'
  - This model contains an algorithm which automatically selects applications for review and control
  - The algorithm is self-learning (feedback loop issue)
  - Civil servant cannot know why the algorithm has selected an application
- Dual nationality was used in the fight against organised crime

Role of automated decision making

The witch hunt

- Approach was based on a 'business case'
- System led to stopping allowances per group instead of individually (80-20 principle)
    - DTA acted according to an unsubstantiated 80-20 rule, accepting that at least 20% of affected citizens would be completely innocent (later it turned out that in 95% of cases, fraud was not present at all)
- Without the algorithm and mass process the childcare benefit scandal would never have happened

Role of automated decision making

The label 'deliberate intent' or 'gross negligence' (fraudster)

- Label means that repayment should be done in a fixed manner; no approach on the basis of individual circumstances
- Internal memorandum (2016): anyone with a childcare benefit debt exceeding € 3.000 should automatically receive the label
- Label also led to loss of job, housing, bank financing etc.
- It destroyed families

Interim conclusions

- The discriminatory algorithm and illegal database were not *the* issue which led to the scandal. They were, however, a necessary condition for the scandal to happen
- Other root causes:
  - Lack of protection of fundamental rights in the courts
  - Attitude of DTA in the courts
  - Civil servants unaware of the operation of the algorithm / lack of understanding
  - Lack of internal and external information sharing
  - No interest in the case from the academic side
  - High institutions of State were ignored
  - Combating fraud more important than fundamental rights

Other issues

- Content, accuracy, use, security, authorisations and extent of a broad database ("FSV"), used within the DTA as a whole, at present unclear
  - FSV has been 'switched off' for the time being
- It is at present unclear how many other databases exist and how these data are being used in (self-learning) algorithms
- There is no reason to believe that the childcare benefit scandal is an isolated event

District Court of The Hague in SyRI case

- SyRI (System Risk Indicator) is a legal instrument used by the Dutch government to detect various forms of fraud, including social benefits, allowances, and taxes fraud
- On 5.2.2020, the District Court in the Hague struck down the legislation regulating the use of SyRI as violating Article 8 ECHR
- According to the Court, the algorithm is insufficiently transparent and verifiable

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2020:1878

Other case law

- Supreme Court
  - Tax assessment based on wrong technology cannot be corrected to the detriment of the taxpayer (BNB 2019/150)
  - If tax assessment is based on automated decision making, the DTA has to make – on request by the taxpayer – transparent and verifiable the choices, assumptions and input data in order to avoid the black box problem (BNB 2018/182)

Protection of taxpayers' rights: state of play

- Two possibilities to address the issue
  - GDPR request (only for natural persons)
  - Litigation against tax assessment
- Issue: no real consequences of violation to give insights by DTA
- Formally, the protection is there, but not materially
- It is naive to believe that everything will be all right 'if the person concerned has done nothing wrong'

How can taxpayers' rights be improved?

- Introduction of a realistic legal right for all taxpayers, natural and legal persons, or interest groups, to challenge algorithms and databases up-front
  - Duty of active information sharing by DTA required
- Independent oversight body specifically for the tax authorities
- Legal representation paid by the State
- Different mind set in the courts
- For the DTA (recommendation by Dutch human rights college):
  - Standard fundamental rights review before public procurement of new systems, the design of the system and during use of the system
  - Inform taxpayers in a transparent way how (semi)automated decisions were made
  - Enhance knowledge on automated decision making in the organisation
  - In short, a culture change

Outlook

- Venice Commission will review Dutch administrative law
- Hopefully this review will be the start of a broad discussion and real renewal and improvement of taxpayers' rights
- Knowledge about these matters at all levels – the administration, taxpayers and the courts – is absolutely vital, and that is why DigiTax is such important initiative!

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Thank you!

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