Summary

Objective of the study

Enforcement of 'regulatory law' – administrative law and special criminal law – cannot adequately take place without a supervisory investigation instituted for this purpose. Paradoxically, a person involved is obliged, on pain of a separate prosecution in the event of refusal of such cooperation, to provide (active) cooperation during this 'sphere of supervision' (see article 5:20 of the General Administrative Law Act (Awb)). This is in spite of the fact that such administrative supervision can give rise to a suspicion of a violation of the law. Subsequently this can initiate a criminal investigation or an administrative penalty investigation. As far as supervision is concerned, the person concerned has an obligation to comply with claims from a supervisory authority. On the other hand, in the context of criminal investigation – in view of the effect of the nemo tenetur principle – the accused should, on the contrary, be protected against government pressure in order to (actively) cooperate in his own evidence. Viewed in this way, the enforcement of the regulatory law by means of administrative supervisory investigation, forms a natural area of tension with the originally criminal nemo tenetur principle. The questions examined in this study are therefore the following:

— What are the infringements of the legal protection derived from the nemo tenetur principle, as a result of the phenomenon of the sphere transition between administrative supervision and criminal investigation?
— How can these infringements of the before mentioned legal protection be addressed?

Answering these questions demands an investigation into the content of the terms 'sphere transition' and 'nemo tenetur principle'. A concrete answer to the formulated questions requires an analysis of the scope of the nemo tenetur principle. Therefore, the case law of the ECtHR has been analysed. It was then examined to what extent the case law of the highest Dutch courts is sufficiently in line with that of the ECtHR with regard to the application of the nemo tenetur principle.

The distinction between the administrative supervision and criminal investigation spheres

Administrative supervisory investigation is defined in *chapter 2* as an investigation by the government, into the extent to which certain regulations are complied with.

In this definition, the supervisory investigation is essentially based on the *legality hypothesis*'. Indeed, as follows from the definition, any supervisory investigation is – *in principle* – based on the assumption that the person concerned complies with the law. This approach is compared to the criminal investigation, which is based on the hypothesis that an offence has been committed: an *illegality hypothesis*.

However, a number of factors have been identified in *Chapters 2 and 3* that make the above-mentioned distinction between administrative supervision and criminal investigation problematic. For example, the WED detection sphere can already be activated on the basis of 'clues'. Based on the case law of the Supreme Court (HR 25 June 2013 ECLI:NL:HR:2013:3 'Tankduwbak'), such clues can be so 'generic', that the application of these powers virtually approaches the scope of supervisory powers. On the other hand, administrative supervision can still take place in case of 'repressive supervision'. This concerns supervisory investigations based on 'abstract suspicions' of violation of the law.

Misuse of supervisory powers

In the 'FIOD' judgment (HR 26 April 1988, *NJ* 1989/390), the Supreme Court accepted that supervisory powers may also be used for criminal investigative purposes. On the one hand, the application of supervisory powers may 'not exclusively' be used for such criminal investigative purposes. On the other hand, this application must not be at the expense of the defendant's procedural rights: the guarantees accruing to the defendant as such must be observed. In that context, criticism was discussed in *Chapter 3* of such an application of supervisory powers. The core of this is that the powers are not used 'also' for criminal investigation purposes, but in fact 'exclusively' for such purposes. It has been argued that the case law of the Supreme Court refers to an extremely formalistic approach, in the assessment of the 'not exclusively' criterion. It has been proposed that the 'Aler criterion' be applied in this context. In the case of this criterion, misuse of supervisory powers is deemed to have occurred, if a different objective from the original main objective comes first.

The supervisory investigation judged in the criminal proceedings

Chapter 3 also discusses the problem of judging possible legal breaches in the supervisory investigation, in the context of criminal proceedings. 'Procedural defects' in the criminal investigation can be raised within the meaning of Article 359a of the Code of Criminal Procedure. However, the legal terminology of Section 359a of the Code

of Criminal Procedure is an obstacle to applying the supervisory investigation within the scope of that Section. The reason for this is that the article refers to 'preliminary investigation' (article 132 of the Code of Criminal Procedure). In turn, the definition of 'investigation' (article 132a of the Code of Criminal Procedure) plays an essential role in this respect. The main problem lies with the civil servants who have been appointed exclusively as supervisory authorities since the public prosecutor only has authority over officials charged with investigation (article 152 of the Code of Criminal Procedure).

The following approach is proposed. With regard to the question of whether a 'fair trial' as referred to in article 6 ECHR is involved, the European Court of Human Rights assesses the procedure 'as a whole'. In doing so, the ECtHR does not make a formalistic distinction between the various phases of the investigation. There must then be a link between conduct in the supervisory investigation and infringement of article 6 of the ECHR. The Supreme Court has also 'created room' for this 'article 6 ECHR category' in its summary judgment (HR 19 February 2013, *NJB* 2013/565 (section 2.4.4.)). The application of the exclusion of evidence may then be necessary to ensure the right of the accused to a fair trial within the meaning of article 6 of the ECHR.

The case law of the ECtHR: the scope of the nemo tenetur principle

The analysis in *Chapter 5* has led to the following legal rules that can be deduced from the application of the nemo tenetur principle by the ECtHR:

— As the starting point of the right to silence, a 'reasonable suspicion criterion' should be used as a material interpretation of that principle.
— Statements made as part of the supervisory investigation (testimonial evidence) should be excluded from the evidence in the punitive procedure.
— After the existence of suspicion, there is no longer any obligation to cooperate in the request for the extradition of 'real evidence' (i.e. the suspicion is related to the material from which extradition is claimed, the claim is then made in the context of the investigation or the statutory penalty investigation).
— If there is a suspicion and real evidence is still being demanded, within the context of regular supervision, a guarantee must be provided to ensure that this material is excluded from the penalty procedure.

Three further conditions can be mentioned here. Firstly, the imposition of a penalty must meet the standards of article 6 of the ECHR, as must the 'regular' criminal proceedings. Furthermore, the (complex) nature of the 'regulatory law' does not justify an infringement of article 6 of the ECHR. Finally, and this is probably the most important

condition for the interpretation of the right to silence, defence rights must be interpreted in such a way that they are practical and effective, not theoretical and illusory.

Chapter 5 also examined to what extent the nemo tenetur principle has significance in addition to the right to silence, i.e. the claims for the extradition of 'real evidence' to the accused. It has been concluded that the protection of the principle can also be applied to 'real evidence'. The protection of 'procedural autonomy' can be seen as the legal basis of the nemo tenetur principle, in the 'real evidence' judgments of the ECtHR. This is all the more true in view of the ECtHR's recurrent consideration that the complex nature of fraud cannot prejudice the procedural rights derived from article 6 (1) of the ECHR. It follows from the ECtHR case of 5 November 2002, *NJ* 2004/262 (Allan v. United Kingdom) that, among other things, the nemo tenetur principle, as the core of a fair trial, protects the defendant's freedom of choice in determining his trial position.

This is in line with the described historical development of the nemo tenetur principle in *chapter 4*. It was discussed how the position of those involved was compromised by the duty of reply imposed by the British Star Chamber and the High Commission, in the context of religious (and political) persecution. The right to silence was further developed during this period in order to protect the procedural autonomy of the accused. From the beginning of the 18th century, the nemo tenetur principle was also applied in English law to the forced extradition of potentially incriminating documents. *Chapter 4* also explains how much this legal basis played a role in the Dutch criminal prosecutor's interpretation of the nemo tenetur principle. The provision of Article 107 (old) of the Code of Criminal Procedure is motivated by the need to safeguard the procedural autonomy of the accused. The application of the nemo tenetur principle by the ECtHR to situations concerning the claim of 'real evidence', should also be considered in the context of procedural autonomy.

It is true that the Saunders judgment referred to documents in the context of material independent of the will'. However, these are qualified in relation to the method of obtaining 'documents pursuant to a warrant'. The classification of the ECtHR, therefore, concerned 'real evidence' that was obtained without the (active) cooperation of the accused. He must, therefore, tolerate the seizure of documents during a search, as opposed to being forced to provide documents by hand.

Furthermore, the case law rendered after the Saunders judgment (in particular J.B. and Chambaz) can only constitute a compatible legal context, if that ECtHR consideration in Saunders is interpreted, as documents seized by investigating authorities during such a search. If in the Saunders consideration 'warrant' is only interpreted as an 'order', the ECtHR could not have reached the judgment it had reached in cases such as ECtHR 25 February 1993, *NJ* 1993/485 (Funke v. France), ECtHR 3 May 2001, *AB* 2002/343 (J.B. v. Switzerland) and ECtHR 5 April 2012, *AB* 2012/323 (Chambaz v. Switzerland), namely that there

was a violation of the nemo tenetur principle. After all, there was talk of an 'order' addressed to the suspect for extraditing documents.

The additional question in this context has been whether a 'fishing expedition' by the government is a necessary condition for being allowed to refuse a claim for 'real evidence'? Based on the analysis in *chapter 5*, this question can be answered in the negative. The most practical and important argument stems from the Chambaz case. In this case, no fishing expedition has been found. Again, if such a 'fishing expedition' had been a truly necessary condition, the ECtHR could not have found a violation of the nemo tenetur principle in that case.

The scope of the administrative right to silence

The analysis of the administrative right to silence in *Chapter 6* discussed fundamental criticism of the choice, to link the right to silence to the moment of the 'formal hearing'. First of all, the legislator has reserved the right to silence under the General Administrative Law Act for 'pure questions of culpability'. The legislature has explicitly considered that the right to silence does not apply to questions that also relate to the regular supervisory investigation. In doing so, it wanted to avoid that the right to silence would already apply at the time when a reparatory or punitive sanction has not yet been chosen. This restriction largely deprives the right to silence of an effective and practical significance.

The second aspect is that the starting point for the right to refuse to grant an Awb, depends on the moment when the supervisory authority chooses to do so. Because the right to silence is linked to the formal interrogation criterion, it is activated by the moment at which the officials concerned to initiate a 'pure penalty interrogation'. As a result of the above, the formal interrogation criterion with respect to the criminal procedural right to silence, has a relatively late starting point. Instead of the formal criterion, the material approach to the criminal procedural right to silence should be favoured. In light of that view, an administrative concept of suspect should be introduced in the General Administrative Law Act. The relevant question in relation to the right to silence should therefore be: does a reasonable suspicion of guilt for a criminal offence arise, based on the established facts?

Application of the right to silence in administrative case law

Chapter 7 also examined the question of how the highest administrative courts interpreted the right to silence in the context of the sphere transition. The discussion of

CBb case law shows a formalistic picture with regard to the interpretation of the principle of the right to silence. It is not the material situation that is decisive for the CBb in determining this – there is a suspicion of a violation of the law or not – but the intention of the supervisory authority to proceed to a penalty. This implicitly makes the commencement of the right to silence dependent on the intentions of the supervisory authority that existed at that time.

The ABRvS opted with the decision of 27 June 2018, ECLI:NL:RvS:2018:2115 unambiguously for the formal interrogation criterion, in accordance with the legislature. This means that the right to silence applies at the moment of an interrogation, aimed at imposing a penalty.

On the other hand, the case law of the CRvB has shown a development towards a 'material' approach to the right to silence. For example, in the decision of the CRvB of 20 November 2013, *AB* 2014/126, the scope of the Awb right to remain silent was explicitly addressed. In addition, the foregoing limitation of the legislature of the administrative right to silence to "purely culpability questions" was addressed. The CRvB ruled against the legislature on that point. According to the CRvB, irrelevant for the right to silence is whether the hearing was only aimed at the 'what' and not at the 'why'. The CRvB continues that Article 6 of the ECHR and its interpretation by the ECtHR "colours" the interpretation of Article 5: 10a of the Awb. The foregoing indicates that the CRvB applies the application of the Awb right to silence law more in accordance with the criminal procedure for a right to silence. Therefore an important restriction of the silence law has been addressed, at least in that area of social security law.

Exclusion of statements made in the verification procedure

The analysis in *chapter 7* showed that the protection of testimonial evidence in the tax jurisdiction of the Supreme Court is fully in line with that of the ECtHR. Statements made in connection with the supervisory tax investigation, in respect of which there is an obligation to cooperate, may not be used as evidence for the tax penalty. The Supreme Court is consistent in this: all statements must be excluded. It is plausible to assume that, in view of the value attached to the protection of the right to silence, the criminal law Chamber of the Supreme Court would also proceed to exclude the evidence in the criminal case from statements made during the supervisory investigation.

The analysis in *chapter 7* also showed that the settled case law of the CRvB is also in line with the evidence exclusion rule applied by the ECtHR. The CRvB states that in social security cases administrative decisions on penalties may not be based on statements made during interrogation, if the right to silence has not been pointed out

prior to the interrogation. However, statements made without observing the right to silence, may be lawfully used to determine entitlement to social security benefits.

Extradition of real evidence

In the series of judgments of 24 April and 29, May 2015 discussed in *chapter 7*, the Tax Chamber of the Supreme Court has qualified extradited 'real evidence' as 'legally independent material'. The implication of this is that the claimed extradition is not protected by the nemo tenetur principle. The Supreme Court, therefore, restricts the concept of 'will-dependent material'; apparently limited to "testimonial evidence". As already followed from the analysis of the ECtHR case law, that approach falls short. The fiscal chamber of the Supreme Court thus allows a form of investigation in tax law that is not in accordance with the way in which the ECtHR interprets the application of the nemo tenetur principle. In this regard, it appeared in *Chapter 8* that the case law of the Supreme Court's criminal law chamber on this point, is fully in line with the explanation given in tax matters from the fiscal chamber of the Supreme Court.

However, the tax division of the Supreme Court has considered that claims for the provision of data and information cannot be granted insofar as they are insufficiently substantiated or constitute a 'fishing expedition'. It has been argued that this standard cannot logically be derived from the ECHR case law under discussion, as a general condition under which the nemo tenetur principle is applicable to such claims of 'real evidence'.

Furthermore, the following emerged from the discussion of CBb case law in *Chapter 7*. In the judgments, CBb January 10, 2018, *NJB* 2018/280 and CBb September 4, 2018, *NJB* 2018/1715, the CBb apparently equated the distinction between non-intentional and intentional material with the question as to whether or not the claimed evidence existed physically.

However, the claimed material was regarded as 'intentional', also in view of the specific questions posed by the supervisory authority. In accordance with ECtHR case law, the material could only be enforced under the clause that it would not be used for punitive purposes. This approach of the CBb leaves more room for the application of the nemo tenetur principle to 'real evidence' than in the case law of the Supreme Court.

Sphere accumulation

A variant of the problem of the extradition of 'real evidence' is the situation of the 'sphere accumulation'. As with the 'real evidence' cases, these are suspects who refuse to comply with a claim for the extradition of such material. However, the crucial difference is that

the refusal of the information demand in these cases does not take place in the context of the criminal/penalty procedure, but in a parallel (non-punitive) procedure.

In the judgment HR 12 July 2013, *AB* 2013/343, guarantees were formulated with regard to the information requested in summary proceedings. According to the Supreme Court, if it cannot be excluded that 'will-dependent material' will also be used against the taxpayer in connection with a criminal charge, the national authorities will have to ensure that the taxpayer can make effective use of his right not to cooperate in self-incrimination. The lacuna of this 'guarantees' case law is primarily the definition of the concept 'will-dependent' material'. As previously considered, the Supreme Court limits this concept to statements. The clause attached to the enforcement of information in the context of the guarantee to be provided by the court, therefore, does not relate to real evidence. Apart from the discussed standard regarding the prohibition of fishing expeditions.'. It has already been explained why this standard cannot be derived from ECtHR case law, as a necessary condition for the application of the nemo tenetur principle to requests for the extradition of 'real evidence'. The case law of the Supreme Court, therefore, does not sufficiently meet the interpretation of the ECtHR's protection of the nemo tenetur principle in this respect.

In conclusion

The analysis of administrative case law has shown that the 'administrative penalty investigation' cannot be a fully-fledged alternative to the criminal investigation. The administrative penalty investigation does not have any separate investigative powers for such an investigation. Mere supervisory powers are specified in the Awb. The gap has become explicit in the tax domain. There, the Supreme Court ruled in the judgment of HR 22 June 2007, *BNB* 2007/292 that article 47 of the AWR is not applicable when only statutory penalty investigation is required. From a conceptual point of view, this lack of powers can be explained, as the legislature has assumed a 'limited' framework. The supervisory authority carries out an investigation and may conclude a criminal or punitive offence has been committed. The supervisory authority then draws up a penalty report on the basis of the evidence already collected. In the limited perspective of the legislature, therefore, there is no provision for the situation in which the administrative supervisory authority has to gather evidence after the 'material suspicion' has arisen. This concerns the collection of 'real evidence' against the will of the person concerned.

The lack of such powers is compensated for by extensive recourse to the active cooperation of the person concerned. Conceptually, this has been made possible by a legally limited interpretation of the nemo tenetur principle, that does not relate to the interpretation of that principle in the case law of the ECtHR.