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The Regulatory Powers of Quangos in the Netherlands: Are Trojan Horses Invading Our Democracy?

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1. The Concept of Regulation

Discussing the regulatory powers of Dutch quangos, one easily runs the risk of mixing up different concepts of regulation and rule-making.¹ In the Netherlands a definition of regulation usually covers more than just the promulgation of (generally binding) rules. In the context of government policy and public services, regulation is normally considered to be the control of something by rules, as opposed to its prohibition. In this respect, regulation is not limited to rulemaking. It is also about licensing, inspection and enforcement, and sometimes even dispute resolution. In relation to market failure, regulation is normally the opposite of deregulation and liberalization. Regulation in this sense includes setting standards that determine the ‘rules of the game’ on markets for public services. As far as administrative law is concerned, regulation is in some countries narrowly termed as the legal restrictions promulgated by administrative agencies in contrast with statutory law or case law. This paper deals with regulation in a broader sense. Besides government agencies, other non-governmental bodies are engaged in standard setting to create a level playing field on globalizing markets. Hereafter regulation may comprehend:

- public statutes, standards or statements of expectations;
- establishing policy rules that limit the executive powers of quangos;
- a process of registration or licensing to approve the operation of a service;
- a process of inspection or other form of ensuring standard compliance, or reporting and management of non-compliance with these standards;

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¹ Van der Meulen 2003, p. 26 and Meuwese 2004, p. 1127-1128. The latter author points out rightly that in regard to market regulators the notion of ‘regulation’ may refer to all three pillars of the *Trias Politica*. At the same time, the notion of ‘regulation’ in practice often refers to technical executory rules and policy rules rather than general statutory rules.

- a process of de-licensing whereby that organization or person is judged to be operating unsafely and is ordered to stop operating at the expense of acting unlawfully;
- dispute resolution by quangos in case of conflicts between providers of public services and/or consumers;
- imposing sanctions in case of continued non-compliance with laws and (other) regulations, like licensing conditions.

One has to bear in mind that even quasi-public activities often know a limited form of (self-) regulation. For example the Dutch Association for Professional Soccer (KNVB), has an important role to play in setting standards relating to the safety of soccer matches. The KNVB can even impose penalties as soon as regional clubs break these rules. A penalty by the disciplinary commission of the KNVB can, for instance, be that a soccer game has to be played without supporters.² In this case, however, regulation is a synonym for the production of (ethical) codes of conduct. When we use the word regulation hereon after, we are not referring to self-regulation except in case we explicitly determine otherwise.³

2. Central Research Question

For the demarcation of the scope of this report, we would like to suggest the following central research question:

To what extent do quangos possess (autonomous) regulatory powers, and are there any principles of good governance that can and will be used to master these powers?

For the explanation of principles of good governance, we refer to the rules, processes and behaviour that affect the way in which regulatory powers are exercised by quangos, particularly with regard to openness, legitimacy, effectiveness, coherence and accountability.⁴

As far as openness is concerned, we consider this to be more than just the right to have access to information. Quangos that provide important public services should also inform the public voluntarily about their activities and the way they are operating. For that reason, some of them have established a protocol or a manifest that explains how the organization wants to present itself to the outside world. When it comes to legitimacy, this does not refer to the exercise of control by Ministers and Parliament. Legitimacy also covers aspects of recognizability as a public authority and acceptance by clients and the public in general. The effectiveness of a quango's operations refers to the question: does liberalization work and has the quality of public services improved? This concerns, for example, the number of mistakes and the timeliness of decisions. Efficiency, in its turn, relates to matters of costs and benefits, price-quality ratio. An example of improved efficiency is the tariff for services of the Land register (*Kadaster*). These have decreased considerably since this organization

² See: Article 21 of the 'Reglement tuchtrechtspraak betaald voetbal van 6 december 2004'.

³ Self-regulation and co-regulation are becoming more and more important instruments in legislative policy on both the national and the European level. See for an overview in relation to the national context: Baarsma *et al.* 2003. On the European level, the interinstitutional agreement on 'Better lawmaking' (2003/C 321/01) is highly relevant. See also Senden 2005.

⁴ A similar governance concept was adopted in the white paper on European Governance by the European Commission. COM(2001) 428 final.

became a quango in 1994.⁵ Finally yet importantly, there is the question of accountability. An important issue here is the responsibility towards Ministers and Parliament on the one hand, and the accountability towards society and professionals in the sector on the other hand.⁶

3. A short History of the Quango Debate

One can roughly discern three major developments in the rise of the number of quangos over the last few decades.

3.1. Shifts in Governance from the Private to the Public Domain

First, there has been a shift in governance from the private to the public domain. In 1952, for example, the Organization Law on Social Insurances (*Organisatiewet sociale verzekeringen*) laid down the foundations for the implementation of the law on social insurances for workers. Responsible for the implementation of this legislation were a number of private trade and profession societies (*bedrijfsverenigingen*). In these organizations, representatives of social partners formed the board of directors. Every professional branch had one of these societies and the law determined that employers were automatically signed up as members of the public body for the professions and trade in their sector. Gradually the societies of private trade and profession became more and more important in the execution of administrative laws on social insurances for sickness, unemployment and incapacity for work.⁷ Among other things, they were entrusted with judging the legitimacy of social security claims, taking care of the distribution of payments and monitoring compliance.⁸

Unlike the social insurances for the general public (*volksverzekeringen*), the execution of workers insurances was first and foremost a matter of private initiative. During the eighties and nineties, however, the costs of social insurances increased tremendously. An inquiry by the Dutch Parliament showed that the public bodies for the professions and trade had not taken adequate measures to prevent abuse and figurative use of workers insurances.⁹ The public bodies for the professions and trade had been preoccupied with paying allowances on time at the expense of attention for reintegration and volume control in social security policy. Ultimately, the debate in Parliament about the parliamentary inquiry by the Buurmeijer Commission resulted in a motion to marginalize the influence of the social partners and establish a more independent organization for the monitoring and inspection of unemployment and incapacity allowances. Because of this debate, the implementation of social insurances for workers was allocated to a quango. Since January 1 of the year 2002 the responsibility for unemployment allowances, claim-assessments, and the collecting of insurance contributions is accommodated in the Executive Office for

⁵ Before this period, *Kadaster* was part of the Ministry of Finance until 1970. After that, *Kadaster* was reorganized (a cut back from 57 regional to 15 regional offices) and became a part of the Ministry of Housing, Spatial Planning and the Environment from 1982 until 1994. See for a short overview of the history of *Kadaster* <<http://www.kadaster.nl>>.

⁶ One can experience a lot of private initiative here, such as: consultation by stakeholders, quality control manuals etc. See <<http://www.publiekeverantwoording.nl>>.

⁷ Concerning social insurances we have to discern between employee insurances (*werknemersverzekeringen*) and insurances for the general public (*volksverzekeringen*), like the basic insurance provisions for retirement.

⁸ Berkhout *et al.* 2003, p. 7.

⁹ Commissie Buurmeijer 1993.

Workers Insurances (*Uitvoering Werknemers Verzekeringen*, or UWV). Besides this, the UWV is now responsible for reintegration of unemployed and incapacitated workers. The UWV is positioned as an independent organization with public authority, which is not subordinated to the Minister of Social Affairs and Employment.

3.2. *Outsourcing of Public Tasks by Departments*

A second major development in the trend towards quangocratization has to do with the political wish for a 'smaller government'. Ministers should concentrate themselves on the core business of their department and out place public services that can be performed more efficiently by specialized organizations. A prominent example is the establishment of a special organization for the granting of student loans and, more in general, information management by the Minister of Education, Culture and Science. Previously, a special unit inside the Ministry called the *Directoraat Studiefinanciering* performed these tasks. In the early nineties, the Dutch government decided that it would be more efficient to transform the *Directoraat* into a quango, and to outsource the information management to a special agency, called the IB-group (hereafter § 6.2).

The Dutch Forest Preservation Council (FPC: *Staatsbosbeheer*) is yet another example of outsourcing public duties. The FPC's mission is threefold:

- maintaining, restoring and developing woodland, natural heritage, landscape and cultural-historical values at FPC's sites;
- promoting outdoor-recreation at as many FPC's sites as possible;
- contributing to the production of environmentally-friendly, renewable raw materials such as timber.

Until 1998, FPC was part of the Ministry of Agriculture, Nature and Food Quality (LNV). FPC is now an independent administrative body.¹⁰ Since FPC's independence, annual agreements have been made with the Ministry, which list the objectives and the price at which these are to be realized. FPC annually reports to the Ministry of LNV and to the parliament on the results achieved.

3.3. *Competition Authorities*

A third development is the explosion of new competition authorities caused by the trade liberalization on European markets for energy, post and telecom, and financial services.¹¹ In the past, the European Commission had an important role to play in this context. Lately, member states have gotten more responsibility on matters of enforcement of competition rules. EC-Regulation 2003/1, for instance, creates a system of parallel competences in which the Commission and the member states' competition authorities are competent to apply the articles 81 and 82 of the EC-Treaty. National competition authorities and the Commission have formed a European Competition Network (ECN) of public authorities, which cooperate closely in order to enforce competition laws. Through cooperation, this network tries to maintain a level playing field for companies on the internal market. In the Netherlands, most competition authorities like the Netherlands Competition Authority, the Post and Telecom Authority, and the Netherlands Authority for Financial Markets, have been positioned as quangos. This has been done to safeguard their independent position

¹⁰ Wet Verzelfstandiging Staatsbosbeheer, *Staatsblad* 1997, 514.

¹¹ Visie op markttoezicht, *Kamerstukken II* 2003/04, 29 200 XIII, nr. 50.

towards the political domain on the one hand, and the private companies in the sector they have to supervise on the other hand.

3.4. *Some Facts and Figures*

The climax in the increase of the number of quangos has to be situated in the eighties and nineties of the past century. During the heydays of privatization and liberalization of markets (post, telecom, energy etc.) the mainstream of policy analysts and lawyers believed it would be wise to separate the implementation and monitoring of administrative laws from political interference. Later on, the epicenter of the debate about the pros and cons of quangos shifted from a pragmatic perspective on matters of feasibility and efficiency, towards a more fundamental discussion on constitutional issues. One of these issues is without doubt the inevitable field of tension between the accountability of Ministers towards Parliament versus the independent position of quangos with executive and regulatory powers, which fall outside the scope of the traditional democratic complex.

Recently the quango-debate in the Netherlands seems to focus more on the costs and benefits of strengthening the independent position of specialized inspection agencies, like the Netherlands Competition Authority and the Netherlands Authority for the Financial Markets. Some people argue that these quangos are becoming too powerful without a proper structure to deal with governance issues, liability problems, and aspects of legitimacy and accountability. On the other hand, there are also experts who claim that European legislation could force these agencies to move even further away from the political influence of national Ministers.¹²

In the meanwhile, one could easily forget that quangos are all but a new phenomenon in the Netherlands. The University of Leiden (1575), for instance, was one of the first quasi-autonomous public bodies in our country. Around 1900 there were already about 75 quangos in the Netherlands. According to the Netherlands Bureau for Economic Policy Analysis (CPB), their number increased from about 300 in 1960, towards 550 in 1993, with a slight decrease down to 431 in 2000. Due to the ongoing debate about an appropriate definition of quangos (hereafter) these numbers should not be taken too seriously. A few years ago, research performed by the Netherlands Chamber of Audit (*Rekenkamer*) claimed that in 2000 there were about 3200 corporate persons with one or more public duties. In total, they should be held responsible for the spending of approximately 119 billion euros of taxpayer's money. About 80% of them were also supposed to be quangos, according to the Court.¹³

Looking at the gap between these calculations, it is fair to say that the CPB and the Court of Audit probably have a different view on the kind of organizations that should (not) be called quangos. Fortunately, the Ministry of the Interior and Kingdom Relations issued a special quango-register.¹⁴ Consequently, it is now easier to get an overview of the expansion or decline of the total number of quangos. Yet, one still has to bear in mind that the quangos registered on this website are only the ones situated on the level of the central government. As Zijlstra has noticed earlier, this is only a tip of the iceberg. The Local Authorities Act (LAA) allows for a relatively broad delegation of powers from the Bench of Mayor and Aldermen to municipal

¹² See Lavrijssen 2004. Also see Voskamp-ter Borg 2005, p. 986-990.

¹³ Rekenkamer 2002.

¹⁴ <<http://almanak.zboregister.overheid.nl>>. The register shows that most quangos are spread over the ministries of Agriculture, Nature and Food Quality; Education, Culture and Science; Transport, Public Works and Watermanagement, and Health, Welfare and Sports.

commissions. The introduction of these commissions in 1964 was motivated by almost the same arguments that are being used for the establishment of quangos on the national level.¹⁵

4. Definition

Until today, there is no special framework law for quangos (later on we will elaborate on a draft for such a law) in the Netherlands, and the Constitution does not recognize quangos as a separate category of independent administrative agencies. Because of this, there is no legally binding definition of quangos. On the European level such a definition does exist when it comes to regulatory agencies. The Interinstitutional agreement on the operating framework for the European regulatory agencies defines an agency as:

‘any autonomous legal entity set up by the legislative authority in order to help regulate a particular sector at European level and help implement a Community policy’.¹⁶

This definition limits the scope of the operations of European agencies to the implementation of Community policies. Therefore, it is necessarily narrower than a description of the tasks of most quangos on a national level.¹⁷ Nevertheless, national quangos can be used for the monitoring and implementation of European laws. This is clearly proven by our national competition authorities. As we have noticed before, they are often cooperating with regulatory agencies abroad as part of a European network.

In the UK, the term quango is an abbreviation of the phrase ‘quasi autonomous non-governmental organization’. It is used to describe:

a public body that has responsibility for developing, managing and delivering public policy objectives at an ‘arm’s length’ from Ministers.¹⁸

This description is also quite accurate when it comes to a characterization of the Dutch equivalent *zelfstandige bestuursorganen* (zbo’s). Nevertheless, almost every definition of quangos still seems to be somewhat controversial in the Netherlands. Zijlstra explains this by referring to the fact that definitions are often adapted according to the needs of those who have a special interest in (not) decentralizing administrative powers.¹⁹ Zijlstra himself describes zbo’s as public non-advisory bodies (on the level of the central government) within the meaning of Article 1:1 General Administrative Law Act (GALA), which are not subordinate to any Minister in the sense that he is not entitled to give specific instructions in individual cases that

¹⁵ Zijlstra 1997, p. 484-485.

¹⁶ Interinstitutional agreement on the operating framework for the European regulatory agencies, COM (2005)59 final.

¹⁷ At the same time, the explanatory memorandum of the Interinstitutional agreement certainly contains some meaningful lessons for the setting up of quangos on a national level on good administration, accountability, participation and openness.

¹⁸ House of Commons, Research paper 05/30, 11 april 2005. Website: <<http://www.parliament.uk>>.

¹⁹ Zijlstra 2004, p. 1980-1986. A similar definition can be found in article 124a of the General guidelines for legislative drafting in the Netherlands. These guidelines or so-called *Aanwijzingen voor de regelgeving* can be found on <<http://www.justitie.nl>>.

have to be followed by the agency.²⁰ Other definitions include that quangos are not embedded in the traditional democratic complex, because they are not accountable towards elected and representative democratic institutions (Parliament, Provincial Councils, City Councils etcetera).²¹

According to the draft for a framework law on quangos and the General guidelines for legislative drafting (Art. 124e), quangos should always be established by, or, in special cases, in virtue of, an Act of parliament. This demand is a consequence of the fact that quangos operate at arm's length of Ministers. To counterbalance the decline in accountability towards Parliament once a quango has been established, there should at least be a form of Parliamentary consent beforehand.

5. The Quango Debate in the Netherlands

In recent years, quangos or zbo's have been subject to increased public debate, both in the UK and in the Netherlands. The trend toward privatization of public services in the eighties and nineties has been an important amplifier for the growing agitation in the quango debate. Concerns have been expressed about their accountability, democratic legitimacy, diversity of members and independence. Some people even say we are moving towards a 'quangocracy' or 'quango state'.²² While the current themes in the quango-debate in the Netherlands and in the UK show a lot of similarities, the historical backgrounds differ considerably.

In the Netherlands, M. Scheltema deserves credit for being the first scholar to start a serious academic debate about the advantages and disadvantages of quasi-administrative bodies on the level of our central government.²³ In 1974, he held his inaugural lecture at the Law Faculty of the University of Groningen about independent administrative agencies, being the alleged *stepchildren of Dutch constitutional and administrative law*. Especially, the insulation to some degree from direct ministerial involvement is sometimes believed to be a weakening of the scrutiny mechanisms laid down in the Dutch constitution. More in particular, the principle of ministerial responsibility and accountability contributes to the fact that the legal position of quangos remains highly controversial in the Netherlands.²⁴ Recently, a study by an inter-departmental working group advised to abolish most quangos, and restore ministerial responsibility and accountability for most semi autonomous administrative organizations. Only a handful of the current quangos should be kept outside the range of political influence by Ministers to avoid conflicts of interests.²⁵ The overall conclusion of the working group reads that a restoration of previous arrangements is in order.

According to Scheltema, however, it is a mistake to believe that every administrative act is covered by the principle of ministerial responsibility. The fact that a Minister has to answer questions of Members of Parliament about acts of, for instance, civil servants that work for him, does not imply that a Minister is also

²⁰ The issuing of general instructions, on the other hand, is not uncommon in relation to quangos. See for instance art. 16 of the Act concerning liberalization of the *Informatie Beheer Groep* (IBG is, among other things, responsible for the management of student grants in the Netherlands), *Staatsblad* 2004, nr. 593.

²¹ Raad voor het Openbaar Bestuur 2003, p. 45.

²² Ankersmit 2005. More elaborately Van Thiel 2000.

²³ Scheltema 1974.

²⁴ One of many examples for this controversialness was the fact that the Dutch Senate postponed the draft for a framework law that was supposed to harmonize the establishing of quangos.

²⁵ Werkgroep Verzelfstandigde Organisaties op Rijksniveau 2004, p. 7.

qualitate qua responsible for each mistake or wrong decision of government officials. Only to the extent that a Minister gave false instructions that caused the mistake or fault, he should be held accountable by Parliament. Scheltema also stressed, that quangos could serve an important role in the balancing of powers between the executive and the legislative competences of Dutch Ministers. Transferring certain executive powers to quangos might even prevent abuses of powers by Ministers in case there is a possible conflict of interests between their administrative and political roles. An example is the position of the Electoral Council. This council advises the Dutch government and both Houses of Parliament on practical matters relating to elections or questions of franchise. The Council also acts as the central polling station in parliamentary elections and elections to the European Parliament.²⁶ It is probably wise that the Minister for the Interior in the Netherlands cannot give specific instructions to the board when it comes to topics, like: setting the date for new elections or determining the validity of the list of candidates for the various political parties. Otherwise, possible conflicts of interest between the Minister as a representative of the Crown, and as a representative for his political party, lie in wait.

6. Why Quangos: possible Advantages

According the General guidelines for legislative drafting, there are three legitimate reasons for the establishment of quangos. Article 124c of the guidelines reads explicitly that they should only be erected if:

1. there is a genuine need for independent decision-making, based on a special kind of expertise, which is hard to generate within the administration;
2. it concerns a strictly rule-guided way of executing administrative decisions in a large number of cases; or
3. it is useful from a public participation perspective to invite private organizations to the decisions making process to perform a specific administrative task, which outweighs the disadvantages of a loss of control by the Parliament.

6.1. Independent Decision-making: the Case of CBS

A typical example of the first motive to erect a certain quango, is the position of the Central Bureau for Statistic research in the Netherlands (CBS).²⁷ This institution conducts an incredible amount of, especially socio-economic, research for all branches of government. Article 3 of the Statistics Netherlands Act therefore reads that it is the task of CBS to carry out statistical research for the government for practice, policy and research purposes and to publish the statistics based on such research. While CBS may occasionally carry out statistical research for third parties, it does most of its work in favour of various governmental institutions.

The independence of CBS is guaranteed in several ways. First, the Central Commission sets both the long-term statistical programme and the annual work programme for Statistics. This is an independent commission that watches over the independence, impartiality, relevance, quality and continuity of the statistical programme. The Director-General decides autonomously which methods are to be used to make these statistics, and whether or not to publish results. Secondly, CBS became an autonomous agency with legal personality in 2004. So there is no longer a

²⁶ More information can be found at <<http://www.kiesraad.nl/>>.

²⁷ <<http://www.cbs.nl/>>.

hierarchical relationship between the Minister of Economic Affairs and the organization. One of the reasons for this is that CBS is responsible for collecting, processing and publishing important statistical information for policy makers, like macro-economic indicators for consumer prices and economic growth. One can imagine that these statistical facts and figures may sometimes contain sensitive information, at least from a political perspective. That is why decisions about the collecting and publishing of this information should be kept away from the Minister of Economic Affairs. However, the Minister stays responsible for setting up and maintaining a system for the provision of government statistical information; in other words the Minister is politically responsible for legislation and budget, for the creation of conditions for an independent and public production of high quality and reliable statistics. Even the costs of tasks and activities undertaken to put this legislation into practice are accountable to the government's budget.

However, when it comes to decisions that concern the content, timing and publishing of the information flow, the Minister has no authority to influence the decision making process that goes on within the CBS.

6.2. Rule-guided Decision-making: the IB-group

A second example of a typical quango-type organization is the so-called IB-group. This quango is responsible for the implementation of several education laws on behalf of the Minister of Education, Culture and Science. Among other things the IB-group:

- distributes student grants for both national and foreign students and is responsible for season tickets for students to be able to use public transportation facilities (trains, metros, busses etc.) to get to school;
- takes care of the applications, selection and admission of students in the sphere of higher education law;
- is responsible for the issuing of student loans;
- has an important role to play in the information management of basic education data, like keeping record of student administration numbers etcetera; and
- functions as an accreditation body for the recognition of student diplomas;
- organizes state exams and other nation wide public and private school exams.

Because of the sheer number of administrative orders IB has to take every day it would be virtually impossible for any Ministry to carry out these tasks in an orderly fashion. It not only demands specific knowledge, but it also requires a specialized and well-organized administrative machinery. Locating these tasks within the body of the Ministry of Education would mean that the priorities of the organization have to be balanced with lots of other public interests that need attention on a daily basis. Moreover, because the IB-group has an independent position, the Minister of Education, Culture and Science may only give general instructions. He is not allowed to interfere with the way the agency handles specific dossiers. Of course citizens do have the right to address an administrative court if they do not agree with the administrative orders taken by the IB-group. The Act on the liberalization of the former predecessor of IB also explicitly states that IB-group has to have a special organization structure (with a board of directors, an obligatory information statute and

a supervisory board) which guarantees maximum public accountability and transparency of all of its operations.²⁸

6.3. *The Public Participation Model: the Health Care Insurance Board*

A third example, in this case of private involvement in the public decision making process, concerns the Health Care Insurance Board (CVZ). This organization, founded in 1999, co-ordinates the implementation and funding of the Sickness Fund Act (*Ziekenfondswet*) and the Exceptional Medical Expenses Act (*Algemene wet bijzondere ziektekosten*).²⁹ The CVZ has an independent position between the central government on the one hand and the health insurers, care-providers and citizens on the other. Together with the Ministry of Public Health, Welfare and Sports and three other independent government organizations (the Supervisory Board for Health Care Insurance, the Health Care Tariffs Board and the Hospital Provisions Board) CVZ plays a part in ensuring an affordable, reliable and efficient system of health care insurance in the Netherlands. Some of the most well known tasks of CVZ are:

- providing advice on the sum of the contributions and budgets for sickness funds;
- managing contribution funds and distributing them over the sickness funds;
- providing guidelines for carrying out new and existing legislation;
- informing care-insurers, care providers and citizens;
- monitoring the feasibility and efficiency of government plans concerning health insurance’;
- detecting and reporting bottlenecks in the implementation of Sickness Fund Act and the Exceptional Medical Expenses Act.

CVZ has an executive board appointed by the Minister of VWS and a supportive organization under the guidance of a management board. The executive board comprises seven independent experts, who have their roots in the health care or insurance sector. The main goal of CVZ is to enhance the efficiency and transparency of the implementation of the overall system of health care insurance. For that purpose, CVZ is closely co-operating with organization in the health care sector, like hospitals, insurance companies and associations of patients. Most activities of CVZ ultimately lead to the promulgation of policy rules and executive orders.³⁰

7. **Legal Position and Framework Legislation on Quangos**

7.1. *Quangos: a blind Spot in the Dutch Constitution?*

The Dutch constitution does not refer to quangos at all. So there is no constitutional basis for their establishment, nor for the necessary democratic control of powers and the accountability of quangos in this respect. However, there have been several attempts in the past to embed the different roles that quangos play in the public domain in the text of our constitution. While in 1980 the Dutch government still thought it would be too early for a revision of the constitution, some scholars, like

²⁸ Wet verzelfstandiging informatiseringsbank, *Staatsblad* 1993, 714.

²⁹ *Kamerstukken II* 1999/00, 27 038, nrs. 1-2.

³⁰ Article 1:3 of the General Administrative Law Act defines a policy rules as: ‘an order, not being a generally binding regulation, which lays down a general rule for weighing interests, determining facts or interpreting statutory regulations in the exercise of a power of an administrative authority. An administrative order means: ‘a written decision of an administrative authority constituting a public law act’.

J.M. Polak, already begged to differ on this point. Polak referred to Article 87 (old) of the Dutch Constitution. This Article carries back to the revision of the constitution in 1922.³¹ Article 87 (today Article 79 of the constitution) serves to prevent an excavation of the powers of Parliament by advisory bodies, established by the government. In the roaring twenties of the previous century, fear did exist that important advisory bodies would be able to capture government officials and by-pass the position of Parliament. Therefore, Article 87 decided that advisory bodies shall not be established without previous consent through an Act of parliament. Polak argued that, if Article 87 serves to protect the primacy of parliamentary control of power against advisory bodies, it should a fortiori pertain to non-advisory bodies with executive powers!³²

In 1997, the government switched positions and proposed to alter Article 134 of the constitution to give quangos a special position next to the public bodies for professions and trades. This time, however, the Dutch Parliament acted obstructive. Most political parties in Parliament took the view that it would make more sense to establish a framework law on the position and functions of quangos before an alteration of the constitution might be in place.

In 2003, the Dutch Council for Public Administration (ROB) attempted another time to embed quangos in the constitution. The Council proposed to amend the constitution in a way that left no room for quangos on the level of the central government,³³ except for those established by, or, in virtue of, an Act of parliament. According to the Council there were two good reasons to create a special position for quangos in the constitution. First, they have become such an important factor in the administrative organization that it would be unreal to leave them out of consideration when it comes to the constitutional ground-rules concerning the organization of government. Second, quangos are an exception to the basic rule that Ministers are responsible for the way executive powers have been exercised by the administration. Such an exception to a fundamental constitutional rule has to be founded in the constitution itself. Nevertheless, the Dutch government rejected all the proposals of the Dutch Council for Public Administration without a proper explanation. Apparently, politicians do not want to burn their fingers on this topic anymore. For this reason alone, it seems unlikely that quangos will be embedded in the constitution on a short-term.

7.2. Quangos and Public Corporations

From a legal point of view, the Netherlands are structured as a nation state. The country is divided into decentralized entities, generally known as ‘public corporations’. First of all, these corporations can be defined by territory, like the provinces and the municipalities. Within their territory these organizations possess a certain amount of regulatory autonomy. They are more or less free to rule their own household, unless the law determines otherwise. Secondly, public corporations can also be defined by their function, like the public bodies for professions and trades mentioned in Article 134 of the constitution. Their regulatory autonomy is tied to functional issues. As a consequence, they have no autonomous regulatory powers.

³¹ Huart 1925, p. 122-123.

³² Polak 1980, p. 298.

³³ Special provisions were proposed for quangos on the decentralized level of government.

Public corporations themselves do not possess rulemaking powers. They consist of administrative bodies with executive, regulatory or judicial competences.³⁴ Characteristic for a public corporation is that it contains a system of checks and balances between these bodies. Furthermore, there usually is a representative body elected by the members within each territory or functional region. By that manner there is always some kind of democratic representation for executive and rule-making powers within each public corporation.³⁵ Quangos, however, do not fit into the traditional democratic complex. Their popularity can be explained by the fact that they are associated with a more efficient and smaller government. Moreover, it is not impossible that quangos are able to, more or less, compensate their lack of democratic legitimacy. Especially in the public participation model, the executive board of quangos often represents all kinds of private interest groups. In those cases there is a kind of bottom up process of democratic representation. Besides this, citizens who do not agree with decisions that have been taken by a quango can often address an administrative court to require an independent judgment. Of course this is not an equivalent for democratic representation, but it does contribute to the control the power over quangos by citizens and supports the idea that quangos are governed by the rule of law.

7.3. *Quangos and their Legal Form*

Quangos can be established in different ways. Most of the time, they do possess some kind of corporate personality either in a public or in a private law context. Corporate personality implies that a quango can, for instance, enter into a contract, be the owner of property, or address a court of law.³⁶ In case a quango has no corporate personality of its own, it is automatically part of the corporate personality of the Dutch State. This indicates that the quango cannot hire its own personnel or otherwise take part in economic transactions. Without corporate personality this prerogative belongs to the Minister.

Quangos with a corporate personality under public law have to be established by an Act of parliament. This act will then determine its powers and duties and, to some extent, even the organizational structure of the quango. An example of a quango with corporative personality according to public law is the Central Bureau for Statistic research, mentioned earlier. Most universities also belong to this category.

In case a quango has corporate personality according to private law, it can only have administrative authority for one or more special purposes as determined by law. These quangos can be shaped as a private company limited by shares (N.V.) or as a company with limited liability (B.V.), and even as an association or a foundation. Nevertheless, Article 124b of the General guidelines for legislative drafting states that corporative personality according to private law is only to be used when that form is more adequate for the activities of the quango.³⁷ In that case they are also governed by Article 59 of the so-called *Comptabiliteitswet*. This suggests, among other things, that they are under supervision by the Dutch Audit Council.³⁸ An example is the foundation responsible for the collecting of reproduction fees for the copying of

³⁴ See Kortmann 2005, p. 479 et seq.

³⁵ Van Wijk *et al.* 2005, p. 86.

³⁶ *Kamerstukken II* 1996/97, 24 130, nr. 20, p. 13-14.

³⁷ Nevertheless the form of the foundation, established by a minister, is chosen many times (around 200 times in the last decade): see *Kamerstukken II* 2004/05, 25 268, nr. 21.

³⁸ Algemene Rekenkamer 2000.

books, video's etc. (*Stichting Leenrecht*). It seems fair to say that the nature of these activities justifies a corporate identity according to private law.

7.4. *Access to Justice*

The liability for unlawful governmental acts normally has to be established by an administrative court. The jurisdiction of these courts relies on the General Administrative Law Act. According to this act, courts are allowed to judge the legality of administrative orders. Administrative courts will not only check if written laws are obeyed but also if principles of proper administration have been followed, such as the principles of due care, proportionality, good faith, legal certainty and equality.

When a decision conflicts with one of these principles, courts will approve the appeal and annul the order. The administrative authority then has to take a new decision respecting the court's decision. In some cases, the judicial decision can even replace the annulled administrative order, but this does not happen often. Dutch administrative courts can also order a quango to pay compensation for the damage that is suffered by the public. In case a quango has corporative personality, according to private law, it cannot shift the paying of damages to the state treasurer. However, not all administrative orders can be brought before an administrative court. Article 8:2 GALA states that 'no appeal may be lodged against: (a) an order containing a generally binding regulation or a policy rule, (b) an order repealing or laying down the entry into force of a generally binding regulation or policy rule, (c) an order approving an order, containing a generally binding regulation or a policy rule or repealing or laying down the entry into force of a generally binding regulation or a policy rule'. Because of this it is important to determine the legal nature of the order that may have caused liability.³⁹

7.5. *Harmonization*

Then there is the matter of how quangos are structured and organized. Daily practice in the Netherlands shows a variety in organizational shapes and design. Since the second half of the nineties, there is a call for harmonization and coordination of the legislation concerning institutional issues relating to quangos. As a result, the General guidelines for legislative drafting were extended with special rules for the establishing of quangos.⁴⁰ But from the start, most politicians thought this would not be enough, not in the least because the guidelines are non-binding. In the year 2000, a draft for a framework law on quangos saw the light.⁴¹ The aims of this law are (1) to sort out the present situation; (2) to clarify the issue of ministerial responsibility; (3) to provide rules for financial control; and (4) to increase the public insight. The concept of a framework law used the same definition of a quango as the General guidelines. Both discern between three sorts of provisions: there are (a few) Articles about quangos in general, Articles written especially for quangos with a public legal organization form, and some about those that are corporations according to private law. Most of the articles have the same purport or are an exact copy of the guidelines.

³⁹ Legislation made by government and the parliament together, as well as legislation from other authorities (for instance regulations by the city council or a quango), can be addressed before a civil court. However, the Supreme Court of The Netherlands has decided that article 120 of the Dutch constitution indicates that formal legislation cannot be held unconstitutional or against unwritten law, including general principles of law.

⁴⁰ *Staatscourant* 1996, nr. 177.

⁴¹ *Kamerstukken II* 2000/01, 27 426, nrs. 1-2.

There has been a lot of discussion about the current concept of a framework law. In general there are two opposite opinions.⁴² One could say that the ‘pluralists’ are in favour of diversity. They believe that it is impossible that all quangos, regardless of their size, function and historic background, should have to live up to the same set of (minimum) standards. On the other side are the ‘unionists’. They feel that a framework should be established setting out uniform conditions relating to the creation, operation and control of quangos. At this time it is hard to say which party is going to win the battle over the framework law. Peters has characterized the current draft as a ‘careful compromise’ between the wish for a law that consists of strict rules and obligations and a more flexible approach that provides non-binding guidelines, like the General guidelines for legislative drafting are doing.⁴³

At the moment it looks as if the framework law will only apply to quangos if and when the law that institutes a quango says so. Furthermore, the draft for a framework law offers ample room for dissenting arrangements. Nevertheless, the current text does provide some general rules on issues like the legal status of personnel working for quangos and, especially, about monitoring compliance and financial control. Ministers are, for example, given the right to demand certain information that is necessary to monitor compliance and to annul decisions taken by quangos in case of gross neglect of their duties. Unfortunately a number of rather important matters will probably stay unregulated. Perhaps the Dutch government can learn something in this respect from the European legislator. Looking at the draft for an Interinstitutional agreement on the operating framework for European agencies,⁴⁴ might learn that it could be a good idea to be more explicit on certain accountability issues. The Interinstitutional agreement demands, for instance, that before an agency can be established an impact assessment has to be undertaken by the European Commission. This impact assessment has to take several factors into account, including: the problems which must be resolved and the needs which must be met in the short or long term, the alternatives for establishing an agency, any benefits in terms of expertise, visibility, transparency, flexibility and timeliness, coherence, credibility and effectiveness of public actions etcetera. Moreover, the draft agreement offers interesting ideas on obligations concerning good administration.

For the time being, however, the draft for a framework law has been adjourned because the Dutch government wants to reconsider the whole quango issue. This reconsideration was announced in the plan towards a ‘Different government’. This is supposed to be the master plan of the (second) Balkenende administration. It provides us with five action points: (1) optimizing public service; (2) less bureaucracy; (3) a more efficient public organisation; (4) better cooperation between governments; and (5) better listening to citizens. Many projects were defined to realize this master plan and its goals. One of them was the assignment to a study group ‘Privatised Organisations on a central governmental level’ (called after its chairman: the Kohnstamm committee). This committee was asked to come up with a strategic advice on the future of quangos in the Netherlands. It turned out that, according to the Kohnstamm committee, most of the quangos should simply return under the ministerial responsibility. Recently the government has given its reaction on this advice.⁴⁵ It has asked the Senate to carry on with the discussion that was adjourned.

⁴² Van Thiel 2001, p. 189-193.

⁴³ Peters 2000, p. 4-9.

⁴⁴ COM(2005)59 final.

⁴⁵ *Kamerstukken II* 2005/06, 25 268, nr. 24.

Furthermore, a new committee will be installed to perform a screening on the existing quangos (*Commissie Doorlichting ZBO's*). This screening is supposed to shed more light on the question if the motives for a special status of quangos in the governmental organization are still relevant. If none of the motives are still relevant, the committee will make a cost-benefit analysis to decide if a quango must 'return' to the departmental organization or not.

8. Regulatory Powers, Executive Ordering and Dispute Resolution

8.1. Regulatory Powers of Quangos: the Law in the Books

In general, Article 124f of the Dutch guidelines for legislative drafting covers the attribution of regulatory powers to quangos on the level of the central government. The article reads: regulatory powers are only conferred to quangos:

- as far as it concerns organizational and technical matters; or
- in special cases, on the condition that a Minister keeps the authority of (dis)approving the rules made by quangos.

Unfortunately, the guidelines do not clarify what is meant by organizational and technical matters. As a consequence a margin of appreciation is left to quangos, to decide in which cases ministerial approval of their rules is absolutely necessary. At the same time, quangos do not possess autonomous regulatory powers attributed to them by the constitution, like for instance provinces, municipalities, and water boards (Art. 124 of the Dutch constitution). These bodies always possess the authority to enact rules on matters belonging to their local autonomy, unless the constitution or a statutory law determines otherwise.

Besides this, quangos are not to be confused with public bodies for professions and trades (Art. 134 of the Dutch constitution).⁴⁶ The duties and organization of these bodies, the composition and powers of their administrative organs and the public access to their meetings is regulated by a statutory law (*Wet op de bedrijfsorganisatie*). As a consequence, the rule-making powers of quangos always have to rest on a delegation of regulatory powers by an Act of parliament for a special purpose. A so-called 'blank delegation' of rule-making powers towards quangos, even by an Act of parliament, is without doubt against the constitution.

All in all, the regulatory powers of quangos remain controversial. While the involvement of Parliament in the granting of legislative powers to quangos is guaranteed, this does not solve every problem. Once a quango has the power to enact generally binding rules, there is no longer a political control over the content of the rules. As we have seen, ministers sometimes have the right to approve or disapprove quango-regulations. However, they cannot alter these rules. So the power to disapprove is inadequate as a steering mechanism. Together with the fact that quangos are not subordinate to the authority of Ministers, the only thing that rests for a Minister, who wants to influence the course of a quangos policy, is using his right to give general directions to the board of directors. No one knows exactly how 'general' these directions have to be, to prevent Ministers from putting unauthorized pressure on quangos.

⁴⁶ An English version of the Dutch constitution can be found at: http://www.minbzk.nl/contents/pages/6156/grondwet_UK_6-02.pdf.

8.1.1. Rule-making Powers in Practice

In the year 2002, the University of Groningen conducted a research that covered the way quangos handle their rule-making powers.⁴⁷ The researchers discovered 153 (clusters of) quangos, from which about 40% (61) are entitled to enact rules on the basis of a statutory law. Within this group of 61, 39 refer to rule-making in special cases, and are therefore in need of ministerial approval. An example of the sort of regulatory authority we are talking about here, are the regulations that concern the providing of subsidies. In 30% of the cases where ministerial approval was obliged, such an approval did not exist in practice. Perhaps even more alarming, however, is the fact that 40% of the total number of quangos claim to have regulatory powers, while in reality they do not possess such powers or vice versa.

A possible explanation for this confusion is the rather complicated distinction that exists in Dutch administrative law between policy rules and generally binding regulations. On the outside, both look very much alike (general formulation, suited for repeated application, aimed at an indefinite number of addressees etc.). Nevertheless, policy rules are based on an executive power, while generally binding regulations always have to be based on a specific delegation of legislative power by an Act of parliament or, otherwise be founded on a direct attribution by the constitution. A mix-up is easily made in case the legislator leaves a margin of appreciation for agencies to interpret open-ended clauses in the law. Quangos often fill in this margin by setting technical standards for the benefit of a consistent application of the law. These standards, however, are the derivative of the power to implement and execute statutory laws. They do not arise from an autonomous lawmaking power.

8.2. Executive Powers

The executive powers of most quangos in the Netherlands do not differ substantially from those of ordinary administrative authorities.⁴⁸ Quangos, like the Dutch Competition Authority and the Authority for the Financial Markets, can grant or withdraw permits, which are required to operate on markets for financial institutions (stock exchange, insurance, casino's etcetera). The Dutch Emissions Authority is responsible for the granting of permits concerning tradable greenhouse gas emission rights for installations under the regime of European directive 2003/87 EC.⁴⁹ Many other examples could be given about quangos with the authority to grant permits or sign releases.

A second category of executive powers originate from quangos responsible for the monitoring and enforcement of, especially, competition laws. The independent Post and Telecom Authority (OPTA), for instance, supervises compliance with legislation and regulations in the areas of post and electronic communications. In particular this involves the Postal Act, the Telecommunications Act, and delegated regulations based on these acts and on European laws. Laws and regulations are intended to promote competition on these markets, giving consumers more choices and fair prices. OPTA can take enforcement measures against a provider if the party holds an excessively strong market position. In order to enforce legislations, OPTA, is

⁴⁷ Kloosterman & Winter 2003, p. 119-130.

⁴⁸ According to article 1:1 of the GALA, an 'administrative authority' means: (a) an organ of a legal entity which has been established under public law, or (b) another person or body which is invested with any public authority.

⁴⁹ Article 4 of Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61.

authorized to collect information and demand access to relevant documents, issue (administrative) fines in the event of a violation, issue threats of fines in order to force compliance with legal obligations, and retract previously issued telephone numbers.⁵⁰ Furthermore, OPTA regulates the tariffs of former public corporation KPN, because this party holds significant market power on the telecom market. However, according to the draft for a framework law on quangos any decision about tariffs, ultimately, has to be approved by the Minister responsible for the policy field in question.⁵¹ In this respect the ‘independency’ of OPTA vis-à-vis the Minister of Economic Affairs is limited.

Other possible administrative competences of quangos are, for instance, the power to issue directions. The Dutch Central Bank (DNB), for instance, evaluates the financial household of pension and saving funds. Research may prompt the DNB to make recommendations to the board of directors of such a fund in case of breaches of the Pensions and Savings Fund Act. If these recommendations are not followed in a satisfactory and timely manner, the DNB may issue a direction. This direction must then be followed up by the board of directors, otherwise a fine or a cease and desist order under penalty, or an administrative fine, can be imposed upon the organization. At the same time, one has to be careful to treat directions as a mere equivalent of administrative sanctions. Truly, sometimes a direction may be a sanction in itself because it can be seen as a mandatory reaction to an offence. In other cases, however, the direction is simply an instrument to warn financial institutions for future developments that could jeopardize their liquidity or solvability, or otherwise cause disturbances to the management of daily operations. In those cases, there does not have to be any breach of the law.⁵²

8.3. *Dispute Resolution: the Law in the Books*

Last but not least, quangos are also active on the third pillar of the Trias Politica, namely in the area of settling disputes. Although dispute resolution is a relatively rare phenomenon amongst Dutch quangos, there are some examples in the field of energy law and, again, telecommunication law. Article 20(3) of Directive 96/92 EC concerning community rules for the internal market in electricity, for instance, determines that:

‘Member States shall designate a competent authority, which must be independent of the parties, to settle disputes relating to the contracts and negotiations in question. In particular, this authority must settle disputes concerning contracts, negotiations and refusal of access or refusal to purchase’.

The disputes referred to in this directive shall be settled by the Director-General of the Dutch Competition Authority, according to Article 51 of the Electricity Act 1998. A similar provision can be found in Article 19 of the Dutch Gas Act. This Article also states that disputes in relation to the application of Articles 11, 14 and 15 shall be settled by the Director-General on the basis of the Competitive Trading Act.

⁵⁰ *Staatsblad* 2004, 189. *Wijziging Telecommunicatiewet en enkele andere wetten in verband met de implementatie van een nieuw Europees geharmoniseerd regelgevingskader voor elektronische communicatienetwerken en -diensten en de nieuwe dienstenrichtlijn van de Commissie van de Europese Gemeenschappen.*

⁵¹ Kaderwet Zbo's article 17.

⁵² See Verhey & Verheij 2005, p. 158.

However, Subarticle 3 of Article 19 adds to this, that if a dispute relates to a condition or a tariff for the transmission of gas or for a service necessarily related to this, the Director-General may determine the said condition and the said tariff for a period decided by him. This shows that dispute resolution may also include a binding decision about conditions and tariffs. Yet another example can be found in Article 71 of the Railway Act. Subarticle one of this act enables interested parties to address the board of directors of the Dutch Competition Authority to investigate if a railroad company or the railroad administration has acted against directives 91/440 EC and 2001/14 EC. The board can also be asked to decide if an agreement about access to the rail network has been violated. If the board decides that the complaints are valid, a duty backed by a penalty can be imposed on the condemned party.

Although other examples of dispute resolutions could be given, Ottow describes them as an atypical task for quangos. According to him most quangos do not have the equipment, nor the financial resources, to investigate complaints thoroughly and to fulfil a proper role as independent arbitrator.⁵³ Nevertheless, in a certain way almost all quangos play some part in settling disputes. The reason for this is that, according to Article 7:1 of the GALA, before an appeal against an administrative order to an administrative court is possible, one normally has to lodge objections against the order. This means addressing the administrative authority and asking for a review. In fact this is already a sort of quasi-judicial procedure to settle disputes outside of court. Lodging objections is supposed to work in a low-threshold-way. Especially when a quango is set up as an inspection agency or a competition authority responsible for the upholding of anti-trust laws, some people claim that the benefit of a low threshold procedure might very well be rather imaginary. It seems not unlikely that citizens or companies, who have to deal with the agency on a regular basis, will be hesitant to file an objection in fear of a disturbance of good relations for the future.

A more prominent way of dispute resolution is assigned to the OPTA. Article 12.2 of the Dutch Telecommunications Law (TW) states that:

If a dispute will rise among providers regarding access to, and interconnection between, networks, the board of OPTA can pass a binding judgment to settle the dispute on a formal request of one of the interested parties, unless the legislator has assigned this task to another authority.⁵⁴

The legislator has done his best to fit these provisions into the system of the GALA. Because the decision of OPTA is binding, according to Article 12.6 of the TW, the effect is that this decision has to be considered as an administrative order in the meaning of Article 1:3 of GALA. The request to settle a dispute, therefore, has to be considered as an application by an interested party for such an order. As a consequence totally different competences (dispute resolution and executive decision-making) are getting mixed. Until recently, this meant that an objection could be lodged against the order in which a dispute was settled. Article 17(3) of the revised TW made an end to this. It would be strange if OPTA had to decide on an objection against one of its own previous settlements. One could hardly claim that OPTA would have been totally objective in the process of reconsidering its previous decision. More in general, this contributed to a change in the GALA. Since the first of September

⁵³ Ottow 2003, p. 51.

⁵⁴ Article 12.9 of the TW complements this task by giving consumers and providers of electronic communication networks and services the right to address OPTA to settle a dispute between them.

2004 it is possible to skip the objections procedure (Art. 7:1a GALA) if all interested parties agree on this.

8.3.1. Dispute Resolution in Practice

An important reason to entrust quangos with dispute resolution is that this should lead to a relatively simple, cheap, informal and competent way of settling disputes. Daalder has argued that, as far as competition authorities are concerned, this theory does not correspond with reality.⁵⁵ Case law shows that dispute settlement procedures in this area are very often highly formalized, time-consuming and still resulting in a trip to court, afterwards.

To a certain extent, the problem of dispute resolution by quangos in the field of competition law has to do with the fact that the decision to settle a dispute is considered to be an administrative order. This means that the regular provisions of the GALA are applicable. As a consequence, frictions may arise between a quasi arbitration-like way of decision-making and a more hierarchical approach of taking an administrative order. OPTA, for instance, cannot deviate from the application to settle a dispute between telecom providers. In other words, the application dictates the scope of the dispute. If a dispute does arise between private parties about tariffs, and after the application the tariffs have gone up, OPTA can only decide something about the original tariffs. This is due to the fact that decisions about the legality of an administrative order have to be taken from an *ex tunc* perspective.⁵⁶ Another consequence of dispute settlement through an administrative order is that courts have full jurisdiction over OPTA's decisions, where usually some restraint will be shown. Last but not least, normally, administrative orders will only become invalid because of an annulment in court, or when the administrative authority itself revokes the order. In case of an order taken by OPTA, concerning dispute settlement, however, private parties are able to bypass the order retroactively if they can come to an agreement about their mutual rights and obligations.

In general one could say that dispute resolution by quangos does not necessarily fit into the procedural law laid down in the GALA.

9. Ministerial Control over the Regulatory Powers of Quangos; General and Specific Directions

Article 124l(5) of the guidelines for legislative drafting decides, among other things, that depending on the nature of a quango, the following instruments of control will be attributed to ministers:

- establishing generally binding regulations, which have to be observed by quangos, concerning matters mentioned by an Act of parliament;
- the power to give general instructions or make policy rules that have to be followed by quangos;
- the power to approve, adjourn or annul certain administrative orders coming from quangos.

Originally, the draft for a framework law on quangos kept silent on this subject. Following the advice of the High Council of State,⁵⁷ the Dutch government refrained

⁵⁵ Daalder 2004, p. 23-32.

⁵⁶ Voorzieningenrechter Rotterdam 20 april 2004, LJN-nr. AO 8431.

⁵⁷ *Kamerstukken II* 2000/01, 27 426 A, p. 5.

from a general regulation about the authority of ministers to give policy rules or general instructions for quangos. The government thought a general provision on this matter could easily conflict with the independent position and expert role of certain quangos. Kummeling on the other hand, argued that this is not a good excuse. A differentiation between various types of quangos could have solved this problem, according to him.⁵⁸ It would have been easy to make an exception for quangos, which have to be able to come to an independent judgment without political interference. The category which first comes to mind then are, again, the competition authorities whose job it is to keep an eye on the way public authorities operate on markets for public services. In the meanwhile, the draft for a framework law has been altered. As a result of an amendment in Parliament, the government switched positions and introduced a new Article in the draft framework law on quangos that offers Ministers the power to give general directions to quangos.⁵⁹ According to the Dutch government, Ministers also have the authority to make policy rules that are binding for competition authorities. Verhey and Verheij have argued that this does not have to cause any problems from a separation of powers perspective as long as competition authorities have the authority to deviate from these policy rules in unexpected circumstances and Ministers refrain from interference in individual cases.⁶⁰

10. Accountability

For the work of quangos in the field of public policy-making the transparency of their decision-making is an important topic.⁶¹ All sorts of decisions and activities in the public field have to meet basic standards and principles of good governance. This is of course the case for public authorities and civil servants in the domain of the government, but also for the working-field of the quangos. One of the fundamental rules of Dutch Constitutional Law is ‘No Authority without public Accountability’. This adage rules also the field of quangos. Thereby we have to realize that there are different ways of organizing accountability. One important kind is the accountability towards the parliament; which – in the Dutch constitutional system – can be activated by the responsibility of the ministers for the functioning of quangos and the legal framework that rules their authority. This top-down approach of accountability is part of the functioning of the traditional democratic and political system.

But we have to admit that this kind of accountability within the political framework is not the only way to follow and control the quality of the work of quangos. Also other forms of accountability can be used to create a good view on the results of the activities of quangos. These forms are a more horizontal and deliberative approach of accountability. We can mention in that sense various kinds of professional accountability, like peer review-procedures and audits and visitations on behalf of professional standards. A few years ago a group of Dutch quangos formulated a charter on public accountability. The charter covers issues, like: publication of annual results, a code of conduct for quangos and procedures for the

⁵⁸ Kummeling 2001, p. 48.

⁵⁹ *Handelingen II* 2001-2002, nr. 54, p. 3705.

⁶⁰ Verhey & Verheij 2005, p. 214. Interference in individual cases is also prohibited by Article 124I(6) of the General guidelines for legislative drafting.

⁶¹ See for instance the report of the Dutch Audit Council, *Kamerstukken II* 1999/00, 27 045, nrs. 1-2, about the Forest Preservation Council. In 2000, the Audit Council concluded that, both the financial accountability and the justification over policy results by the FPC have been inadequate since FPC became a quango. The Audit Council labeled the information flow from FPC towards the Ministry as being far too general and vague to be useful for a serious performance track.

handling of complaints by clients and citizens. The members that drew up the charter have committed themselves to establish certain quality control mechanisms and guarantees for responsiveness towards society.⁶²

There is also a third way to organize accountability, which we can call social accountability. In this approach a quango is in contact with the relevant actors in the field, such as councils and organizations of users of the services of the quango. Sabel has written about this form of accountability to the civil society actors. He advocates forms of deliberative democracy to stimulate the process of learning in the field of public services.⁶³ Sabel especially draws attention to ‘learning through monitoring’ and opening up to public scrutiny. Furthermore benchmarking results between quangos and/or public authorities could contribute to a better performance track-record of quangos.

In practice it is important to realize that there are no Chinese walls between these diverse forms of organizing accountability. Perhaps politicians should be more interested in the results of the professional and the social forms of accountability and even more the effectiveness and efficiency of the operations of quangos. This attitude could also help to bridge the current gap in public trust between government and citizens.

11. Conclusion

Turning back to the title of this report we can conclude that the image of quangos as being Trojan horses, which are invading our democracy, represents a gross exaggeration of their functioning in daily practice. Although there seems to be a growing aversion among politicians and legal scholars against quangos, there is no sound empirical evidence that their performance is, in general, worse than that of the average administrative authority. Moreover, we do believe that the way in which quangos are functioning right now does not necessarily cause infringements on the rule of law, at least as long as the legislator determines the room for manoeuvre in the exercise of its rule-making powers. Of course, we have to admit that it is virtually impossible to specify the limits to a quangos powers in every detail, but this is also true for ‘regular’ administrative agencies. Besides, legislation is perhaps not the only instrument to ensure legitimacy and enhance the level of public accountability.

Over the years we have observed a growing variety of quangos with different tasks and also a diversity in terms of rule-making powers. Overall, however, the power to promulgate generally binding regulations concentrates itself mainly to competition authorities. This is not surprising because they have to be able to set tariffs for public services in case of an abuse of market power. In our opinion the Dutch debate about a proper control of quangos focuses too much on the possibilities and constraints for Ministers to influence the decision-making by quangos. Sometimes the formal instruments to monitor and control their performance have, in fact, become meaningless because Departments do not have the knowledge nor skills to evaluate the quality of the public services performed by quangos.

Does this mean that all is good that ends well? It is probably too early to draw this conclusion. One cannot deny that there are still some questions that need to be answered in relation to the accountability of quangos. Because of the variety of motives for the establishment of quangos and the wide range of functions they have to

⁶² One can find the charter on public accountability at <<http://www.publiekverantwoorden.nl>>.

⁶³ Sabel 2004.

fulfil, it seems fair to say that we do need a framework law on quangos to set some basic rules concerning the public or private design of quangos, the need for a certain standardization of best practices in the field of quality control and benchmarking, and some ground rules about principles of good governance to guarantee a minimum-level of transparency and accountability for all quangos. Recently the parliamentary debate about such a framework law has been reopened. Let us hope that soon agreement will be reached about these ground rules. In the meanwhile the story about quangos is to be continued.

References

Algemene Rekenkamer

Algemene Rekenkamer, *Verantwoording en toezicht bij rechtspersonen met een wettelijke taak*, Den Haag 2000.

Ankersmit 2005

Ankersmit F., 'Privatisering bedreiging voor democratie', *NRC-Handelsblad*, Thursday 20 October 2005.

Berkhout et al. 2003

Berkhout, B. Does, B., Van Geuns, R. & Mallee, L., *Markt als middel: privatisering in de sociale zekerheid*, Amsterdam: Regioplan, 2003.

Baarsma et al. 2003

Baarsma, B.E., Felsö, F.A., Van Geffen, S.M., Mulder, J.D.W.E. & Oostdijk, A., *Zelf doen? Inventarisatie van zelfreguleringsinstrumenten*, Amsterdam: SEO, 2003.

Commissie Buurmeijer 1993

Commissie Buurmeijer, *Parlementaire enquête uitvoeringsorganen sociale verzekeringen*, Den Haag, 1993.

Daalder 2004

Daalder, E.J., 'Van geschillen, advocaten en geschilbeslechting door de overheid', in: Koeman, N.S.J., Ten Veen, A. & Van Angeren, J.R. (red.), *Overheid en markt*, Deventer: Kluwer, 2004, p. 23-32.

Huart 1925

Huart, F.J.A., *De grondwetsherziening 1917 en 1922*, diss. Leiden, Arnhem: Gouda Quint, 1925.

Kloosterman & Winter 2003

Kloosterman, D.R. & Winter, H.B., 'In zelfstandigheid geregeld. Een onderzoek naar de omvang en de aard van de regelgevende bevoegdheden van zelfstandige bestuursorganen en de kwaliteit van de regelgeving', *RegelMaat* (4), 2003, p. 119-130.

Kortmann 2005

Kortmann, C.A.J.M., *Constitutioneel recht*, Deventer: Kluwer 2005.

Kummeling 2001

Kummeling, H.R.B.M., *Een kale kaderwet. Commentaar op het wetsvoorstel Kaderwet zelfstandige bestuursorganen*, Preadvies Vereniging voor Wetgeving en Wetgevingbeleid, Den Haag: Sdu Uitgevers, 2001, p. 27-53.

Lavrijssen 2004

Lavrijssen, S.A.C.M., 'De rol van de Nederlandse administratieve rechter bij het toezicht op de mededinging', *SEW* (4), 2004, p. 18-37.

Van der Meulen 2003

Van der Meulen, B.M.J., 'Marktautoriteiten. Aanzet tot interne rechtsvergelijking', in: Van der Meulen, B.M.J. & Ottow, A.T. (red.), *Toezicht op markten*, VAR-preadvies, vol. 130, Den Haag: Boom Juridische uitgevers, 2003, p. 19-130.

Meuwese 2004

Meuwese, A., 'Brusselse spraakverwarring: "regelgevende instanties" zonder regelgevende bevoegdheden', *Nederlands Juristenblad*, 2004, p. 1127-1128.

Ottow 2003

Ottow, A.T., 'Het verschil tussen duivenhokken en telecommunicatie: De bestuurs(proces)rechtelijke obstakels bij het toezicht op de telecommunicatiemarkt', in: Van der Meulen, B.M.J. & Ottow, A.T. (red.), *Toezicht op markten*, VAR-preadvies, vol. 130, Den Haag: Boom Juridische uitgevers, 2003, p. 131-234.

Peters 2000

Peters, J.A.F., 'De kaderwet zelfstandige bestuursorganen: een eerste kennismaking', *Tijdschrift Privatisering* (7), 2000, p. 4-9.

Polak 1980

Polak, J.M., 'Een wettelijke basis voor zelfstandige bestuursorganen', *Nederlands Juristenblad*, 1980, p. 298.

Raad voor het Openbaar Bestuur 2003

Raad voor het Openbaar Bestuur, *Andere openbare lichamen in de Grondwet*, Den Haag, 2003.

Rekenkamer 2002

Rekenkamer, *Rechtspersonen met een wettelijke taak*, Den Haag, 2002.

Sabel 2004

Sabel, Ch.F., 'Beyond Principal-Agent Governance: Experimentalist Organizations, Learning and Accountability', in: Engelen, E. & Sie Dhian Ho, M. (eds.), *De Staat van de Democratie. Democratie voorbij de Staat*, WWR Verkenningen, 3, Amsterdam: Amsterdam University Press, 2004, p. 173-195.

Senden 2005

Senden, L., 'Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?', *Electronic Journal of Comparative Law*, January 2005, vol 9.1, available at: <<http://www.ejcl.org/91/art91-3.html>>.

Scheltema 1974

Scheltema, M., *Zelfstandige bestuursorganen*, Oratie Rijksuniversiteit Groningen, Zwolle: Tjeenk Willink, 1974.

Van Thiel 2000

Van Thiel, S., *Quangocratization: trends, causes and consequences*, Utrecht: s.n., 2000.

Van Thiel 2001

Van Thiel, S., 'Kaderwet Zelfstandige bestuursorganen; uniformiteit of verscheidenheid', *Bestuurswetenschappen* (2), 2001, p. 189-193.

Verhey & Verheij 2005

Verhey, L.F.M. & Verheij, N., *De macht van de marktmeesters*, NJV-pleadvies, Deventer: Kluwer, 2005, p. 135-332.

Voskamp-ter Borg 2005

Voskamp-ter Borg, I.E.I., 'Europese eisen aan de nationale markttoezichthouders', *Nederlands Juristenblad*, 2005, p. 986-990.

Werkgroep Verzelfstandigde Organisaties op Rijksniveau 2004

Werkgroep Verzelfstandigde Organisaties op Rijksniveau, *Een herkenbare staat: investeren in de overheid*, Den Haag, 2004.

Van Wijk et al. 2005

Van Wijk, H.D., Konijnenbelt, W. & Van Male, R.M., *Hoofdstukken van bestuursrecht*, Den Haag: Elsevier 2005.

WRR 2004

WRR, *Bewijzen van goede dienstverlening*, Den Haag, 2004, available at <<http://www.wrr.nl>>.

Zijlstra 1980

Zijlstra, S., 'Weg met de zelfstandige bestuursorganen', *Nederlands Juristenblad* (38), 2004, p. 1980-1986.

Zijlstra 1997

Zijlstra, S.E., *Zelfstandige bestuursorganen in een democratische rechtsstaat*, Den Haag: VUGA, 1997, p. 484-485.

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