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The Rule-Making Powers of Independent Administrative Agencies ('QUANGOs')*

Comparative Analysis in Fifteen Countries

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Even though decreasing political responsibility and improvement in services are not mutually exclusive by definition, it is difficult to see why a decrease in accountability to the public should lead to improvement in services for the same public.¹

1. Introduction

1. This general report discusses the rule-making power of independent administrative agencies (also called “*quasi autonomous non-governmental organizations*” or, in short, “QUANGOs”). The report is based on national reports received from fifteen countries. All contributors are thanked for their co-operation.

2. Very interestingly, the range of national reports allows us to compare various constitutional systems:

- Presidential or semi-presidential systems (France, US) and parliamentary ones (Belgium, Germany, the Netherlands, Finland);
- Republican (US, France, Finland, Israel, Italy, Germany, Greece, Switzerland, Poland, Russia) and monarchies (Belgium, the Netherlands, Denmark, Spain);

* Session IVD3. National reports received from: Belgium, D. De Roy; Denmark, K. Revsbech; Finland, O. Suviranta; France, D. Capitant; Germany, K. Fischer; Greece, S. Zissimopoulos; Italy, G. Franco Ferrari; Japan, T. Honda; Israel, G. Seidman; The Netherlands, H. Peters, Ph. Eijlander & R. van Gestel; Poland, Z. Kmiecik; Russia, Talapina; Spain, G. García-Alvarez; Switzerland, J. H. Meylan; US, D. Custos.

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¹ M. Beblavy, *Understanding the waves of agencification and the governance problems they have raised in Central and Eastern European countries*, 2(1) OECD Journal on budgeting (2002), specifically p. 130.

- Centralized states (France, the Netherlands, Denmark) and more federalized states (such as Belgium, Germany, Switzerland, Spain, United States);
- Civilist (France, Belgium, Germany) and case-law systems (US, Israel);
- EU countries potentially influenced by Community law – even if the EU is deemed to have no competences in the matter² – and non-EU countries (Israel, Japan, Russia, Switzerland, United States).

3. In order to avoid an overload of footnotes, the general report does not systematically provide specific references to national reports. Complementary information has been drawn from studies on the subject made in the recent past by the OECD (*Les autres visages de la gouvernance publique – agences, autorités administratives et établissements publics*; Puma, *La gouvernance des autorités et institutions réglementaires*, Revue de l'OCDE sur la gestion budgétaire, vol. 2, n° 1).³

Furthermore, interesting work has been carried out on the European agencies,⁴ based mainly on the draft interinstitutional agreement on the operating framework for the European regulatory agencies.⁵

4. These numerous sources confirm the absence of any general denomination or definition for QUANGOs as a whole.⁶ As stated elsewhere,⁷ they vary widely in terms of funding, size, functions (predominantly policy, service delivery or administration of law and regulations), legal form, powers, and, lastly, the rationale for their creation. This report only deals with the powers of QUANGOs, and more precisely their potential rule-making power. However, such a perspective will require us to consider other aspects, which are relevant for a general understanding of our topic.

In the first section, the report shows the limited rule-making power of QUANGOs, due to the very strict conditions for such a formal recognition. This entitles us to consider the institutional position occupied by QUANGOs in a democratic State, somewhere between the executive and the legislative branches. The second part deals with this institutional

² Some reports note that the EU accession might have had some influence on the set-up of QUANGOs: *E.g.* Finland. Also the recognition of the Community law influence can be found in the Spanish report.

³ *Add.* OECD, *Working party on regulatory management and reform, Designing independent and accountable regulatory authorities for high quality regulation* – Proceedings of an Expert Meeting in London, United Kingdom, 10-11 January 2005, 236 p.; Rapport de l'office parlementaire d'évaluation de la législation n°404 (2005-2006) de P. Gélard, fait au nom de l'Office parlementaire d'évaluation de la législation, déposé le 15 juin 2006, Sénat français, available at <http://www.senat.fr/rap/r05-404-2/r05-404-2.html>.

⁴ *E.g.* Rapport d'information fait au nom de la délégation pour l'Union européenne sur les agences européennes par M.-Th. Hermange, Sénat français, s.o. 2005-06, n°58 (in short 'French Senate report'); *add.* J. Ziller, *L'autorité administrative dans l'Union européenne*, in L. Burgogne-Larsen & L. Azoulay (ed.), *L'autorité de l'Union européenne* – Actes du Colloque de Rouen du 9 avril 2004 (2005).

⁵ Brussels, 25.02.2005, COM(2005)59 final; *add.* Council Regulation (EC) n°58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with the management of Community programmes and Communication from the Commission, The operating framework for the European Regulatory Agencies, Brussels, 11.12.2002, COM(2002) 718 final.

⁶ *Cf.* the statements in D. Gill, *Signposting the zoo – From agencification to a more principle choice of government organisational forms*, 2(1) OECD Journal on budgeting 27 (2002).

⁷ *Id.*, spec. p. 28.

articulation, from two distinct angles. Hence, despite the limited nature of the formal rule-making powers, QUANGOs can use other mechanisms to achieve similar results. Secondly, the accountability of the QUANGOs is rarely thoroughly developed. These observations will lead to the formulation of a number of questions regarding the further development of QUANGOs and their powers by way of conclusion.

2. QUANGOs and Rule-Making Power: a Paradoxical Subject of Research

5. After explaining why this subject might be seen as a paradox, both sides of the paradox will be discussed: QUANGOs will be defined (a.) as well as the different acceptations of the rule-making power (b.).

6. The engulfing wave towards the multiplication of QUANGOs, which is sometimes assumed, is unclear.

As far as the concept is concerned, the definition of QUANGOs seems simple enough in one respect, and quite complex in another. We are talking about entities that are *not* part of a government ministry; but, on the other hand, they are an alternative way in which to perform a service, to perform *functions which are governmental in nature*.⁸

As far as the general trend is concerned, some national reports⁹ claim that QUANGOs are here to stay and that the means they represent in public expenditure makes them impossible to overlook. At the European level, recent initiatives suggest clear trends towards more agencies.¹⁰ Nevertheless, rationalizing attempts in some countries¹¹ requires us to nuance this assertion.

7. Given the lack of a general and coherent system of QUANGOs, one of the main tasks of the present report is to provide an analytical framework, an attempt to conceptualize the phenomenon.¹² This report focuses on the two axes of the title: rule-making power and the QUANGOs.

8. The title submitted by the Congress organizers can be addressed as a very logical and fundamental question, or as a paradox. The central question is to know whether and how

⁸ See, Israeli report.

⁹ Israeli report.

¹⁰ French Senate report, *supra* note 4, p. 5.

¹¹ In the Netherlands, Werkgroep Verzelfstandigde Organisaties op Rijksniveau, *een Erkenbare staat: investeren in de overhead* (2004), p. 7: this working group advised that most QUANGOs should be abolished; in Finland, the increase in QUANGOs is not at all clear.

¹² Previous attempts can be found in the various works of the OECD.

QUANGOs fit within the democratical framework.¹³ However, the question is also a paradox insofar as it implies the assessment of a classical means of State intervention (rule-making) through a relatively new way of organizing the State along the lines of QUANGOs. The topic aims to examine how this institution can use “old” or traditional ways of organizing the State, supposed to be the monopoly of the traditional executive power, under the well-known procedures of accountability. In other words, since QUANGOs refer to an assumed alternative means of State intervention,¹⁴ we must look at how and why this alternative uses “traditional” ruling instruments.

The paradox does not only lie in the meeting of old and new, but also in the following:

- QUANGOs are alleged to be necessary to solve the problems and weaknesses of the traditional State (e.g. to increase efficiency in service delivery; to place some decision-making power outside the political sphere);
- When QUANGOs are set up and need to be really efficient, they need to have an impact on reality, to become effective. They are thus in such a position of potential power (close to a rule-making power or at least with some kind of discretionary power – and the difficulty in qualifying the real extent of the power may be a reason to overestimate it) that they engender suspicion: They are very often analyzed through the same perspective as the traditional State organisation, suddenly very trustworthy. Hence, the legitimacy of QUANGOs’ intervention is questioned.

9. The following two sections discuss the two sides of this paradox by analysing the concepts of QUANGOs on the one hand, and that of rule-making power, on the other.

2.1. Diversity in the QUANGO World: an Alternative in State Organisation which is Lacking in Organisation

10. This report has chosen a narrow definition of QUANGOs, as it only discusses QUANGOs with decision-making power among the whole spectrum of entities outside the core of the government and the ministries (consultative bodies, experts, commissions, funding bodies, etc.).¹⁵ QUANGOs are only *one way* of organizing the presence of the State in social and economic regulation.¹⁶ Traditionally, a differentiation in the organization of the State was made between ministries, decentralized agencies, public enterprises, private enterprises with some kind of functional public service, private associations that regulate some professions or sectors.¹⁷

¹³ Thus refrasing the question by M. Lombard, *Institutions de régulation économique et démocratie politique*, 2005 A.J.D.A. 530-540.

¹⁴ A. Schnick, *Les agences à la recherche de principes*, in OECD, *Les autres visages de la Gouvernance publique – Agences, autorités administratives et établissements publics* 39 (2002).

¹⁵ Gill, *supra* note 6, spec. p. 50.

¹⁶ *Id.*, espec. pp. 29 – makes a classification of state institutions.

¹⁷ *Id.*, espec. pp. 30.

11. If QUANGOs are an alternative to traditional ministries, or an “alternative mode of delivering services by the State”,¹⁸ it is not always easy to assess their full scope among the possible alternatives to that traditional organisation. “*The rise of agencies is simply the latest stage of a never ending process of organisational change and experimentation.*”¹⁹ No precise indication can be found in the legislation or in the system as a whole concerning a fine-tuned definition of QUANGOs.

12. This alternative way of governing has been used in a wide range of sectors:

- Economic regulation: Federal reserve boards;²⁰ interstate commerce commission;²¹ financial overrulers;²² competition sector – horizontal²³ or vertical;²⁴
- Social regulation: consumer product safety commissions,²⁵ labour relations;²⁶
- Political regulation / human rights: freedom of speech²⁷ or privacy,²⁸ rights of the citizens,²⁹ federal election commission;³⁰
- Central Banks;³¹
- Security-related sectors: food,³² the environment,³³ public security;³⁴
- Research;³⁵
- Professional autonomic organisation³⁶ or self-administration.³⁷

¹⁸ The definition is that of the general reporter, but has been drawn from Schinck, *supra* note 14, p. 37.

¹⁹ A. Schinck, *Agencies in search of principles*, 2(1) OECD Journal on budgeting 7 (2002).

²⁰ *E.g.*, USA.

²¹ *E.g.*, USA.

²² *E.g.*, Belgium (Commission bancaire, financière et des assurances); France (Commission des opérations de bourse); Poland (Commission for Bank-Supervision).

²³ *E.g.*, Japan (Fair Trade Commission); Greece (Hellenic Competition Commission).

²⁴ *E.g.*, Belgium (CREG for gas and electricity).

²⁵ *E.g.*, USA.

²⁶ *E.g.*, Japan (Central Labour Relations Commission and Labour Relations Commission for Seafarers).

²⁷ *E.g.*, France (Conseil supérieur de l’audiovisuel); Denmark (Danish Broadcasting Corporation); Poland (National Council of Radio Broadcasting and Television); Greece (National and Radio Television Council).

²⁸ *E.g.*, France (Commission nationale de l’informatique et des libertés); Poland (General Inspectorate for the Protection of Personal Data).

²⁹ *E.g.*, France (Médiateur de la République, Défenseur des enfants).

³⁰ *E.g.*, USA.

³¹ See on the peculiarities of the Euro-zone central banks: Lombars, *supra* note 13.

³² *E.g.*, Belgium (Agence fédérale pour la sécurité alimentaire).

³³ *E.g.*, Japan (Environmental Dispute Coordination Commission).

³⁴ *E.g.*, France (Commission nationale de déontologie de la sécurité); Japan (National Public Safety Commission and Public Security Examination Commission). Almost never mentioned in the national reports are the cells on financial information set up as a result of FATF’s fight against money laundering and since 2003 to prevent the financing of terrorism. Some specific investigations into the status and the power of such cells can be found in International Monetary Fund, *Les cellules de renseignements financiers – tour d’horizon* (2004).

³⁵ *E.g.*, Denmark (National Environmental Research Institute, Danish National Research Foundation).

³⁶ *E.g.*, Russia.

³⁷ *E.g.*, Germany.

QUANGOs are used at every level of State administration, with more emphasis on a general and national level.³⁸ As a rule, constitutive units in federal states also enjoy the power to set up QUANGOs.³⁹ In countries such as the Netherlands, numerous local QUANGOs exist.⁴⁰

13. The examples illustrate that QUANGOs are an integral part of the organization of the State. As such, they should have some kind of constitutional grounding of a more or less formal nature. However, constitutions very seldom provide a clear foundation for the creation of QUANGOs.⁴¹ When it does exist, this formal recognition may be of two kinds: a general one, or a more specific one which explicitly refers to QUANGOs or lists (some of) them.

Finland illustrates the first of these scenarios. The Finnish Constitution grants rule-making powers to “other authorities”, in addition to the President, the Government or specific departments (and the relevant paragraph stipulates the conditions for such a delegation).

QUANGOs are expressly provided for in the Greek⁴² Constitution. In Poland, some QUANGOs, such as the National Council of Radio Broadcasting and Television, are embedded in three articles of the Constitution,⁴³ without any general provision regarding QUANGOs as a whole.

Even in the United States – where these agencies are the most developed –, the Constitution does not provide a specific foundation for independent regulatory agencies.⁴⁴ This being said, legal scholarship unanimously places QUANGOs in the institutional framework.

14. Aside from any formal constitutional recognition of QUANGOs, these entities might find historical reality in the very way the State is organised. At first sight, this would appear

³⁸ In Spain, in most cases, QUANGOs exercise their powers in the state as a whole, but certain exceptions, such as “autonomic independent entities”, do exist.

³⁹ *E.g.*, Belgium, Switzerland, Germany.

⁴⁰ *E.g.*, also a few of them at the local level in Denmark.

⁴¹ No constitutional basis: *E.g.*, Belgium, France, the Netherlands, Denmark, USA, Germany, Japan, Spain.

⁴² As well as a non-limited list of 5 QUANGOs (Hellenic Data Protection Authority, National Radio and Television Council, Supreme Council for Civil Personnel Selection, Greek Ombudsman, Confidentiality of Communications Authority).

⁴³ Article 213: (1) The National Council of Radio Broadcasting and Television shall safeguard the freedom of speech, the right to information as well as safeguard the public interest regarding radio broadcasting and television.

(2) The National Council of Radio Broadcasting and Television shall issue regulations and, in individual cases, adopt resolutions.

The only other QUANGO with a form of rule-making power is also laid down in the Polish Constitution (namely the Council for Monetary Policy).

⁴⁴ Art. I, Sec. 8, cl. 18 of the US Constitution reads:

The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitutions in the government of the United states, or in any department or officer thereof.

to place them on safer ground than in systems where QUANGOs were “added” at a latter stage in the institutional architecture. Indeed, in countries like the United States or Finland, QUANGOs have been part of the institutional set-up for a long time.

Hence, QUANGOS have existed in the United States since the late 19th century, “in connection with the expansion of the administrative hold over the economy, agencies, singularly independent agencies, became the favorite recipients of the law-making authority. They emerged at the end of the 19th century as essential instruments of discipline of free enterprise, in the name of public interest”. However, some issues (such as the exact relationship between the President and QUANGOs) remain the subject of controversy.

Finland has also had QUANGOs for a long time, but the “position of national administrative agencies in the administrative machinery is not linear.”⁴⁵ However, the opinion that the agencies were independent first developed in legal literature in the beginning of the 20th century, as a “defense against the strengthening Czarist rule in Finland at the end of the 19th century – the central administrative boards were for the most part led by Finnish men” The current position of the agencies dates back to 1913 with the interpretation by a leading scholar of administrative law. According to K.J. Ståhlberg, administrative authorities were independent not only with regard to authorities on the same level, but even with regard to superior authorities. As a rule – and as is the case in most countries – the superior authority does not have the power to take action in matters falling within the competence of subordinate authorities. This new Ståhlbergian way of describing the position of administrative authorities was taken as a starting point when drafting the Constitutional Act (1919) for the independent republic. However, this Act says very little regarding the position of administrative agencies. The Ståhlbergian description was gradually adopted in practice and in the legal literature. Starting from the 1940s, this view was predominant.

More recently, Japan also enshrined QUANGOs in its post-World War II Constitution.⁴⁶ The system of Commissions, one of the Japanese kinds of QUANGOs, was introduced by the Supreme Commander for the Allied Powers after World War II. They were modelled on the independent regulatory commissions of the United States. Their purpose was to ensure a form of democratic administration.

⁴⁵ In and around the 1980s most of the traditional national administrative agencies were eliminated. In the 1990s, however, it became clear that in many fields there was a need for national administrative agencies with “hard” administrative and even regulatory powers. The fact that Finland became a member of the European Union in 1995 was not of minor importance in this context.

⁴⁶ Elaborated nearly in the same circumstances, the German Constitution did not choose the same organisation, while it copied the competition system of the United States where QUANGOs are most used.

15. Even in the absence of historical development, QUANGOs have also been put in place in order to respond to various crises or at least to respond to specific problems.⁴⁷ At the European level, the EFSA⁴⁸ was set up as a reaction to the ESB crisis. In Belgium, one can find the following examples: Commission bancaire et financière in the aftermath of the 1929 – financial crash; AFSCA⁴⁹ following a wide dioxine crisis in 1999. In Japan, as well, a series of financial scandals involving major securities “houses” led to the creation of new institutions in 1991 [Securities and Exchange Surveillance Commission (SESC) and Financial Supervisory Agency (FSA)]. Following some reorganization in the late 1990s, these can be qualified as QUANGOs.⁵⁰

In these examples, reactions to the various crises were prompt, but they did not include any real conceptual reflexion concerning the constitutional requirements for setting up those new entities.

16. Since constitutions may be very vague regarding the legality of QUANGOs, the foundations for their creation must be found in the constitutional exercise of powers. Often, constitutions provide that powers flow from the Nation (or the people) and that the powers can only be exercised in accordance with the constitution, which grants some powers to the Legislature and the Executive, but none to the QUANGOs.⁵¹ As a result, QUANGOs have to be set up by a specific legislative act,⁵² the legislative branch being entitled to provide a framework for the QUANGOs⁵³ either on a case-by-case basis or in a general statute. The requirement of a legal basis for QUANGOs seeks to “prevent different public administrative fields from diffusing and detaching themselves from the hierarchically democratic controlling mechanisms.”⁵⁴ The legislative act might contain various information about the regime

⁴⁷ For striking examples of the use of QUANGOs as a way of responding to specific problems, *See*, Rapport public 2001 du Conseil d’Etat, Les autorités administratives indépendantes, la Documentation française, n° 52, 2001, pp. 261 and f.

⁴⁸ European Food Safety Authority.

⁴⁹ Agence fédérale pour la sécurité de la chaîne alimentaire.

⁵⁰ Also the FSA and the SESC were the result of those scandals. The Japanese report underlines that such reorganization might be caused by the globalization of finance.

⁵¹ *E.g.*, Belgium; Germany:

In taking a closer look at the Court’s statement, its background becomes clear: it is derived from the basic democratic principle in Art. 20 II 2 GG, which states that all power in the state is held by the people. The Court deduces from this principle that any governmental activity with decision-making characteristics must require democratic legitimation ...; parliamentary elections put the power of the people into practice ... , and it is the election which legitimates the formation of the government. The power of the government to give instructions to the subordinated administrative authorities forms the continuation of this legitimation chain.

⁵² Finland: but the extent of the content of the general principles that should be laid down in Acts of parliament is unsure; in France, it remains unsure whether the Executive may create a QUANGO (Gélard, *supra* note 3, pp. 28 and f.); in some cases in Denmark, an authorization in the State Budget has been enough (for the state-owned company delivering natural gas, oil and electricity to customers there).

⁵³ Belgium, France, the Netherlands, US, Spain, Germany.

⁵⁴ German Report.

applicable to QUANGOs, and it may provide that the entity will have some rule-making power. In many countries, this legal basis is mandatory.⁵⁵ The extent of the specifications in the Act of Parliament is generally clearly established: the name, powers (even in the USA, interpretation is necessary), the main tasks, composition, ...

17. In practice, very few of the countries studied here have general rules regarding QUANGOs.⁵⁶ The main examples of such general rules are from the United States (1946 Administrative Procedure Act, as the basis for the Independent and the Executive Agencies) and from the Netherlands (where a recent draft is pending). But elsewhere, the legal requirements are very vague, various, depending on one case to another.

The legal status of the QUANGOs also varies widely. In almost every case, QUANGOs do have specific legal personality,⁵⁷ very often considered as being the key to their independence.⁵⁸ But the legal regime is very different from QUANGO to QUANGO, and from State to State.⁵⁹

The distinction between public law and private law bodies is not meant to imply that each body will be completely in one of these legal jurisdictions. For example, private law bodies can be incorporated under private law but still may be created by statute and subject to the budget law or administrative law with respect to the exercise of certain administrative powers. Similarly, public law bodies may be subject to private law (and treated as separate legal entities for those purposes) when conducting certain transactions with third parties (entering leases, etc).⁶⁰

18. Given this lack of common foundation, legal literature and case law are of particular importance. First of all, they establish the boundaries of the use of QUANGOs.⁶¹ Secondly, they specify the general characteristics and the scope of QUANGOs' powers. In France, the qualification of QUANGOs has been provided through legislative acts, case law or doctrine. In Belgium, the notion is developed mainly in the doctrine (in the non-binding "legisprudence"⁶² of the Conseil d'Etat). The Belgian report pinpointed some characteristics which have been developed by legal doctrine (the executive function, specialisation, powers specific to the "puissance publique", and independence). It might also explain why some national reports focused on specific QUANGOs without any generalisation or conceptualisation of the global regime, as is the case with Spain, for instance.

⁵⁵ *E.g.*, Germany, Finland.

⁵⁶ Nothing in Belgium, France, Spain, Switzerland, Germany, Israël, Denmark.

⁵⁷ The Netherlands, Belgium, Switzerland, Spain; Contra: Poland; in France, the lack of legal personality is seen as a requirement for the independence of QUANGOs (*See*, Lombard, *supra* note 13).

⁵⁸ Israel.

⁵⁹ Mostly public law in Belgium; mostly private law in Russia; mixed depending on the case in Denmark.

⁶⁰ Gill, *supra* note 6, espec. p. 43.

⁶¹ Finland.

⁶² This is the name given to the practice of the Council of State when it provides advice on draft legislation.

Due to the lack of legislative precision surrounding QUANGOs, it might be very difficult to qualify a body as such and which may have a number of consequences for their legal regime. Certain systems try to solve the issue of poor visibility in various ways. In France, the Conseil d'Etat set up a list of 'autorités administratives indépendantes' in 2002, as did Parliament in 2006. However, the list does not appear to be updated on a systematic basis. In the Netherlands, a QUANGO register has been set up for QUANGOs existing at the national level (but, according to the doctrine, this is only "the tip of the iceberg"): No such register exists for local QUANGOs.

19. At this stage of the report, it appears that in many cases the very object of the research is rather vague. For the sake of clarity, the report will henceforth discuss entities which lie outside the classic departmental organisation of the State, and which have decision-making power.

2.2. Variation in Rule-Making Power

20. Any attempt at defining rule-making power must start with a comparison of the 'pouvoir réglementaire' (2.2.1). Once the content of the notion has been explained, the consequences of the use and control of this power have to be underlined (2.2.2). The rule-making power of the QUANGOs can then be outlined (2.2.3).

2.2.1. The Concept of Rule-Making and the Balance of Power

21. There are different approaches to the concept of 'rule-making'. The first is to compare 'regulatory' and 'rule-making' power. The second is to point out the difference between 'regulation' and 'rule-making' power. A third approach is to decompose the power along a continuum, from formal 'regulatory' power to 'informal' power, through participation in the elaboration of 'règlements'.

22. Two main conceptions of rule-making power exist. The first one, the French, refers to the power to issue 'règlements', which constitute general, abstract, impersonal and binding norms. The second conception states that rule-making is the carrying out of general policy, as opposed to "adjudication", used for administrative action affecting individual rights.⁶³ In this sense, the American report discusses the rule-making power as follows:

the rulemaking power may be defined as the authority to issue rules or regulations [...]. According to the American administrative law, a rule is "the whole or a part of an agency statement of general or particular

⁶³ American report.

applicability and future effect designed to implement, interpret, or prescribe law or policy” [...]. From a comparative standpoint, besides the confusing mention of ‘particular applicability’⁶⁴ this definition sounds familiar due to its reference to the impersonal and prospective character of rulemaking. Less familiar to the comparative mind is the encompassing nature of the American definition of rulemaking. As a matter of fact, rulemaking describes not only the binding law-making power of agencies but also a non-binding component of their normative power which in other legal systems such as French administrative law are clearly excluded from the rulemaking sphere.⁶⁵ To this effect, the administrative American law distinguishes between, on the one hand, legislative rules which modify the legal landscape and are binding, on the other hand, non legislative rules which do not have the force and effect of the law.

Irrespective of these nuances, rule-making implies a decision made by the entity in order to make some choices, even if it is only within a very narrow margin. This decision can shape an individual position or have a wider scope through the setting of standards, guidelines, good practices, policy rules, recommendations, advice, initiatives.

Because the notion of “rule-making” in American law is very wide, the challenge for other countries is then to draw a line between rule-making power and regulation, when needed. The distinction between rule-making power and regulation implies that regulatory agencies are not, as such, QUANGOs.⁶⁶ At least, there is no systematic link between both. Some national reports have tried to keep a narrow definition of the rule-making power,⁶⁷ but on the whole the reports have tended to discuss a broader concept of rule-making.⁶⁸ Here are the most striking attempts in this direction:

Discussing the regulatory powers of Dutch QUANGOs, one easily runs the risk of mixing up different concepts of regulation and rule-making. [...] 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 rule-making. 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 defined as the legal restrictions promulgated by administrative agencies in contrast to statutory law or case law. This paper deals with regulation in a broader sense.⁶⁹

The French report takes another approach to extend the rule-making power:

⁶⁴ For Continental European scholars and the Administrative Conference of the US, the mention of ‘particular applicability’ sounds erroneous because of the general norm associated with rule-making.

⁶⁵ For instance, the definition of the French rule-making power includes only what in the US is referred to as legislative rule-making.

⁶⁶ This is pointed out in the Belgian report. See, J. L. Autin, *Les autorités de régulation sont-elles des autorités administratives indépendantes?*, in *Environnements: les mots du droit et les incertitudes de la modernité: Mélanges en l’honneur du Professeur Jean-Philippe Colson* (2004), pp. 439-450; Lombard, *supra* note 13, spec. p. 532.

⁶⁷ *E.g.*, the Belgian report tends to study individual and regulatory powers, but rejects a broader sense of rule-making; the Swiss report tries to explain the various definitions of ordinances, but after a very thorough distinction, the report then focuses on a narrow approach.

⁶⁸ *E.g.*, France, the Netherlands.

⁶⁹ Dutch report. Under French law, the following definition of regulation can be found

organizer *ex ante* un secteur ou une organisation, soit d’une façon générale (à travers le pouvoir réglementaire), soit d’une façon particulière à travers des droits d’accès à une activité, soit au bénéfice de personne (par l’agrément ou l’autorisation), soit au bénéfice de biens ou d’activités (par la certification, ou l’accréditation)

(Gélard, *supra* note 3, p. 91).

Le pouvoir réglementaire des autorités administratives indépendantes peut connaître des formes multiples. C'est d'abord le pouvoir réglementaire classique d'exécution des lois dont dispose normalement l'exécutif qui peut leur être attribué de manière expresse [...]. Au-delà de ce pouvoir réglementaire exprès finalement assez limité, les autorités administratives indépendantes connaissent des formes plus complexes de l'exercice du pouvoir réglementaire, qu'il s'agisse de démembrements de celui-ci [...] ou que ce soit à travers l'exercice de leur pouvoir d'adopter des décisions individuelles qu'elles élaborent de véritables normes [...].

23. Rule-making power can be autonomous (i.e. flowing from a general competence and without a specific legislative act having to be implemented) or a power to execute or implement a legislative act. To put it simply, from a traditional perspective,⁷⁰ control is linked to the separation of powers. Parliament fulfils an important task of controlling the activities of the Executive. More specifically, as Parliament is the instigator of laws and one of the means for the Executive to implement the laws is its regulatory power, it seems logical that Parliament controls the use of this regulatory power, as well as the other activities of the Government. The issue is to check that the general interest is observed in accordance with the people's will (or the Nation's will).

As such, the regulatory power is not on an equal footing with individual decision-making. However, two points can be made.

First, the Executive branch has a large margin of discretion⁷¹ in the use of regulatory power and the consequences thereof can have a significant impact on a nation's life and will structure all the subsequent decisions taken at an individual level. However, some authors argue⁷² that the risks generated by a discretionary regulatory power are not that important given the nature of this power, which is to be applied on an impersonal basis. This should encourage the Executive power to remain neutral, as it does not know in advance who will be affected by the rules.

Secondly, individual decisions can also be subject to discretionary power, but increasingly, ever more constraints accompany individual decisions. For instance, in Belgium, individual decisions are subject to the marginal control of the courts (i.e. the court checks whether the public body has behaved as a careful body would have done) and sufficient grounds for these decisions have to be formally provided.⁷³ But this general obligation to provide sufficient grounds is less developed for a 'règlement'. This is because the decision can be well reasoned by means of a general discussion before Parliament.

⁷⁰ J. Gicquel, *Présentation*, in *Contrôle parlementaire et évaluation*, La Documentation française 31-32 (1995).

⁷¹ The criterion of "discretionary power" is also the one used at the European level in the "Meroni Doctrine" (European Court of Justice, vol. V (1958), 11 ff. & 53 ff).

⁷² French report.

⁷³ Cf. Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (25 June 1998), art. 6 (individual decisions): developed mandatory motivation vs. art. 7 & 8 (general norms): a very soft obligation to provide sufficient grounds for decisions.

2.2.2. The Rule-Making Power of QUANGOs

24. Every State seems to experience some difficulties in the recognition of the rule-making powers of QUANGOs, or at least to outline very strict conditions for the recognition of such powers. One notable exception is the United States (where QUANGOs are called 'IRAs').

The American report states:

The source of the IRAs' rulemaking power is legislative. Each enabling statute assigns a specific set of powers to a given agency. A grant of rulemaking power does not exist in every governing statute and even though it elects to confer rulemaking power, Congress may choose to vest only a power to make rules with no force of law, otherwise known as non-legislative rules.

However, the delegation may cover the entire range of the IRAs' mission or may consist in specific grants of authority [...]. Moreover, the wide spread of rulemaking does not necessarily derive from a clear delegatory congressional intent. In fact, Congress has very often employed ambiguous language, vaguely referring to the authority to promulgate rules and regulations, which potentially may or may not be binding [...]. Faced with the determination of the extent of the delegation [...], since the 1970s, courts tend to presume [...] that such a language conveys the intent to confer a legislative rulemaking power. With such a presumption, the post-APA case-law favors a generalization of the delegation of legislative power.

The last part of the cited report is very important: in case of doubt, the presumption is to recognize a rule-making power, while all other national reports underline a strict interpretation of the powers of QUANGOs.

25. The other countries try to be pragmatic⁷⁴ insofar as most of the various conditions are laid down for the recognition of some rule-making powers, in accordance with the constitutional framework. Two elements are recurrent: The requirement of a legislative basis for the recognition of rule-making power,⁷⁵ as well as the publication of the norm issued by QUANGOs in an official journal.⁷⁶ These conditions apply to the recognition of rule-making power in general. We do not purport to look in detail at every national system as some of them might have specific rules depending on the QUANGOs in question. However, two main kinds of constraints can be distinguished: requirements which focus on the object or the nature of the rule, and requirements which relate to the effect of the norms. A combination thereof is also possible.⁷⁷ Furthermore, both approaches might achieve a similar result in some cases.

2.2.2.1. The object of the rules

26. The constraints related to the objective of the power are expressed in different ways. In some countries the norms

⁷⁴ Cf. statement in the Belgian report.

⁷⁵ Japan, Finland, the Netherlands, France.

⁷⁶ E.g., Greece, Japan, Spain, Finland, the USA; in Belgium, publication in the *Moniteur belge* is not required for every règlement (under the *Conseil supérieur de l'Audiovisuel*, for instance), which results in many questions arising.

⁷⁷ E.g., Switzerland.

- Must be limited to technical matters:⁷⁸ no definition of technical matters is provided, which entails a degree of interpretation;⁷⁹
- have a limited scope,⁸⁰ the matter being precisely defined, thus excluding any ‘blank cheque’:⁸¹ this is meant to prevent the Legislature⁸²/Executive⁸³ from losing power in favour of QUANGOs;⁸⁴
- Must be limited to specific cases or sufficient grounds must be provided;⁸⁵
- Cannot breach the general constitutional and legal framework: In practice, this translates, in a number of ways, into the requirement of ministerial control (approbation or amendement, initiative)⁸⁶ or subordination to the regulatory power of the Prime Minister.⁸⁷ In Switzerland, it means that the requirement of a referendum cannot be bypassed. This means that when those referendum procedures are open, they have to be respected and that no power can be delegated to QUANGOs.

27. As the rules are subject to interpretation by the QUANGOs, the following conclusions of a recent Dutch research project are not surprising. Hence,

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 provision 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 etcetera). 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 when 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.

⁷⁸ Belgium, Greece, Japan, France:

son champ d'intervention est limité en principe à des objets techniques dans lesquels il vient simplement préciser le cadre plus général fixé par les lois et règlements; il s'agit avant tout d'un pouvoir réglementaire de nature technique qui permet à ces autorités de préciser des règles dont elles sont par ailleurs chargées de contrôler l'application par des régimes d'autorisation, par des pouvoirs de règlement des différends ou encore par des pouvoirs de sanction.

⁷⁹ Dutch report; in the Netherlands a regulatory power is only conferred on QUANGOs “as far as it concerns organizational and technical matters.”

⁸⁰ France: In the case law of the Conseil constitutionnel, two conditions are laid down «cette habilitation ne peut en tout état de cause concerner “que des mesures de portée limitée tant par leur champ d'application que par leur contenu.”

⁸¹ Finland: “No open-ended or vague authorisations are allowed.”

⁸² Switzerland:

il ne saurait non plus, par un simple ‘blanc-seing’, lui abandonner entièrement le soin de régler une matière, même relativement bien circonscrite. Sur ce point, cependant, la jurisprudence, [...], fait preuve d'une certaine souplesse: il n'est pas possible de définir une fois pour toutes ni ce qui constitue, ou non, une réglementation d'une importance telle qu'elle ne puisse être instaurée que par une loi au sens formel, ni le degré de détail que doit revêtir la norme de délégation; tout est affaire de circonstance.

⁸³ Belgium: “La conséquence en est que l'attribution de ce pouvoir ne peut être conçue qu'en termes spécifiques et donc être complète, précise et limitée.”

⁸⁴ Switzerland; the Netherlands.

⁸⁵ Finland: “There must be a special reason for the authorisation pertinent to the subject-matter under regulation. Such special reasons are very often connected with special professional features of the activities to be regulated.”

⁸⁶ Belgium (as a rule); in the Netherlands (in specific cases).

⁸⁷ France.

2.2.2.2. The effect of the rule

28. In some systems, a rule issued by a QUANGO cannot have any impact on the rights of the individual.⁸⁸ Regulations which have serious legal implications for the operators or can create rights and duties for citizens are likely to be issued by competent authorities such as the Cabinet, the head of the Cabinet Office or ministers.⁸⁹ In Finland, as a general limitation to the rule-making powers of administrative authorities, according to the Constitution, all principal rules on the rights and duties of private individuals must be laid down in an Act of Parliament.

In Switzerland, when some autonomous regulatory power is recognized, for instance for the so-called 'entités prestataires de services', this power is always subject to a limitation when its content could impact on the fundamental rights of the users.

29. In short, as many national reports have stated, and with the exception of the USA, the rule-making powers of QUANGOs are marginal. This very limited recognition also concerns the other powers of the QUANGOs and also applies to the small number of QUANGOs with some rule-making power.⁹⁰

3. QUANGOs and Rule-Making Power: the Logic Behind the Balance between Autonomy and Control?

30. The topic of the 'rule-making power of the QUANGOs' is not only a paradox: No rule lays down that a 'new' institution has to use new instruments. Furthermore, the question surrounding the balance between autonomy and control is also a logical question insofar as it is a way of studying the institutional location of the QUANGO in a democratic framework, somewhere in between the Executive and the Legislature. Indeed, beyond the diversity of the phenomenon, questions regarding QUANGOs' rule-making powers can be studied from the perspective of the fundamental balance between autonomy and accountability.

One can assess the autonomy of QUANGOs by analysing the controls to which they are subject. However, the power of rule-making is only the tip of the iceberg. As regulatory power is normally formally well defined in a democratic State (its exercise, source, limits, control), *a priori* this topic appears less vague than an examination of the competences of QUANGOs. The first section discusses the specific place of the QUANGOs by means of three models, on the basis of the formal and legal framework.⁹¹ Each of those three patterns are based on

⁸⁸ *E.g.*, Denmark.

⁸⁹ Japan.

⁹⁰ *E.g.*, Poland (only one QUANGO with clear rule-making powers, the National Council of Radio Broadcasting and Television, an organ of state control and for defending certain fundamental rights); a similar situation exists in Greece.

⁹¹ Other studies have categorized QUANGOs on economic or political grounds.

a specific balance between autonomy and control. Those models are highly theoretical and arbitrary, as is any attempt to categorize. Beyond the wide diversity of QUANGOs, the aim is to highlight some characteristics of QUANGOs through their internal workings (structure, organization) as well as their external workings (relationships with the other powers, accountability, ...). Every explanation should be read with a benevolent eye, knowing that each specific QUANGO or national system shows a range of possibilities, resulting in many exceptions to what is said. The sketch presented should be seen like a painter's palette. Each single QUANGO has a touch of each element, some more overwhelming than others, as some examples will illustrate. The merit of this presentation is to stress that there is no single model of QUANGOs, but several questions that need to be addressed in accordance with the legal, social and historical context of each State.

The second section provides a more complete picture, through the judicial review that might be influenced by the position of QUANGOs in the democratic framework (section 3.2).

3.1. The Relationship between the Parliamentary and Executive Decision-Making Power, Particularly with Regard to the Rule-Making Power of QUANGOs

31. The following paragraphs will focus on the autonomy and the independence⁹² of QUANGOs towards the Executive and the Legislative branches. In order to gain a precise image of such a relationship, it is important to present the various logics at work by the creation of QUANGOs. This will cast some light on the autonomy of QUANGOs and the mechanisms binding the Executive and the Legislature concerning QUANGOs. The study will then address the tools available to QUANGOs in their attempt to fulfil their tasks. Those powers lead to the question of the accountability of QUANGOs.

Trends – Reasons for QUANGOs	Scope of autonomy	Kinds of competences	Accountability	Consequences for the Executive / Government
Neutrality	Independence and specialisation of manpower and QUANGOs	Not necessarily the three powers	Towards Parliament directly	Less Governmental power
Pragmatism	Every means necessary to achieve the goals are up to QUANGOs	All three powers	Through ministerial responsibility to Parliament. Homologation of the acts by the Ministers	Enhancing the State's abilities. Either the Government has the means to control the QUANGOs, and its power may be reinforced. Or it lacks them

⁹² On the differences between both concepts: Gill, *supra* note 6, spec. pp. 65-66. Add. Autin, *supra* note 66, pp. 439-450.

Governance	Broad autonomy	All three powers	'extended accountability' - towards Parliament & Executive - towards the sector and / or public	Specific power in itself, having its own place, counterbalancing the Executive
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Theoretical approach of QUANGOs' diversity

3.1.1. Reasons for Setting up QUANGOs

32. After a specific crisis (for instance ESB) or a more general legitimacy question,⁹³ one way to restore the trust of citizens and the credibility of the State institutions is to create QUANGOs. The idea is to build this credibility on different pillars, like the expertise of the new empowered entity, the means given to it or the promoted transparency. I will describe three main trends, the first one can be called the neutrality logic, the second one the pragmatism and the last one the Governance logic.⁹⁴

QUANGOs play various and not exclusive roles in the balance of powers between the Legislature and the Executive. The creation of QUANGOs can lead to a limitation in the concentration of powers by the Government. However, the emphasis could also be placed on practical reasons leading to an improvement in the services provided by the State and, on an indirect basis, the extension of governmental presence in society. Finally, in some systems, QUANGOs have their own place, and are sometimes qualified as a 'fourth power'.⁹⁵ However, the characteristics of QUANGOs are intertwined with each other and some reports illustrate this in a striking way.

33. QUANGOs can be set up in order to isolate important functions of the State from political⁹⁶ or sectoral influences, or a potential conflict of interests. This conflict may have different origins, depending on the fields in which the QUANGO is used. The following examples are often given:

⁹³ The French report asks the following question

Le développement de ce type d'institutions ne marque-t-il pas une méfiance générale au regard de la manière dont les objectifs d'intérêt public sont pris en charge par les institutions gouvernementales et administratives classiques qui constituent l'exécutif?

⁹⁴ For another categorizations, *See*, Gill, *supra* note 6, spec. pp. 30 and f.: economy (freeing from civil service controls and from administrative procedures); efficiency (focus and single tasking); effectiveness (flexible and customer friendly, value of a governance board); or legitimacy (separation of powers, promoting the involvement of experts and wider civil society, distancing politicians from certain decisions).

⁹⁵ E. Zoller, *Les agences fédérales américaines, la régulation et la démocratie*, 2004 R.F.D.A. spec. 758.

⁹⁶ *E.g.*, Japan.

- The economic sector where the State was previously in a monopolistic position. In that case, the State in itself could have some ‘personal’ interest in the decisions that it takes. Typically, such conflicts of interest arise when the State remains a major economic actor in one liberalized sector;⁹⁷
- A relationship where the State risks not being neutral or impartial towards citizens (the citizens-State relationship);⁹⁸
- Political field: Election Committee⁹⁹ or Committee on access to the media or to the body which broadcasts the news.¹⁰⁰ In such cases, the politicians in power could have a great interest in barring their opponents from accessing the media or in disturbing the electoral process.

To prevent such conflict of interests, committees are set up, whose manpower are free from any political and/or sectoral links. They are chosen for their independence and expertise. This should preclude too much concentration of power in the hands of the Executive. In other words, specialisation is a way to protect the general interest against biased decisions.

The French report summarises this consideration in the following terms:

il s’agit alors de dépolitiser l’exercice de certaines fonctions étatiques [...]. Le fait de confier une politique particulière à une autorité administrative indépendante permet en outre d’assurer une étanchéité de celle-ci au regard des autres politiques publiques. [...]

Dans ces différents domaines, le développement d’une administration polycentrique permet d’introduire un élément de séparation des pouvoirs au sein même de l’administration, d’établir des checks and balances rendus nécessaires par la concentration des pouvoirs au profit de l’exécutif.

Likewise, the Dutch report states 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 power by Ministers in cases where there is a possible conflict of interests between their administrative and political roles.

The American report also sheds some light on this issue:

Originally [...], the independent agency symbolized the vesting in idealized [...] experts of regulatory powers over the economy that challenged the common law notions of property and contractual freedom in the name of the public interest. It contrasted with the executive agency which theoretically was confined to managerial tasks [...] and could not venture into decision making as far-reaching and encompassing as congressional action. Accordingly, it was termed the independent regulatory agency.

The interest in the following quotation lies the footnote after “idealized”: “They were idealized in that they were presumed to resort to science and be insulated from the failings of politics.”

⁹⁷ *E.g.*, France.

⁹⁸ Rapport Conseil d’Etat, *supra* note 47, p. 275; France: le Médiateur de la République ou la Commission d’accès aux documents administratifs.

⁹⁹ Dutch report:

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. [...] 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 such as: 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.

¹⁰⁰ *E.g.*: Denmark, Italy, France.

A limitation of the Executive can also be found in Finland for historical reasons dating back to the Russian Empire. The doctrinal interpretation of the independence of the agency is indeed “a defense against the strengthening Czarist rule in Finland at the end of the 19th century – the central administrative boards were for the most part led by Finnish men. [...]”.

34. On the other hand, it is often argued¹⁰¹ that the independence of QUANGOs improve their performance. Starting from that assumption, it could be said that QUANGOs are created to enhance the achievements of the State, and are given more freedom of movement and means in order to do what the Executive is not able to do, for material or financial reasons, for instance. Indeed, the modern State delivers services, and citizens have become consumers. In that case, QUANGOs might be set up in order to enable the State to carry out its task in a businesslike manner.¹⁰² However, the improvements carried out by the QUANGOs are not necessarily of an economic nature. Sometimes, it is assumed that QUANGOs are better equipped to fulfil the requirements of equality, fairness or impartiality.

The aim of efficiency is often linked to “*New public management*”, defined as “*a set of ideas and methods that aim to combine accountability and efficiency in public administration.*”¹⁰³ However, the impact of this theory on the increase of QUANGOs is all but clear. Indeed, there is no obvious causal connection between the apparition of theories like “*New Public Management*” and the multiplication of QUANGOs. As an example, in Finland, the phenomenon of administrative agencies not belonging to a strongly hierarchical administrative structure under the Ministers or Ministries is certainly not new. International administrative trends such as “*New Public Management*” and “*Good Governance*” did not lead to the establishment of such administrative structures. Actually, one could assume that new means of governing introduced as a result of “*New Public Management*” have more likely *decreased* the independence of these agencies in their relation with Ministries, rather than increasing it. However, this development has not been the object of legal research.

By contrast, the Japanese report confirms the influence of “*New Public Management*” on the Administrative Reforms Council. This institution published some reports on the reforms of the national government organization between 1996 and 1999. It introduced the principle of separation between the policy-drafting and the policy-execution functions of government.

¹⁰¹ Schinck, *supra* note 14, p. 43:

Les agences éparses trahissent généralement une solution d’expédient; souvent leur création a paru judicieuse dans des circonstances particulières, mais elle ne s’inscrit nullement dans un grand dessein. En revanche, il est probable que la séparation délibérée d’activités d’un ministère et leur attribution à une agence soit motivée par l’idée que les entités indépendamment centrées sur une mission sont plus efficaces que les services ministériels.

¹⁰² Denmark.

¹⁰³ T. Hernes, *Four ideal-type organizational responses to New Public Management reforms and some consequences*, (71)1 *International Review of administrative sciences* 5-17 (2005).

Its reflexions led to “The Basic Law of the Administrative Reform of the Central Government of 1998”, which provided that Commissions and Agencies – external bodies of the Ministry – shall assume implementing functions.

The Belgian report does not explicitly take any position on the use of such theories, but gives a sceptical opinion regarding the “*New Public Management*” and similar schools, thereby wondering:

L'autorité administrative chargée d'assurer la régulation d'un secteur économique doit apparaître indépendante à l'égard du secteur soumis à régulation. Cette qualité lui permettra de garantir l'adoption de décisions conformes aux exigences d'impartialité, de non-discrimination et, plus généralement, aux principes de bonne administration. En se réjouissant de la promotion de telles valeurs, on en oublierait presque que, depuis longtemps, elles sont censées gouverner l'action des autorités administratives [...]; c'est alors qu'à la distraction succède une question: comment les exigences auxquelles doit satisfaire l'action administrative justifient-elles aujourd'hui la création d'autorités indépendantes de l'administration centrale et des autorités politiques chargées du pouvoir exécutif? Ou bien la création d'autorités indépendantes est censée rencontrer les carences d'une action administrative n'affichant pas les qualités évoquées ci-dessus, ce qui suppose que ces manquements aient été établis et révèlent un problème structurel, que la création d'autorités émancipées du contrôle d'autorités politiques permettrait de résoudre. Ou bien, rien ne permet de soutenir que, de manière générale, l'action administrative est exposée à des reproches tenant à son impartialité ou à l'égalité de traitement des opérateurs économiques, ce qui laisse alors entendre que la création d'autorités administratives indépendantes est animée d'autres considérations que la seule volonté d'assurer le respect de certains des principes généraux du droit administratif [...].

35. Finally, QUANGOs fulfill a specific function in the global balance of power between the Executive and the Legislative branches with regard to their specific material missions. They might be a way of ensuring the control of a sector in the public interest. The State is there to provide a general service: It provides the framework and establishes general rules when this is necessary. And this necessity has sometimes been reintroduced into the definition of the authority of a specific sector. But to be able to do this, the State requires a thorough knowledge of the sector. And in some institutional frameworks, such missions do not belong to the Executive, but to specific independent agencies. We call that institutional framework the ‘Governance framework’, especially since it relies upon several key principles, such as openness, legitimacy, effectiveness, coherence and accountability.¹⁰⁴

For present purposes, we borrow R. Laking’s definition of ‘governance’:

At its most general level, governance [...] means the constitutional, legal and administrative arrangements by which governments exercise their power as well as the related mechanisms for public accountability, rule of law, transparency, and citizen participation.

Organisational governance is the rules and processes by which organisations are directed and controlled. [...] Organisational governance in the public sector refers to the control of public organisations so that they achieve the purposes for which they have been established and that their activities conform to the general principles of good governance.¹⁰⁵

The United States provides the prototype for such logic. There, QUANGOs

emerged at the end of the XIXth century as essential instruments of discipline of free enterprise, in the name of public interest [...]. Sometimes, in this tempering of wild capitalism endeavor, they came into existence with the blessing of the regulatees themselves [...]. They represent, in other words, the American model of

¹⁰⁴ Dutch report.

¹⁰⁵ *The Governance of the Wider State Sector: Principles for Control and Accountability of Delegated and Devolved Bodies*, OECD Global Forum on Governance, Public Governance, 13 November 2001, p. 5.

public economic intervention. It is one that reluctantly engages into direct management [...] and preferably exercises oversight. This model of indirect intervention was later used in other areas where it has now morphed into a model of protection of fundamental rights [...] or elections regulation [...]. Such a migration from the economic and social regulatory spheres to the constitutional and political regulatory realms is sufficiently indicative of the adaptability of the American IRAs. It is also explicative of the large borrowing they gave rise to.¹⁰⁶

36. Several national reports show how difficult it is to clearly identify the main trends (i.e. Neutrality, Efficiency and Governance) behind the setting up of the QUANGOs in general as well as in specific cases. However, they also acknowledge the existence of these trends and logics and how confusing it might be to lift the veil and to look behind the legal and formal mechanisms.

Several reports sum up various reasons for the autonomisation of administrative entities. The principal reason outlined in the German report is the possibility of specialisation and expertise, protected from political decision-making. But this report adds other reasons such as the recognition of self-administration, as in the case of professional bodies; the protection of constitutional rights, as in the case of public broadcasting companies and universities; and the safeguarding of decision-making on social and cultural values. Two risks are pointed out “the danger of diverging or contradictory administrative decisions and an increasing ineffectiveness of supervisory mechanisms”, which gives rise to the question of whether the overall working of the State will be more efficient.

However, other reports tend to make a somewhat more positive link between efficiency and legitimacy, whether these arise simultaneously¹⁰⁷ or are more successive.¹⁰⁸

3.1.2. Modalities of QUANGOs' Autonomy

37. Autonomy can be examined from different angles, according to the different sources of the influence on QUANGOs and the scope of autonomy which QUANGOs enjoy with regard to the Executive and Legislative branches, on the one hand, and with regard to the regulated sector, on the other. The notion of independence or autonomy is not subject to a unique description. The notion can have at least three meanings. Those relationships will be discussed from different points of view, namely the independence of the staff, the independence of the QUANGO itself as a body (in the organization as well as with regard to its budget), and the independence of the QUANGOs concerning their actions.

¹⁰⁶ QUANGOs are a part of the distribution of power and the weakening of the Executive power. Two other characteristics of the US government may have a similar favourable effect. First, the federal nature of the State determines the decentralization of the rule-making power among different levels of government. Second, the principle of checks and balances embedded in the Constitution supports a diffuse distribution of a given power (American report).

¹⁰⁷ E.g., Dutch report.

¹⁰⁸ E.g., Dutch report, Danish report.

3.1.2.1. Autonomy of the staff

38. A first issue is to know who will run the QUANGOs and what kind of qualities they need to have. How they are appointed, and so on. Who can propose a candidate? Parliament?¹⁰⁹ The Executive? Other institutions (such as judges)? Or actors within a particular sector?

In some systems, the Executive is the only one to appoint such bodies, following¹¹⁰ discussions or hearings before Parliament.¹¹¹ This implies that the autonomy of the staff of QUANGOs is officially recognized. In other systems, candidates come from different institutions and sectors and represent a range of interests, the sum of the various origins of the candidates meaning that the whole institution is deemed to be independent.

However, experts from a certain field who are chosen for their knowledge of a specific sector and are appointed by the State are not necessarily representative of the sector. Such members can sometimes be found on the boards of QUANGOs or more often in *ad hoc* committees. In some countries, such as Finland, the boards of agencies may have representatives from the sector, but it is not at all typical that such collective organs have a strong position in the organisation of the agencies. Thus, the influence of the field in question on, for example, the rule-making activities of the agencies, is not the result of the formal representation of the field in the decision-making organs of the agencies. Moreover, as a rule the agency should ask for opinions from those affected or their representatives before issuing the legal rules in question.

Some guarantees are added to ensure independence. For instance, members cannot be dismissed before the end of their term of office¹¹² or only due to non-political reasons¹¹³ or under specific legal provisions;¹¹⁴ their mandate is not renewable,¹¹⁵ they are subject to some incompatibilities,¹¹⁶ and so on.

¹⁰⁹ *E.g.*, Greece (at least for the QUANGOs listed in the Constitution).

¹¹⁰ Japan: A member of a Commission shall be appointed by the Prime Minister after special procedures (for example, the approval of both chambers of the Diet); Spain (the Minister shall appear before the relevant parliamentary committee to report on the proposed candidate).

¹¹¹ *E.g.*, the USA: consultations with senators prior to nomination, or through confirmation after nomination.

¹¹² *E.g.*, France.

¹¹³ *E.g.*, the USA; in Poland, the first case of a member and the president of the National Council of Radio Broadcasting and Television itself being dismissed by the President – Lech Walesa – caused a stormy political discussion in the country as regards the prerogatives of the head of State.

¹¹⁴ *E.g.*, Japan.

¹¹⁵ *E.g.*, France.

¹¹⁶ *E.g.*, France.

3.1.2.2. Autonomy of the institution

39. As a rule, QUANGOs are autonomous regarding their internal process, staff and so on. One delicate question is that of financing¹¹⁷ and budgetary control. This is one of the rare occasions when Parliament has a real insight into a QUANGO. This control may be linked to the presentation of an annual report or a working program for the coming year. In the USA, for instance, the periodical authorization of a maximum level of expenditure as opposed to permanent authorization and annual appropriation has a significant weight on agencies' activities.¹¹⁸ These congressional rituals mobilize substantial agency resources, as they may result in a sanction or recompense for past action, and force agencies to carefully justify their request for funding. Congress may include prohibitions and instructions with respect to future action in the appropriations bills.

Some national reports have underlined that QUANGOs can be dismissed by the Legislative branch (sometimes upon the initiative of the Government).¹¹⁹

3.1.2.3. Autonomy in the elaboration of acts issued by the institution

40. The independence of QUANGOs can be assessed according to the extent to which they are free to make their own rules, without any intervention by the Executive or the Legislature (when a general and full delegation of powers is provided). Situations vary greatly. Furthermore, questions regarding the independence of QUANGOs can also be assessed according to the position of their acts in the hierarchy of norms.

3.1.2.3.1. Roles of the Government or the Legislature

41. In some systems only QUANGOs oversee a regulation from its initiative¹²⁰ to its entry into force. For instance, in the USA, the agency enjoys discretion to use such a power and to draft the regulations that it deems appropriate. The only constraints are provided by the Constitution, the applicable statutes and case law. This entails that the agency does not co-decide with any other entity. As a matter of principle, neither the President nor the Secretary

¹¹⁷ This point is of huge importance and is very often much disputed (the power of QUANGOs to levy taxes gives them real independence as regards other institutions (as they do not have to rely on state resources to have their own policy) and is, for instance, not recognized in France due to a fear of the consequences thereof – See for an illustration Lombard, *supra* note 13, p. 531).

¹¹⁸ The Congressional Budget Office plays a key role in this process.

¹¹⁹ E.g.: the USA.

¹²⁰ *Contra*, in Belgium, in case some QUANGOs do not intervene when necessary, the Government may take the initiative.

of State controls the initiative, or determines the content, or triggers the entry into force of the rules in question. Under the law, the American agency is the only body to enact the rules and it itself contributes to the corpus of administrative law.¹²¹

The situation is very similar in Finland, as the Ministries have, on the basis of their hierarchical position, no general powers to dictate how the agencies should act. The situation is also similar in Spain: The entry into force of the “Circulares” from the Bank of Spain, the National Securities Market Commission or the National Energy Commission does not require any approval by another administrative authority.

42. By contrast, in Belgium an approbation of the ‘règlement’ by the Executive is, as a rule, a mandatory requirement for the binding force of the regulation in question. However, this approbation may vary in accordance with the legal basis of such a power: sometimes the Executive may change the content of the rules or even may issue the rules itself instead of a failing QUANGO.¹²² In other cases, the only possibility is pure approbation without any conditions.¹²³

In the Netherlands, ministers also have the power to approve, postpone or annul certain administrative orders emanating from QUANGOs.

In Greece, the Minister may, by means of a reasoned decision, nullify the application of measures imposed by the Hellenic Competition Commission or modify them, if this is justified on the basis of reasons of social policy or national economic public interest, which clearly exceed the purpose of all or some of the specific measures.

In France, this interconnection between the Government and the agency, where one cannot decide without the other, is known as a “form of co-decision.”¹²⁴

¹²¹ However, a legislative veto is possible (a resolution by which Congress nullifies a regulation before it takes effect offers some degree of similarity with the power of approval vested in ministers elsewhere), *see infra*.

¹²² Loi du 2 août 2002 relative à la surveillance du secteur financier et aux services financiers, art. 64, al. 3.

¹²³ The Belgian report points out

cette approbation pure et simple ne doit cependant pas faire illusion et inspire d'évidentes questions: qu'en est-il de l'indépendance du C.S.A. qui, adoptant un règlement sur l'information politique en périodes électorales, doit le soumettre à l'approbation d'un Gouvernement dont les membres figurent parmi les destinataires de la norme?

¹²⁴

le pouvoir réglementaire accordé par la loi aux autorités administratives indépendantes par la loi est en réalité partagé avec l'autorité ministérielle chargée d'homologuer les règlements adoptés. Ainsi par exemple, l'art. L. 36-6 du Code des postes et des communications électroniques précise-t-il que “les décisions prises en vertu du présent article sont, après homologation par arrêté du ministre chargé des communications électroniques, publiées au Journal officiel.” Dans un tel cas, le pouvoir réglementaire est exercé de manière conjointe par l'autorité indépendante et par l'autorité ministérielle dans le cadre d'une véritable procédure de codécision puisque aucune des autorités ne peut décider sans l'aval de l'autre. Il en va de même par exemple on l'a vu pour le règlement général adopté par l'autorité des marchés financiers aux termes de l'art. L. 621-6 du Code monétaire et financier. De même, dans le projet de loi relatif à la transparence et à la sécurité en matière nucléaire, il est prévu que les “décisions réglementaires à caractère technique (adoptées par l'Autorité de sûreté nucléaire) pour compléter les modalités d'application des décrets et arrêtés pris en matière de sûreté nucléaire ou de radioprotection [...] sont soumises à l'homologation des ministres chargés de la sûreté nucléaire [...] et de la radioprotection.” (art. 2 bis).

3.1.2.3.2. Hierarchy of norms

43. The position of the rule in the hierarchy of norms can be discussed from several angles: with regard to laws and regulations, or with regard to acts adopted by other QUANGOS. In the first case, the position of acts adopted by QUANGOs is the lowest in the hierarchy of norms.¹²⁵ The second aspect is more complicated.¹²⁶

In this context, the specific position in the USA can be underlined.

Three series of observations can be made. First, regarding their relationship with statutes enacted by Congress, rules issued by IRAs present a lesser legal value than the congressional rules. They must in fact conform not only to the relevant statutes but also to the Constitution and the case law.

Second, as to reciprocal relationship among the regulations produced by IRAs, because IRAs are not structured as a hierarchical branch of government, there is no hierarchy between the regulations produced by them. All the products of IRAs' legislative rulemaking share the same legal status. Compatibility among those rules results from voluntarily coordination among agencies.

Third, the place of the binding norms formulated by IRAs relative to the executive orders promulgated by the President is controversial. At first sight, it can be easily stated: due to their independence, IRAs are not subject to presidential pronouncements. Nevertheless, the claim for a unitary Presidency that would incorporate executive as well as independent agencies, a certain realism in view of the implications of the President's responsibilities in wartime, challenge in whole or in part this apparently easy determination.

3.1.3. Scope of QUANGO Powers: Theory and Practice

44. QUANGOs exercise formal powers – which can be called their core – as laid down in their constitutive acts. Those powers can take various forms and have different legal consequences as they may be of a legislative, executive or judicial nature,¹²⁷ either individual or general. For instance, QUANGOs might have purely advisory competence – towards the Executive or the Legislative branch¹²⁸ – or this competence may extend as far as decision-making powers in a wide range of ways: licensing, authorizing, inspecting, controlling, sanctioning, issuing guidelines, interpreting general laws, issuing regulations, or allocating and granting economic means.¹²⁹

One can note that QUANGOs enjoy a very broad range of powers, with one exception. As a rule, the use of “force publique” extends to the actual exercise of “executive” power. Hence QUANGOs do not usually have the means to imprison people.¹³⁰

¹²⁵ E.g., Finland.

¹²⁶ See, Rapport du Conseil d'Etat, *supra* note 47, pp. 341-344.

¹²⁷ The allocation of the three types of powers to one entity is possible in France, as long as the QUANGO in question is not the body which is entitled to control the legality of its own acts.

¹²⁸ QUANGOs also issue advice and recommendations to the State (Switzerland) at their own behest or when required to do so by the public authorities. Sometimes, this practice goes as far as participating in the elaboration of laws or règlements, by means of advice or recommendations, which may or may not be compulsory (Spain). The practical force of those instruments has been recognized by the courts (France). In a more indirect way, representing the State in international negotiations is a way of participating in the elaboration of règlements. For instance, the French '*Haute autorité de lutte contre les discriminations et pour l'égalité*' may represent the French State in international and European organisations.

¹²⁹ E.g., Denmark.

¹³⁰ Rapport du Conseil d'Etat français, *supra* note 47, p. 296.

The French Conseil d'Etat states that the common-law countries are more likely to extend the three kinds of powers to QUANGOs while the French system does not give the three powers to every entity.¹³¹

The wide and mixed range of QUANGO powers are explained as follows in the French report:

Le recours à une autorité administrative indépendante est parfois justifié par le fait que ces autorités peuvent être chargées de l'ensemble des activités de régulation d'un secteur: détermination des règles applicables et prise en charge de leur application, par la délivrance d'autorisations, le règlement de différends (sic) ou encore le prononcé de sanctions administratives. *C'est là encore le critère de la spécialisation technique et de l'efficacité qu'elle implique qui est mis en avant.* Un tel regroupement de compétences juridiques serait la garantie de la bonne information du titulaire du pouvoir de réglementation sur les problèmes pratiques rencontrés dans la mise en œuvre des règles existantes et assurerait donc leur adaptation rapide et pertinente. A l'inverse, le fait que l'autorité en charge de l'application des règles en ait déterminé le contenu serait la garantie de leur interprétation correcte au regard des objectifs poursuivis. (our emphasis.)

45. If we stick to rule-making power, different kinds of systems can be distinguished: In some countries, the rule-making is very limited to a narrow range of competences, preferably relating to technical matters¹³² and without being automatic,¹³³ while in other countries, such as the USA, the rule-making power encompasses a *broad discretion* which is to be exercised under the guidance of principles laid down by Congress. The American QUANGOs thus enjoy primary rule-making power. In this context, reference to a real autonomous rule-making power seems to be particularly justified.

46. QUANGOs also often exercise non-legally binding powers,¹³⁴ which can take several forms and entail a number of problems. Those instruments might be mainly directed towards members of the public (and no longer only public entities) as the following American and French examples illustrate.

47. A first and fairly elaborate system exists in the USA where the Negotiated Rulemaking Act of 1990 set up what is called "Regulatory negotiation", or a process through which the agency, the regulated industry and other stakeholders seek consensus on a proposed rule. Rejecting a command-and-control approach to regulation, it purports to shorten the rule-making process, to increase compliance, to reduce litigation, and to produce better rules. It is not a new requirement, but an option that agencies may ignore.

This method does have several drawbacks. First, as the negotiation is not binding it adds an extra step in the "notice and comment" procedure.(see *infra* n°57). Secondly, it simultaneously deprives the agency of the superiority attached to its nature as a public entity,

¹³¹ Rapport du Conseil d'Etat français, *supra* note, p. 280.

¹³² E.g., France, Belgium, Switzerland, Germany.

¹³³ E.g., France.

¹³⁴ In Spain, due to the criticism or the evolution towards real rule-making power, those practices have disappeared.

thereby reducing the public interest to the level of private interests. Thus, it creates confusion concerning the status of the respective participants and the represented interests at stake that offers a breeding ground for regulatory control.

Besides this, there are interpretive rules and policy statements which aim to provide guidelines concerning which voluntary compliance is expected from the regulated sector. The agencies can employ non-codified informal techniques of their own such as letters, speeches, news media interviews, threats of enforcement, and presentations at professional meetings to communicate the proper conduct to be exhibited by the regulated parties.¹³⁵

48. In France, there is a specific tool called “*Le pouvoir réglementaire dérivé*”. Through the exercise of numerous powers at an individual level (sanctions, authorisation or dispute resolution), QUANGOs can exercise a form of rule-making. This power is developed through the interpretation of norms (legal or regulatory) that QUANGOs have to apply in their discretionary power. As the field is highly technical, interpretation is necessary to provide precision, to include the various situations within a specific framework, and to take technical and market developments into account.

This has resulted in the development of a real doctrine aiming at some coherence in the use of the QUANGOs’ discretionary power. Even if this is not really original, its main importance is as “la légitimité démocratique défaillante des autorités administratives indépendantes confère une place relativement plus importante à la légitimité qu’elles peuvent tirer de leur efficacité.” It implies that QUANGOs are required to be efficient and they need to use any possible tool to achieve their goals. One way to fulfill this mission is the foreseeability of QUANGOs’ decisions as ensured by this “doctrine”.

On a practical side, the importance of this doctrine can really forge a whole section of the law. However, this may not hinder the use of regulatory power. New rules can never jeopardize an individual examination of each situation by a QUANGO. However, the boundary between the “interpretation of a rule” and the “creation of a new rule” can be thin and has to be assessed by the court in each case.

49. In short, even when QUANGOs have a limited formal rule-making power, they can use a wide scope of other non-legal tools that are likely to shape the behaviour of citizens or the regulated sector. This situation calls for some criticism, as is illustrated by the following excerpt:

En outre, et plus encore si l’Autorité administrative en cause a du prestige et de l’autorité [...]; il suffit que, notamment par le biais de son Président, elle formule des observations générales, des anticipations, ou des souhaits, pour que le crédit dont elle dispose entraîne le respect de ces formulations générales par les parties prenantes, surtout si nous sommes dans un système auto-observé, comme si elles étaient dotées d’une portée normative. On peut alors faire l’observation suivante. Si au nom de la réticence de principe, légitime et portée

¹³⁵ E.g., the USA, France.

par le Conseil Constitutionnel lui-même, on refuse à des Autorités le pouvoir réglementaire, une autorité pourra puiser dans son propre crédit pour l'exercer en fait, sur le mode d'une Soft Law dont on connaît la puissance, et sans que les parties prenantes disposent des protections juridiques que leur offre l'exercice d'un pouvoir juridique formel [...] Sans doute vaut-il mieux que le droit confère, c'est-à-dire organise et limite, des pouvoirs plutôt que de feindre d'ignorer ceux qui sont exercés de fait.¹³⁶

3.1.4. Accountability of QUANGOs

50. Since a degree of independence is in principle given to QUANGOs, some “limits” should be set. That overview can be seen as a continuum from control *ex ante* to control *ex post* in the form of accountability (political) or judicial review (legal). The first will be examined here as part of the relationship between QUANGOs, the Executive and the Legislature. The latter will be studied in the last section.

Accountability “is the duty to give account for one’s actions to some other person or body”¹³⁷ or “a liability to reveal, to explain, and to justify what one does; how one discharges responsibilities, financial or other, whose several origins may be political, constitutional, hierarchical or contractual.”¹³⁸

The question of accountability implies certain sub-questions: *how will who hold whom for what?*¹³⁹

As regards our topic, this question can be asked as follows:

- 1) What kind of control mechanisms exist?
- 2) Which of the QUANGOs’ acts are subject to forms of accountability? Results, policies, regulations?
- 3) Who is accountable before Parliament? The QUANGO itself or the Executive on behalf of the QUANGO?
- 4) Is the QUANGO accountable before Parliament? The Executive? The sector? The citizens?

51. Those questions could be asked in relation to any kind of intervention or policies developed by QUANGOs. However, the limited scope of this study will focus on the mechanisms surrounding the rule-making power. It is assumed that such a power should be more formally controlled, as

[...] le pouvoir réglementaire occupe parmi les pouvoirs classiques de l’administration une place particulière qui réclame une justification poussée puisque les effets de l’adoption d’une norme générale et impersonnelle sont en principe plus importants que ceux qui découlent de l’adoption d’une simple décision individuelle.¹⁴⁰

¹³⁶ Gélard, *supra* note 3, p. 120.

¹³⁷ C. Scott, *Accountability in the Regulatory State*, 27(1) *Journal of Law and Society* 38 (2000), spec. p. 40.

¹³⁸ E. L. Normaton, *Public accountability and audit: A reconnaissance*, in Smith & Hague, *The Dilemma of accountability in Modern Government: Independence versus Control* 311 (1971), cited by Scott, *supra* note 137, p. 40.

¹³⁹ See R. Behn, *The New Public Management Paradigm and the search for Democratic Accountability*, 1(2) *International Public Management Journal* 131-164 (1998).

¹⁴⁰ French report.

Indeed, since QUANGOs have some decision-making powers, they have to explain what they have done and what they plan to do at a general (e.g. an annual report or the working program for the coming year) or one-off (a specific decision) level. This explanation can take a number of forms and may occur directly before Parliament or indirectly through the Government, which is itself responsible to Parliament. This is an obligation to provide the necessary grounds for all decisions taken, a means to limit this power in a democratic State.

However, in a ‘regulatory State’ the limitation of power and the justification of power in the pursuit of the general interest can be achieved in other ways than through Parliament. This is what is called an ‘*extended accountability*’, which implies that powers can be given through some procedures beyond the representatives of the people. Links with “participatory democracy” can easily be made given that, in such a system, key principles such as transparency, participation, evaluation or the duty to provide reasoned decisions have to be respected.¹⁴¹

Three ways of accounting for decisions will be addressed: before Parliament, through the Government and in extended ways. One kind does not exclude the other. One could say that these forms of control are layered. However, several ways to oversee QUANGOs were already touched upon while explaining the autonomy of QUANGOs.

3.1.4.1. Accountability towards Parliament

52. In some countries (such as France, the USA or in Spain), QUANGOs are directly accountable to Parliament. The modalities of such direct control vary. Indeed, in the USA, Congress has a wide range of ways to keep abreast with the strategy developed by a QUANGO, to control it, to steer it, while the means are more limited in France.¹⁴²

In Spain QUANGOs are controlled by the House of Representatives and the Senate, and appearance before the Chambers on request is compulsory. Nevertheless, specific procedures apply, including restricted access to certain information, but Parliament has the final decision on the subject (for details of the confidentiality obligation – see the national report).

The annual report of the Central Bank and, when relevant, any other reports submitted to Parliament are sent to the government or to the Economy and Finance Minister. Also, Parliament and the Government are regularly informed of the objectives and the implementation of monetary policy. A more or less similar regulation applies to other QUANGOs like the National Securities Market Commission, the National Energy Commission and the National Telecommunications Commission.

In the USA, the accountability of QUANGOs is very elaborate,

¹⁴¹ See for more details, Lombard, *supra* note 13.

¹⁴² Rapport du Conseil d’Etat français, *supra* note 47, p. 369: in most cases, Parliament has the right to hold hearings of the QUANGOs, but does not often use this authority.

with a particular sense of entitlement arising from the view that these agencies constitute its (sic) arms in confrontations with the President. The way for some accountability are the hearing before appointing the members, the approval of the budget, the use of the legislative veto¹⁴³ or even the dismissal of the QUANGO. One very specific measure is the Congressional Review Act of 1996 which provides that, before their rules can take effect [...], agencies must submit them to each House along with a cost-benefit analysis. In creating this quasi-systematic [...] legislative filter, the Act adds another procedural step to that articulated by the APA and contributes to a cumbersome decision making. Apart from cost-benefit concerns, Congress may also pass or attempt to pass a statute designed to substitute its own judgment for that of an agency on a specific regulatory policy question [...].

Lastly, investigations conducted by congressional committees constitute another powerful device of formal political supervision. The public legislative hearings in which administrative action is carefully scrutinized and a commissioner or staff member is plied with questions symbolizes the unparalleled sophistication of American congressional control over administrative action, in general and by IRAs, in particular. Individual oversight by representatives or senators also takes place. Through correspondence or meetings, the latter convey the concerns of their constituents.

3.1.4.2. Accountability through the Executive

53. In some systems, some forms of accountability are more or less formally given to the Executive through reports. Sometimes, it implies that Parliament and the Executive receive the same information simultaneously. In Spain, for instance, Parliament and the Government are regularly informed of the objectives and the implementation of monetary policy by the Central Bank.

In other systems, the Executive controls QUANGOs. In Denmark, for instance, ministers have an obligation to carry out a certain overall supervision of the QUANGOs. If a minister becomes aware of unlawful activities or inexpediciencies, he or she may approach the management of the QUANGO in question or he or she may take the matter to the State Auditor's Office or the police. The minister may also propose that new legislation be enacted by Parliament in order to control a QUANGO that does not act in a satisfactory manner.

54. The system of the accountability of the Executive to Parliament is required by several national constitutions, which implies full ministerial responsibility to Parliament. This is consistent with the democratic principle¹⁴⁴ and the *principe de séparation des pouvoirs*.¹⁴⁵ The result of this might be very difficult and not entirely consistent with the same principles, at least at first sight.

¹⁴³ Since 1983: in order, constitutionally, to resort to a legislative veto, Congress must ensure the involvement of both Houses and of the President.

¹⁴⁴ Germany; in Japan, the question arose but the solution was the reorganisation of QUANGOs; in Finland, too, the question arose with the reorganisation of QUANGOs in the 1980s.

At least one of the arguments put forward when the old national administrative agencies were done away with was that their elimination would strengthen the parliamentary system of government. The aim was that Ministers responsible for the Parliament should have a stronger say in the activities of the entire state administration in their respective fields. When new national administrative agencies with "hard" powers – such as the power of rule-making – have then later on been (re)founded, the question of a parliamentary system of government has not been central.

¹⁴⁵ Belgium.

For constitutional reasons, countries like Belgium¹⁴⁶ require that “l’exercice du pouvoir exécutif ne peut être confié à des institutions échappant au contrôle des autorités politiques et, plus particulièrement, des assemblées législatives.”¹⁴⁷ As a result, QUANGOs cannot have any rule-making power except in a very technical context and only as far as binding force is given to the general rules by an organ which is as politically responsible as the Government (via approbation, for instance).

In the Netherlands, ministers sometimes have the right to approve or disapprove of 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 is left to a Minister, who wants to influence the course of a QUANGO’s policy, is to use his or her right to give general directions to the board of directors. No one knows exactly how ‘general’ these directions have to be in order to prevent Ministers from putting unauthorized pressure on QUANGOs. This is a very difficult balance, as policy rules or general instructions for QUANGOs could easily conflict with the independent position and expert role of certain QUANGOs. After some hesitation surrounding this issue in the preparation of the new draft of general principles, ministers also have the authority to make policy rules that are binding for competition authorities. According to legal scholars, this is not necessarily problematic from the perspective of the separation of powers, 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.

55. In the USA, the extent of Presidential control is uncertain from a legal standpoint. Some methods of Presidential overview are well defined, such as the power of nomination,¹⁴⁸ the litigating authority,¹⁴⁹ or clearance from the President for their budget and legislative proposals before submitting them to Congress. As a result, although some exceptions were introduced in the 1970s, the Office of Management and Budget is allowed to sift through the IRAs’ proposals and endorse, correct or reject them, taking into account the current presidential directives.

Notwithstanding these legal powers, the controversial question of the applicability of executive orders to independent agencies blurs the limits of IRAs’ independence. Although the principle of independence

¹⁴⁶ Similar reasoning in the German report.

¹⁴⁷ The reasoning leading to this conclusion is very clearly exposed in the Belgian report:

1° il se déduit de l’article 33 de la Constitution que les pouvoirs régis par celle-ci ne peuvent être exercés que par les organes désignés à cette fin par le Constituant [...];
2° s’agissant du pouvoir exécutif, c’est au Roi (ou, éventuellement, aux ministres du Gouvernement fédéral) qu’il appartient de l’exercer au niveau fédéral, tandis que – pour les entités fédérées – l’exercice de ce pouvoir est attribué aux Gouvernements de Communautés ou de Région.

¹⁴⁸ In particular, the President appoints the chairperson of the independent agencies.

¹⁴⁹ The authority to petition the Supreme Court lies with the Solicitor General within the Department of Justice.

seems to naturally shield the IRAs from the supervisory control of the President in the issuance of rules,¹⁵⁰ the claim has been repeatedly made that the President could legally subject them to his methodological instructions in this regard. Extensive historical studies conclude that the constant rejection by successive presidents of the attempts to full independence prevented the formation of a customary rule upholding the claimed independence [...]. Other scholars [...] as well as the DOJ and the ABA [...] have contended that the limitation of the presidential removal power did not entail an immunity from presidential oversight of the substance of the IRAs' rulemaking as long as it remained short of a blunt substitution of decision. Such a conception would deprive the President of a power to remove IRAs' commissioners and to override their decisions but would entitle him to supervise rulemaking proceedings by IRAs. As it suggests more a difference of degree than that of nature between executive and independent agencies, the successive and recent reiterations of its formulation leave the IRAs in an unstable position in the American administrative government, despite the judicial validation of the delegation of power and the limited removal power.

3.1.4.3. Extended accountability

56. From a classical accountability towards Parliament by ministers, accountability in a so-called "regulatory State" has also evolved to what is called "extended accountability", that is, accountability towards political bodies, horizontal bodies (to a parallel institution such as an auditing commission), and beneficiaries (consumers, markets, users).¹⁵¹

57. The prototype of the system where extended accountability has been developed through the procedure of transparency, participation and reasoned decisions is the American one. As it is apparent that other systems try to use some of the tools developed there, it seems interesting to provide a deeper insight into the procedure of elaborating (general) rules. Basically, rules can be adopted in two ways, one informal, one formal, depending on the type of matters to be regulated.

In short, the informal procedure (applicable by default) is a procedure of "notice and comment" rule-making with one main aim, namely to achieve transparency from 1946 onwards. The proceedings go through three phases: notice, comment and publication. The first phase¹⁵² has an informational purpose: the agency informs the public that it intends to promulgate a rule. To this end, it publishes a 'notice of rule-making' in which it indicates the legal basis of the proceedings and presents the proposed rule or the issues involved. The second step¹⁵³ in the informal rule-making process is a comment phase during which the public submit 'written comments' on the agency's contemplated rule. It symbolizes the participatory characteristic of American informal rule-making which calls to mind a kind of Congressional debate without any verbal sparring. The effective participants are the regulated industries and other interest groups (as well as other QUANGOs). The third phase is a

¹⁵⁰ B. Schwartz, *Administrative Law* 19 (3^d ed. 1991).

In support of this thesis 2 examples may be referred to. President Reagan's requested voluntary implementation of Exec. Order No. 12, 291, 3 C.F.R. 127 (1982) (requiring federal agencies to conduct a Regulatory Impact Analysis) on the part of IRCs. All declined to comply. President Clinton's Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993) requiring federal agencies to conduct cost-benefit analysis exempted independent agencies from conducting this analysis.

¹⁵¹ Scott, *supra* note 137, pp. 38-60.

¹⁵² The aim is transparency.

¹⁵³ The aim is participation.

decisional and explanatory phase whereby the IRA issues the final rule along with “a concise general statement of its basis and purpose”. However, due to the transfiguration of informal rule-making by the review, this last phase has become a time-consuming and meticulous exercise of rational justification for the given decision, as the QUANGO has to discuss alternate options that might have been submitted by interested parties.

Even though the APA sketches out the three steps involved in informal rule-making, its language, if taken literally, affords the agency a certain degree of procedural flexibility in the exact design of each phase. Thus, it appears to be informal. In contrast, formal rule-making is strictly defined. It is called formal because it borrows several features from the formal adjudicatory process. Instead of the comment and the concise general statement, a hearing on which administrative law judges or commissioners will preside is held by the agency. In addition to documentary evidence, the parties resort to testimony and cross-examination to further their arguments.

This pattern has been supplemented on two occasions. Firstly, in 1966, supplementary legislation either promoted transparency or a cost-benefit analysis of administrative action. As regards the first objective, IRAs are required to make their records available to satisfy the right of information enjoyed by the public and to follow specific procedures when soliciting advice. In pursuance of the second goal, they are mandated to develop information on the paperwork burden generated by their rules, to reduce the regulatory burden on small businesses and to assess the environmental impact of certain regulations. Secondly, the Government in the Sunshine Act of 1976 demands that multiheaded agencies hold open meetings. Thus, this statute adds an additional layer of openness and opportunity for public participation in the rule-making undertaken by IRAs. Nevertheless, the subsequent avoidance behaviour adopted by commissioners doing their utmost to reduce the number of meetings covered by the Act is a sufficient indication of the inhibitions caused by its enactment. Moreover, despite their contribution to the democratization and rationalization of administrative action, these statutes have had a cumulative side-effect. The independence attribute is powerless to spare the IRAs from such a rigidity.

58. However, the difficulties arising from control by the regulated industry in the USA might be underlined. Indeed, the American report stresses

Not only are independent agencies subject to political control but they are also subject to the influence of the economic forces targeted by their regulation. According to the regulatory capture thesis, independent agencies are said to come under the influence of the regulated industries. This phenomenon is analyzed either as an inherent feature of regulation [...] or an inevitable phase of the typical development [...]. It reflects a broader reality of any administrative government, that of identification of a given unit – whether executive or independent – with the interests of the particular industry that it regulates. In the US as elsewhere, professional organizations, interest groups serve as the formal and informal (ex parte contact) media of such control. But one characteristic of the US administrative law is that it makes American Independent or executive agencies especially vulnerable to regulatory capture. To the extent that the regulated companies possess the means to avail themselves of the participatory guarantee of informal rulemaking, administrative

procedure itself may be viewed as fostering a disproportionate power of the industry over the agencies. The transparency legislation was precisely designed to curb this trend. The rise of citizen groups, the complexity of each of the regulated industries, result in competing strategies of instrumentalization of the agencies which makes the capture phenomenon a dynamic process.

At a theoretical level, legal scholars underline that the search for more transparency might lead to the opposite result. Indeed, the accumulation of control, and the opacity in the different layers of control, can lead to the following question: if every entity/everyone controls every other entity, who is actually controlling whom and who in practice asks questions to whom and on what basis?

59. Those questions have not dissuaded several countries from borrowing some elements of extended accountability and from attempting to establish them in their respective systems, with more or less awareness of the implementation problems. The following examples, commented upon when necessary, are noteworthy.

In the Netherlands, general principles are drafted which try to adapt ‘good governance principles’ so that they apply to QUANGOs.¹⁵⁴

In Japan, some forms of extended accountability can be found. Indeed, the Japanese report points to recent modifications to the Administrative Procedure Law of 2005. It now requires the competent authority to give notice of a proposed regulation and its resources to the public, allowing them to submit comments on the draft, and, after taking the comments sufficiently into consideration, to make a statement containing the presented comments or their summary and the consequences of consideration and their reasons at that time the authorities issue a final regulation. The amendments entered into force on 1 April 2006.

The attempt to promote more transparency and to gain more legitimacy through participation has been transposed elsewhere, including in Belgium. However, here, the issue is to assess whether those new modalities surrounding the elaboration of the ‘règlement’ is real or a masquerade. For instance, QUANGOs can opt for submitting their projects to consultation, but they can also discontinue this practice whenever they want.¹⁵⁵ This having been said, some acts are elaborated directly with those regulated or with their representatives in the QUANGO,¹⁵⁶ an issue which raises some questions about the independence of the QUANGO.

Access to the documents or the obligation to provide reasoned decisions is also limited in Belgium. Firstly, QUANGOs have to be qualified as ‘autorités administratives’ according to Belgian law and this is not always the case. Secondly, no general rule of providing

¹⁵⁴ The main question in the Dutch report illustrates this concern “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?” (emphasis in the text).

¹⁵⁵ Commission bancaire, financière et des assurances.

¹⁵⁶ Collège d’avis institué au sein du Conseil supérieur de l’audiovisuel.

reasoned decisions applies to the 'règlement', as the rule only applies to individual acts. Lastly, documents are accessible provided that the legal requirements are met (conditions and exceptions).

Another kind of extended accountability may be found in a Danish example, where, for a number of QUANGOs, the auditing of their accounts is carried out by a private accountant, in parallel with the control by the State's Auditors Office.¹⁵⁷

3.2. Control by the Judiciary on a Case-by-Case Basis

60. In principle, judicial review exists in one way or another, according to the general rules of each national system. In other words, control might be very different from system to system, but is generally consistent with the judicial control used with regard to the Executive. It implies that the responsibility of the State/QUANGO can be questioned, that a particular act can be set aside, made void, repealed, and so on. For instance, in the Netherlands,

[t]he 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 with respect to the court's decision. In some cases the judicial decision can even replace the annulled administrative order, but this does not often happen. 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 treasury. 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.

In Spain, a procedure also exists whereby an Act grants the right to challenge the rules of QUANGOs before the Courts (administrative courts or specific instances) within two months of their publication in the Official Journal.

In France, the independence of QUANGOs implies that the only control upon them is judicial control *a posteriori*, limited to the legality of the decision (as opposed to controlling the merits ('opportunité')). As a rule, administrative courts are competent, but in order to unify the rules of competence in some cases, the judicial courts are also competent concerning some QUANGOs.¹⁵⁸ Lastly, QUANGOs could lead to a finding which determines the State's liability.

Some interesting derogations from this picture are provided by the Belgian situation. In some cases, the specific location of QUANGOs among the Executive and the Legislative

¹⁵⁷ The Danish National Research Foundation can be mentioned as an example.

¹⁵⁸ For instance, for decisions from the '*conseil de la concurrence*'.

branches brings them within the sphere of the Legislative branch. In those cases, QUANGOs are not qualified under Belgian law as ‘*autorités administratives*’, and their acts are not subject to the control of the Conseil d’Etat.¹⁵⁹ Secondly, in some cases, the competent court is not the Conseil d’Etat but the judicial court (especially the Brussels court of appeal) as is the case in France. However, in Belgium, the powers recognized for the court of appeal do not encompass all the activities of QUANGOs. This puts the relevance of the claimed aims of the unity of case law, simplicity, speed, reinforcement of legal security, etc. into perspective. As Belgium has a limited judicial review of legislative acts, it means that QUANGOs may promulgate acts without any judicial control being possible.

Secondly, concerns regarding the use of a specialized court requires some reflexion on its powers. How does this court acquire this expertise? What kind of expertise is required? The normal expert authority regarding administrative acts is the Conseil d’Etat. However, if the expertise lies in the specific and technical field, ways of obtaining this experience are needed. However, in some cases, the court not only has a limited power to control legality, but also enjoys full jurisdiction, which implies that it must reassess the case on the merits, and can thus substitute its decision for that of the QUANGO. This generates many questions regarding the actual independence of the QUANGOs from the political control that should surround such politically tainted decisions, decisions which are normally taken by a politically responsible authority.

4. Conclusion – The QUANGO: a System Somewhere in between Facts and Norms

61. QUANGOs are created and used as an alternative to the traditional organization of the State, which is supposed to fulfill a role of social and economic regulation. Many countries have been caught in a legitimacy crisis for quite some time. One solution was/is to use independent experts to help fulfill the State’s regulatory functions (used in its ordinary sense). Those experts are now found in QUANGOs. This raises a number of questions, which we will attempt to address, albeit in a summary fashion.

¹⁵⁹

La situation des ‘comités sectoriels’ institués au sein de la Commission de protection de la vie privée en offre une illustration intéressante. [...] [A la suite d’une récente transformation] en organe collatéral du pouvoir législatif fédéral, la Commission de protection de la vie privée ne pourrait donc se voir reconnaître la qualité d’ ‘autorité administrative’ [...], faisant partager ce sort aux comités sectoriels institués en son sein. Cet assujettissement à un organe du pouvoir législatif exclut donc que les actes de ces comités sectoriels puissent faire l’objet d’un recours en annulation devant le Conseil d’Etat, à tout le moins en l’état actuel de la législation [...].

62. The position of QUANGOs in the fifteen countries studied here differs. In some countries, QUANGOs do not give rise to any debate,¹⁶⁰ while their constitutionality is questioned in others.¹⁶¹ Interestingly, in spite of doubts surrounding their legality, they do not enjoy some rule-making power in the latter countries.

However, we have noted a number of mechanisms – germane to each country – through which the autonomy of the entity is circumscribed. Among those factors restraining QUANGOs, their rule-making power is very limited, with some exceptions. In the United States, a broad discretion is given to the QUANGOs: Where the legal basis remains unclear, the attribution of rule-making power is presumed. This is not the case in a number of countries, however, as a number of national reports attest. As one concluded:

All in all, the regulatory powers of QUANGOs remain controversial.¹⁶²

or

Or il apparaît qu'en réalité, le pouvoir règlementaire des autorités administratives indépendantes n'est que très secondaire par rapport aux autres pouvoirs qui leur sont octroyés, qu'il s'agisse du pouvoir d'accorder des autorisations, de régler des différends ou encore de prononcer des sanctions.¹⁶³

63. In view of this statement, the following pages will attempt to briefly summarize the main underlying questions concerning the rule-making power of QUANGOs.

64. First, the position of QUANGOs with regard to both the Legislative and the Executive branches is not always solid. In the USA, for instance,

In fact, as in Europe, the constitutionality of the design of independent agencies has been a matter of controversy. The reasons for the controversy were similar. The organizational separation and the correlative degree of independence, on the one hand, seem not to square with the constitutional vision of the presidential leadership of administration [...], the delegation of legislative, executive and adjudicatory powers [...], on the other hand, seems to flout the separation of powers enshrined in the Constitution. [...] The Supreme Court also validated the limitation of the President's power to remove their commissioners [...], although independence from the President seems to establish independent agencies as competitors with the chief of Executive branch.

65. Secondly, research on rule-making power tends to confirm the difficulties found in answering the following question “how will who hold whom accountable for what?”

In this report, the “what” corresponds to the existence and the use of the rule-making power by the QUANGOs. Rule-making can be described as a way of influencing and modeling facts and reality towards a defined goal by means of general, abstract, impersonal

¹⁶⁰ *E.g.*, Spain.

¹⁶¹ *E.g.*, Belgium; even in the USA, “Nevertheless, the existence of the IRAs still stirs up a legal controversy despite these judicial pronouncements.”

¹⁶² Dutch report.

¹⁶³ French report.

and binding or non-binding rules. In what follows, we will focus on the issues in countries other than the USA. Consequently, rule-making will be used in a narrow sense, thus excluding non-binding rules.

Since QUANGOs' rule-making power is often very limited and given that expectations concerning their efficiency are high, QUANGOs seem to be entitled to use any available tool that is likely to provide some security to users, and which is reliable, or is meant to shape their "policy".¹⁶⁴ Given the crisis of legitimacy experienced by Western states in general, QUANGOs are supposed to fill the gap between traditional bodies and users, that is, citizens, in a neutral and efficient way. As a rule, to make the link between the general laws and the individual situations, there is the rule-making power or the regulatory power. If this tool is not given to QUANGOs, what can they do? One solution is to use instruments which are not formally recognized as 'règlements', but which are meant to guide public behaviour. How is such a power given and used? What are the limits of such a delegation?

Again, we come back to the question: "How will who hold whom accountable for those general rules?"

In order to answer this question, we must fall back on the classical mechanisms of accountability, where the body that takes a decision should be held politically responsible before Parliament (in a representative democracy). On the one hand, QUANGOs are not systematically accountable to Parliament. Their accountability is often limited to annual reports. Even if some kind of accountability can be found in theory, practice is sometimes disappointing. On the other hand, in view of the constitutional principle of ministerial responsibility, the Executive might have to be accountable before Parliament for the rules issued by QUANGOs in some countries. However, once this principle is acknowledged, it is difficult to identify practical measures that completely ensure the independence of QUANGOs and make it possible for Ministers to have their say regarding the workings of QUANGOs. We are thus often faced with a "catch twenty-two" scenario in terms of the autonomy of the entity and ministerial responsibility: How can ministers remain accountable before Parliament for the acts of an entity that they may not or cannot steer?

As a result of the lack of full political responsibility on the part of QUANGOs before Parliament (beyond an annual report and the approbation of the budget), the system is very reluctant to recognize the actual extent of the tasks performed by QUANGOs. Indeed, while a QUANGO may prepare nearly every single detail of the rules (règlement), the minister may only endorse it with a formal act called homologation, ratification or approbation. The question then is whether the minister is actually able to assess all the aspects of his/her endorsement. When the only options are to approve, refuse or delay, what kind of control does the Minister actually exercise? Does the control not depend on the Minister's trust

¹⁶⁴ But are they really supposed to develop and carry out their own policy?

in the quality and expertise of the preparing entity? Or on the information provided by the QUANGO itself? How can the minister go beyond the specific interest of a sector, as assessed normally only on a technical basis by the QUANGO, to protect the general interest? A partial answer may be that other actors (another QUANGO whether or not on a consultative basis, lobby groups, trade unions) will react and act as a control mechanism. However, these forms of “informal” control generate a rather opaque framework to elaborate the rules, in a time when openness, transparency and debate are promoted. Besides, the minister might encounter an obstacle in doing so as the trust in the public has been placed in the hands of experts, striving to supplement the legitimacy of politics.

If a real decision is taken at the QUANGO level, the correlative responsibility needs to be transferred to them and clearly limited, and not remain at a ministerial level that does not have the required means to control QUANGOs effectively. Not proceeding to such a transfer may result in some kind of immunity for QUANGOs.

The same question of the ability to steer or to direct QUANGOs exists when the minister is supposed to issue general directions or guidance to the entity without any say in specific cases. How can the minister have the necessary expertise to know what kind of directions are needed? In that case, once again, the minister depends on information provided by QUANGOs themselves.

66. One can go one step further. Even if those mechanisms are improved in such a way that they become more user-friendly (the user being the consumer or political bodies), a very important element should be kept in mind, in our opinion. Indeed, QUANGOs are more or less left in that unorganized framework in many countries,¹⁶⁵ because it is often believed that their discretionary power is rather limited, that it remains technical and, presumably, without any political content.¹⁶⁶ In other words, QUANGOs are assumed not to be involved in any kind of arbitration between competing interests.¹⁶⁷

¹⁶⁵ The very recent attempts to change this in countries like the Netherlands or France do not alter this statement.

¹⁶⁶ The discretionary power of QUANGOs might be broader in very different aspects: in the general activities that the entity wants to fulfil, in the interpretation of the rules, in the individual decision-making, in the guidelines, good practices and so on, advice and recommendations during the rule-making process or the legislative process. By such practices, the impact and the influence of QUANGOs might be very important. One can state that as such an influence does not fit in with the traditional legal thoughts of many countries, those practices are not really subject to any kind of real accountability in most of the countries surveyed.

¹⁶⁷ For instance:

[...] même limité aux cas individuels, le pouvoir d'adopter des décisions ne peut être confié à une agence que dans un domaine technique unique. Ce domaine [...] ne doit laisser à l'agence aucune marge d'appréciation politique ou économique. C'est la raison pour laquelle l'agence ne peut être investie de sa mission que dans un seul domaine (underlined in the text), 'spécialisé' pour reprendre le terme du Livre blanc sur la gouvernance européenne; à défaut [...], l'agence pourrait être conduite à effectuer des arbitrages, disposant ainsi d'un pouvoir d'appréciation qui ne pourrait relever que d'une autorité politique.

(French Senate report, *supra* note 4, p. 35-36.)

Such assumptions lead to a possible fragmentation of the decision-making power, a possibility outlined as follows:

Il faut relever ensuite que la légitimité de l'Etat tient à ce qu'il demeure le garant de l'intérêt général. Cette fonction même de l'Etat cadre mal avec sa parcellisation, fût-elle justifiée par le souci de mieux assurer certaines missions sectorielles. Elle suppose en effet de réaliser en permanence, à des degrés divers, mais qui peuvent être essentiels pour les équilibres du pays, des arbitrages entre des intérêts contradictoires, sectoriels ou non. Des mesures qui, par exemple, auront un impact économique positif sur tel ou tel secteur peuvent avoir des contreparties défavorables sur le plan social ou de l'environnement et des effets politiques déstabilisants, et inversement. Il revient alors à l'autorité publique de trouver le bon équilibre entre des exigences qui s'opposent et d'identifier l'intérêt général dans la contradiction d'impératifs divers. Or la multiplication d'autorités indépendantes au sein même de l'administration rend sinon impossibles, du moins beaucoup plus complexes, ces arbitrages. Le Gouvernement n'a plus toutes les cartes en main et se prive de la capacité de jouer sur plusieurs registres, de renoncer à telle mesure pour mieux faire accepter telle autre ou de choisir telle solution, certes mal reçue par certains secteurs de la société, mais préservant l'intérêt général.

En effet, par construction, la compétence d'une autorité administrative indépendante est spécialisée, sa mission très encadrée et son approche sectorielle, voire dans certains cas '*monoculturelle*'. Elle dispose des outils nécessaires pour élaborer la solution technique la plus adéquate au regard des intérêts qu'elle est en charge de protéger. En revanche, elle est très généralement dans l'impossibilité de faire entrer dans ses décisions des considérations qui excéderaient son domaine de compétence et de vérifier que ses décisions s'intègrent harmonieusement dans le contexte économique, politique et social.¹⁶⁸

The above quotation underlines the consequences of specialized decisions for the 'general interest'. A so-called 'technical' decision is not always free of any political, economic or social considerations. Who says that something is technical? What are the interests behind those decisions?

67. Another way of achieving some degree of control over QUANGOs' decisions might be through "extended accountability". It requires participation, consultation, reasoned decisions, explanations (in short "transparency") with regard to bodies other than political ones (namely towards citizens or the parties concerned). Here, representative democracy is supplemented, though not replaced, by "participatory" democracy. However, some questions also remain:

- How are those rules of participation formalized?
- How can it be guaranteed that those new methods operate correctly?
- What happens if those rule are not properly applied?

Moreover, several (maybe only theoretical?) questions are worth considering. Firstly, how is the general interest ensured in such a system? The central organ (Parliament) that should be the watchdog for the determination (if not the implementation) of the general interest is somehow bypassed. QUANGOs pursue only some kinds of specific competences, and do not have any power to go beyond this.

Secondly, what happens in the case of a conflict between the rules or the system of law put in place by QUANGOs and their actors (with the participation of citizens) on the one hand,

¹⁶⁸ Rapport du Conseil d'Etat français, *supra* note 47, p. 375.

and the general interest as it can be still determined by Parliament, on the other? A conflict can arise in the determination of a rule. This results in a conflict of legitimacy: How can a decision developed through participation be set aside by a decision defined through representation?

68. This can lead to additional disturbing questions since breaches of those rules cannot easily be established, can be interpreted in many ways, are not subject to clear control. Some alternative practices or an elaboration of the rule may be taking place in the absence of any clear rules of accountability. Such a result would be counterproductive and contradict the quest for the enhancement of citizens trust and for the credibility of QUANGOs. One would be faced with a breach of transparency, the opposite of the result sought.

One solution could be a formalisation of the developed practice through clear principles, modalities and control. Another solution could lie in a wider recognition of the rule-making power of QUANGOs. Before stressing the importance of procedural safeguards and citizen participation, the German report seems to be in favour of such a solution when it states:

There are several potent arguments in favour of the expansion of executive rule-making capacities. First of all, the performance of legislative duties by the administration would greatly relieve an often overwhelmed parliament. Secondly, decision-making costs within the executive branch would be lower than in the legislative branch. Thirdly, special agencies – like the Environmental Protection Agency, which employs scientists and technicians – are able to use their expertise [...]; therefore, the delegation of certain tasks to agencies makes sense in highly specialised technical areas requiring advanced expertise [...]. Also, it is advantageous that those agency decisions are based on purely technical evaluations and are not influenced by political considerations [...]. Fourthly, a delegation of legislative powers to an administrative agency creates a useful flexibility (e.g. in fields where technology is rapidly developing, such as in environmental controls), and it enables prompt (re)actions in situations when Parliament is not in session or the legislative process in Parliament is lagging.

69. While QUANGOs were supposed to be an alternative to some problems of the traditional State organisation, they have been established in many cases without a proper adaptation of the normative framework which surrounds them.

As a result of the consciousness of the phenomenon, the powers granted to QUANGOs rarely encompass formal rule-making. There is no recognition that such powers require some checks and balances that are not yet there – neither on a theoretical nor a practical level.

However, as efficiency, credibility and/or foreseeability are required from QUANGOs, they need instruments that satisfy the expectations of those who are regulated and guide public behaviour. As they rarely enjoy “rule-making” power, they issue instruments without any legal status (codes, guidelines, interpretations). And this can be *the* problem for the QUANGOs: For all the grey zones surrounding QUANGOs’ informal powers (their existence, forms, scope, sanctions, accountability), no clear rules are defined in many cases.