

Dutch Government Foundations: Between Autonomy and Accountability

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1 Introduction

In the Netherlands a 'government foundation' is a flexible legal form readily employed by state departments to perform public tasks. Foundations have legal personality based on private law, and are managed by a board. There are relatively few rules and standards that regulate these foundations except a charter document for the establishment of government foundations published in 2006 by the Ministry of Finance.²

We observe a steady growth of the number of government foundations in the Netherlands that operate with a large degree of autonomy for obtaining loans from capital markets, the discretion to participate in public-private partnerships, and deciding about their own budget without prior consent of the parent department.³ Large amounts of public money are channeled through these government foundations, nevertheless state control and supervision are deliberately kept limited in order to let them operate as independently as possible. This trend has resulted in a limited transparency about the foundations' performance and responsibilities. Ministerial departments, inspections, and other control agencies are hampered in their ability to verify the legality and efficiency of the public spending done by these government foundations.

Problems come often to the surface when these foundations grab the headlines and public money is already wasted. In 2009, a cultural foundation went bankrupt due to financial malpractices. Remarkable detail was that this foundation was presided by the state secretary of the department that was responsible for its establishment three years earlier. Another foundation, one of the largest providers of home care in the Netherlands was also at the brink of failure, but was given a life line by transferring vital business parts into two newly established foundations provided with funding by the national government.

These are just two recent examples that illustrate the particular role that the Dutch government plays in relation to foundations that operate at its arm's length or

2 Appendix Tweede Kamer, 2006-2007, 25 268, nr. 42

3 Zicht op veranderingen in financiële relaties tussen Rijk en derden. Tweede Kamer, vergaderjaar 2009-2009, 31 887, nrs. 1-2.

at further distance. It poses questions about, on the one hand, the responsibility, steering power, and the control of the state departments, and on the other hand, the foundations' autonomy, maneuvering space and their accountability.

Scholars are often divided on the above mentioned issues and the different views fit into the traditional fault lines of, on the one hand, the supporters of NPM, privatization, and liberalization who state that bureaucratic control suffocates initiatives and is counterproductive and, on the other hand, those who state that the public administration is now beyond the effective control of democratic institutions in many Western countries.⁴

In the last decade, researchers in the field of public administration have focused their attention on public sector executive agencies or quasi-autonomous organisations (quango's), in Dutch they are called ZBOs.⁵ Nevertheless, research on government foundation remains rather limited, and is mostly done by legal experts who concentrate on legal matters.⁶

The main objective of this paper is to provide more empirical data about the establishment, functioning and dissolution of government foundations and to analyse the governmental dilemma between autonomy and accountability. The paper will answer this central research question: "Is the present regulatory regime on Dutch government foundations prompting accountability risks and – in case that is true – what are the consequences and solutions?" This touches on the foundations' internal governance, monitoring and evaluation, transparency and accountability, and EU procurement rules for public agencies. The paper, firstly, explores the field in which government foundations operate, receive public money, and maintain financial and administrative linkages with governmental departments. Secondly, a more in-depth view will present a life-cycle analysis of government foundations that comprises their establishment, functioning and dissolution. Finally, the paper will compare the

4 The split is concisely outlined in F. Ankersmit & L. Klinkers (Eds.), *De tien plagen van de staat: de bedrijfsmatige overheid gewogen*. Amsterdam: Van Gennep.

5 For research on the European dimension: Comparative Public Organization Data Base for Research and Analysis. <http://www.publicmanagement-cobra.org/>.

For research on the Netherlands: Thiel, S. van, & Buuren, A. van. (2001). Ontwikkeling van het aantal zelfstandige bestuursorganen tussen 1993 en 2000: zijn zbo's 'uit' de mode? *Bestuurswetenschappen*, 55(5), 386-404.

6 Schroten, K. (2000) *De overheidsstichting op het niveau van de centrale overheid*. Instituut voor Staats- en Bestuursrecht. Proefschrift Universiteit Utrecht.

Schreuder, C.A. (1994) Publieke taken, private rechtspersonen. Proefschrift Rijksuniversiteit Groningen, Deventer: Kluwer.

Zijlstra, S.E. (2008). De grenzen van de overheid. In S.E. Zijlstra & R.A.J. van Gestel (Eds.), *Privaat bestuur?* (VAR-reeks, 140) (pp. 9-93). Den Haag: Boom juridische uitgevers.

legal equivalents of this Dutch legal form in other European countries in relation to accountability and autonomy.

A cross-cutting theme of the paper will be to determine whether and how regulations can strike a balance between the autonomy and accountability of government foundations. This boils down in administrative terms to what kind of ministerial responsibility is adequate and appropriate after the foundation's establishment that safeguards the control on public spending and at the same time does not impair government foundations in performing public tasks for which they are considered to be the most appropriate entities.

Government foundations in relation to the trend of agentification

In the paper 'The rise of executive agencies: comparing the agentification of 25 tasks in 21 countries' Van Thiel (2009) addresses two problems in agentification research: the definition problem and the lack of systematic comparative research. Our research shows that the definition problem of agentification also plays a role at the level of government foundations. Van Thiel (2009) distinguishes six categories of public sector organizations or agencies: government units, semi-autonomous organizations, legally independent bodies, private law organizations established by government, sub-national bodies of government and others. Government foundations belong to the third category of private law organizations established by government, but this particular type of foundations remains rather diffuse and contains very different types of organizations. Moreover, the legal equivalent in neighbouring countries is often difficult to pinpoint, but the problematic relationship between the government and private organizations that it has created, is remarkably similar across borders.

The Netherlands is a country teeming with foundations and most Dutch ministers can't bear the temptation to establish one or more. In the paper we describe the administrative context in which government foundations operate, and also their entire life cycle. We're not only interested how the process of establishment takes place, but also how such a legal form evolves and transforms readily and profoundly.

We have also noticed a lack of systematic comparative research. Empirical research on government foundations is scarce and restricted to case study research. We tried to combine various research methods to get a more systematic view of the field of government foundations. We made a broadly quantitative overview of all current government foundations of all ministries and selected 20 cases for further analysis. We also made a comparison in historical and geographical perspective. We described

the rise of Dutch government foundations since the nineteenth centuries and made a comparison with government foundations in Belgium, France, Canada and Sweden.

Other research on agentification by the Netherlands Court of Audit

The research of government foundation is just one part of a broader research program of the Netherlands Court of Audit about agencies at the fringes of central government. We're especially interested in ZBO's, RWT's and new financial relationships between government and private partners. In our research on new financial relations we identified the increasing use of private-law arrangements and public-private partnerships by government as a major trends in the financial relationships between central government and private sector partners. Two specific types of private-law concepts are becoming increasingly popular as vehicles for the financial relationships between central government and private sector partners. First, private-law arrangements between central government and private sector partners. And second, implementation of government policies by organisations governed by private law.

In the series about 'Legal persons with statutory tasks' and 'Enhancing public accountability' (2004) the Netherlands Court of Audit has looked at different elements of public accountability, namely vertical accountability to Ministers and Parliament, internal accountability to a supervisory board and social accountability to society as a whole. Agencies like RWT's, ZBO's and government foundations are increasingly becoming more important; and today they spend together even more public money than the central government does itself. Ministers are responsible to control whether they spend their public funds correctly and effectively. To obtain the greatest possible insight,

2 Overview of Dutch government foundations

2.1 Historical background

The Netherlands is a country teeming with foundations. In 2007 it had 160,000 – one for every hundred inhabitants – and this figure makes it the leading nation in Europe for foundations (Bieleman *et al.* 2007, 11-12).

Wealthy Dutch citizens and civic organisations have been establishing foundations since the Middle Ages, chiefly for charitable purposes. Government foundations, by contrast, are relatively new; the first ones were established during the economic depression of the 1930s to stimulate agriculture and organise labour camps (Donner 1987, 50; Zwart 1937, 17). By 1935, central government had established 18 foundations and regional authorities 11 (Algemene Rekenkamer 1935). During the Second World War foundations were crucial for food distribution and in the 1950s they proliferated in the agricultural sector and reached a total of 45 (Van der Grinten 1958). An inventory in 1958 by the Van der Grinten Commission (*op. cit.*) counted 101 foundations established or co-established by central government and 142 subject to ministerial oversight (113) or assigned with a statutory task (29). From the 1980s until the mid-1990s, the 'agentification' of governmental tasks was on the rise and the number of newly established government foundations mushroomed. This trend went hand in hand with the privatisation of public services and the appearance of autonomous governmental agencies.

2.2 Laws and regulations

For a long time, the establishment of foundations was not regulated except for the sporadic need to obtain the consent of a local or regional authority (Bieleman *et al.* 2007, 11). The Dutch Supreme Court stated in 1882 that foundations could be established without state involvement and that they acquired legal personality automatically. The legal status of foundations remained weak and was based only on

common law and jurisprudence until the Act on Foundations of 1956, which was incorporated into the Dutch Civil Code in 1976 (BW 2:6).

For several decades, ministers had complete liberty to establish government foundations, a situation that lasted until the Government Accounts Act of 1976. From that date on, ministers needed legal approval to establish a foundation and this extra procedure slowed down the process. A new impulse was given in 1989 by a new and faster procedure known as the '*voorhangprocedure*', which replaced the legal approval and speeded up the establishment of government foundations again. The *voorhangprocedure* requires an advisory report by the Court of Audit, approval by the government, and notification to parliament, which can request extra information or conditions (Government Accounts Act, 2001).

Approximately 25% of the current 285 government foundations covered by our survey are 'quangos', known in Dutch as *Zelfstandige BestuursOrganen* (ZBO⁷) or *Rechtspersonen met een Wettelijke Taak* (RWT⁸). Ministerial responsibility for ZBOs is laid down in a legal framework introduced in 2007⁹. The *Kaderwet zbo's* regulates ministerial competences such as power to appoint the board and approve the annual budget. For the other 75% of government foundations, there are no specific rules on the relationship between the minister and the foundation. It is determined by provisions in the funding agreements, contracts and articles of each foundation. The Government Accounts Act of 2001 (section 20) enables the Court of Audit to audit the subsidies that foundations receive from central government.

The government has approved a charter for foundations that was proposed by the Ministry of Finance (Ministerie van Financiën 2006). It stipulates that central government should be involved in the establishment of a foundation only in exceptional circumstances. Additionally, the charter offers a number of guidelines on ministerial powers should the government decide to become involved. Significantly, the charter does not provide binding regulations and states that the final selection of one regime in preference to another should be tailored to the specific context in which a foundation is established.

2.3 Quantitative data

⁷ A ZBO is a central government body that is authorised by law or by ministerial regulation and that is not hierarchically subordinate to any minister.

⁸An RWT is a legal person with a statutory task that is partially or completely funded by means of fees that are levied by law. About 80% of ZBOs are also RWTs.

⁹ *Kaderwet zbo's* of 1 February 2007.

Our survey covered a total of 285 government foundations that existed at the end of 2008 and which central government had established (100), co-established (61), or instigated their establishment (124). In 1991, there had been 93 foundations; their number increased dramatically in 1994 when state museums became independent. During the period 1991-2008, the government was involved in the establishment of 283 foundations and the dissolution of 91.

Figure 1: Government foundations established, dissolved and total numbers between 1991-2008.

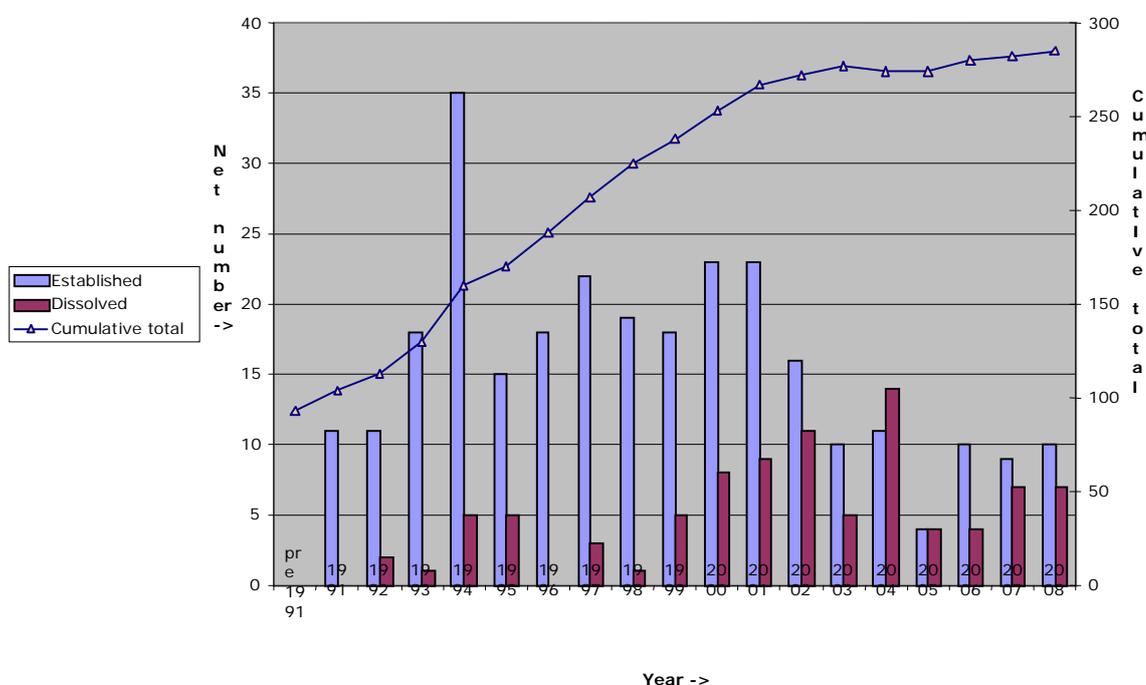


Figure 1 suggests that the life cycle of foundations is relatively short because the appearance of new foundations is closely matched by the disappearance of others. This disappearance, however, does not imply that the operational area of a particular foundation has also disappeared – separate foundations often lose their independent status and merge into a new foundation. This phenomenon corresponds with the situation for ZBOs and RWTs, which were the subjects of previous surveys by the Court of Audit.

Foundations address specific challenges and operate in such diverse areas as social care, development aid, culture, and scientific research. They are active as expertise centres, supervisors of financial markets, quality controllers, subsidy providers and asset managers. Almost a quarter of these foundations have a special task laid down

in law that gives them the status of ZBO (7), RWT (31) or a combined status of ZBO and RWT (31).

2.4 Financial importance

Government foundations form a colourful collection for which there is no clear classification owing to their diversity and variety in size and complexity. Some foundations are small organisations with an annual, government-funded budget of only €10,000; others are complex conglomerates with subsidiary foundations such as public private partnerships that manage several hundred million euros every year. Between these two extremes lies a myriad of foundations with a correspondingly wide range of financial assets.

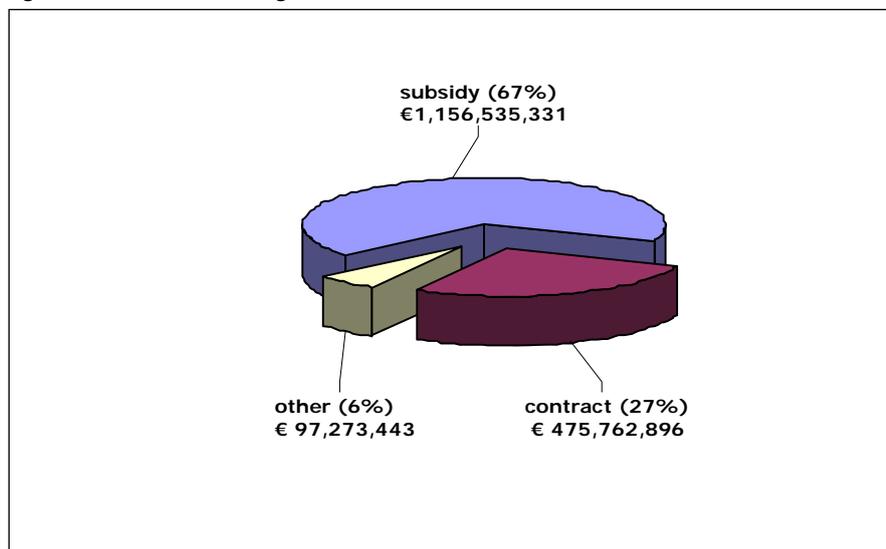
The ministries provided financial data on 124 foundations. In 2007, they managed total revenues of €6.2 billion and their assets represented €5.9 billion. Remarkably, the ten largest foundations accounted for more than €4.8 billion of the assets. The largest are the VUT early retirement fund (€1.7 billion), the State Lottery (€0.8 billion) and the NOS public broadcasting company (€0.8 billion). Less than 15% of the revenues of the largest foundations consisted of public money; the remainder was generated through the foundations' own activities and statutory charges.

Figure 2: Number of foundations and their revenue per category

2.5 Public funding

We obtained figures on the public funding of 153 foundations in 2007. The government provided a total of €1.72 billion, 67% in the form of subsidies, 27% in the form of paid engagements and 6% in the form of public contributions, allowances, loans and payments in kind. Almost half of the total public funding (€840 million) was provided to nine foundations.

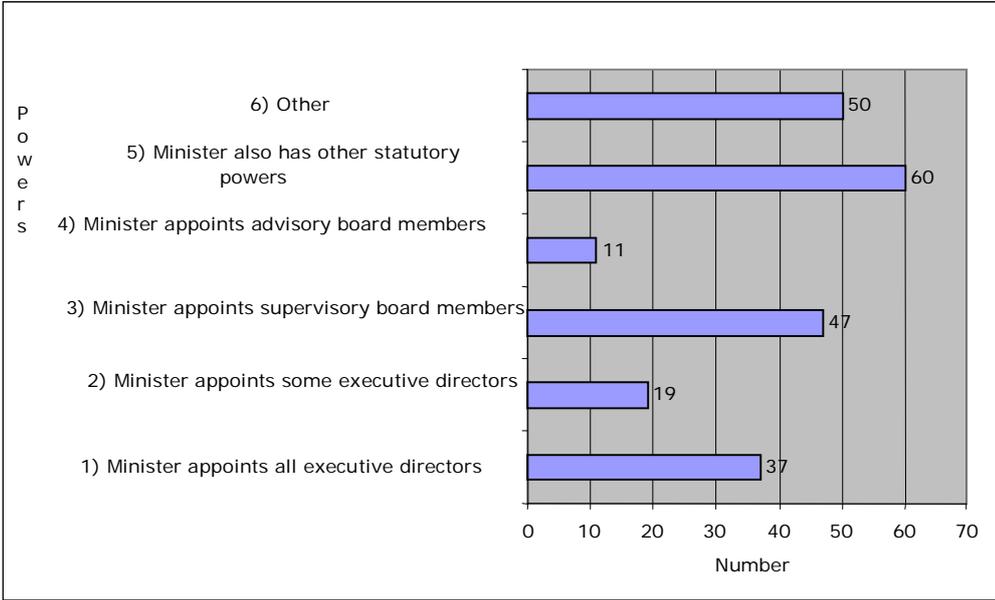
Figure 3: Public funding of 153 foundations in 2007



2.6 Relationship between foundations and government

We obtained information on 198 foundations regarding their relationship with the ministries. A large majority (149) has an administrative relationship with the responsible ministry. The degree of control the responsible minister exercises varies; it includes the appointment of individuals to the board of directors, the advisory board and the supervisory board and the approval of the annual accounts and changes in the articles of association.

Figure 4: Type of ministerial oversight of foundations



3 Life cycle of government foundations

3.1 Selection and methodology

We have composed an inventory of 285 government foundations in collaboration with the governmental departments and have selected 22 cases for further analysis. Each department is represented with two cases; one with a small and another with a large financial significance. Foundations that are ZBOs or RWTs have been excluded because they have already been regulated in previous audits (see section 1). For each case, we have analysed the foundations' annual reports and articles of association, and the departments' funding agreements and minutes about these foundations. Another used research instrument is questionnaire that has been discussed with the foundations and the responsible departments. Respondents have cooperated with this research based on the fact that data will be published anonymously.

3.2 A foundation's internal organisation and establishment

The internal organisation of foundations differs largely and contains in most cases a governing council and a director; there is often also a supervisory board, or advisory board, or a program board, or of combination of the latter three. The tasks and powers of all these different bodies can vary largely and is further outlined in the foundations' articles of association.

The literature discerns six motives for the establishment of government foundations to cover a certain policy area:

- Speed, convenience, and flexibility;¹⁰
- Reducing the number of civil servants on a department's payroll;¹¹
- Independent organisation with less interference by Parliament and the Minister about activities, administration and the management;¹²
- Avoiding supervision, control and accountability;¹³

¹⁰ Schreuder 1994, p. 365

¹¹ Sylvester 1999, p. 63; Zwart 1937, p. 17

¹² Van der Grinten 1958, p. 13

- Stimulating public-private partnerships;¹⁴
- Strengthening a department's independence.¹⁵

The case studies have confirmed each of the above mentioned establishment motives. The most heard reason for establishing a foundation is the speed and flexibility of this legal form; a visit to a notary and a notification to Parliament are the only formal requirements for the establishment of a foundation in the Netherlands. Another recurrent reason is the wish for an independent organisation, free from existing structures and vested interests of the parties involved. Also mentioned was 'facilitating and stimulating the collaboration between governments and private partners'. Foundations open the door to the expertise and support of the private sector, and private partners are also more willing to finance a foundation than an initiative that is directly managed by the government.

A new motive that we have found is the wish to organise and regroup the implementation in a certain policy area in case a department identifies overlap, inefficiencies, or territorial gaps in the work of existing foundations. We also came across a foundation established to maintain the public service performed by another foundation that was at the brink of failure. A final reason is to respond to a motion of Parliament for establishing a particular foundation, even if that implies that a department has to take action *à contre coeur*.

Crucial points for the establishment of foundations

Our analysis has brought up four aspects that we consider crucial when establishing a foundation and that are often not addressed when governments decide to be involved in the establishment of a new government foundation.

The first one is **a business case and business plan**. In the majority of the cases, parties involved in a foundation's establishment do without an elaborated business case that includes a cost benefit analysis to assess the viability of the new foundation. Neither do they make a business plan that gives a systematic overview of how the foundation will function to reach its goals. Both are particularly important documents when one may reasonably expect that the foundation one day will operate in a market with profit seeking competitors. This ambitious goal is not

¹³ Polak 1955, p. 194; Schreuder 1994, p. 74; Simons 1960, p. 191; Van der Grinten 1958, p. 13

¹⁴ Van der Grinten 1958, p. 12; Simons 1960, p. 191; Schreuder 1994, p. 412

¹⁵ Commissie Kohnstamm

always outlined at the birth of a foundation when the public interest is still prevailing, but there are several foundations that operate in sectors such as legal services, social care, and infrastructure that gradually have moved up into the direction of competitive markets. In case a foundation would enter a new stage of life, the initial business plan is a valuable reference point that can be rewritten.

Secondly, **the articles of association require special attention.** We have found almost as many different statutes as there are foundations. This heterogeneity is in itself not a cause of concern, but more serious is that elementary provisions in the statutes are lacking or not carefully formulated. In one case, a foundation was entirely financed by public assignments, but the formulation in the statutes suggested that its assets consisted of governmental 'contributions', which wrongly suggested that there existed a funding relationship between the government and the foundation. A final element is that the 'deed of foundation' does not always mention whether the special procedure for the creation of government foundations (*voorhangprocedure*) has lawfully been accomplished.

A third point is the proper arrangement **of the internal and external governance of foundations.** Many foundations in the survey have not arranged the internal monitoring and control procedures, and the external mechanisms of accountability, government control, and supervision vary a lot. Another weak point is the alignment between internal and external governance. In one particular a foundation largely financed by the government lacked internal and external control mechanisms. In another case they had overseen a procedure for the dismissal of a malfunctioning director. When the governing council had difficulty to sack him, the mediation ended in heavy indemnities, which were largely paid with public money.

The fourth point concerns a foundation's **clearly defined way to address the general interest.** It often remains not clear what interests a foundation is addressing and how and if these particular interests are related to the public interest. We state that a foundation's clearly formulated goal and link to the public interest enables it to characterise and distinguish itself and, at the same time, gives the responsible minister a yardstick to control whether that foundation is still fulfilling its task without drifting too far away from initially set goals. Another benefit of articulating the public interest is that it relates powers and responsibilities of both the foundation and the mother department.

3.3 A foundation's evolution

Our analysis shows that government foundations form a heterogeneous category of organisations at arm's length of the central government that exert a wide range of activities. Consequently, the relationship between these foundations and the responsible departments varies also considerable and shows large extremes. Some foundations have very close administrative and financial ties with the department, but these foundations independently implement the department's policies on a daily basis. Other foundations that once have been established by the central government have evolved into organisations that operate autonomously and sail under their own steam financed by external assignments. There are even extreme cases of government foundations that soon after their establishment become fully privatised organisations that operate in competitive markets such as the Regional Education Centres (the so-called ROIs).

This large variety in relationships between foundation and responsible ministry could be considered as a normal and unproblematic consequence of government foundations, but that does not count for some serious flaws in the relationship management. A number of foundations complains that the relationship with the responsible department lacks any formal procedures and sometimes hinge on contacts with one individual official. This becomes problematic when this person is transferred to another position or a department loses the entire expertise about a foundation's operational area after an official has left the department. This point is exacerbated if more than one department is involved in the foundation's establishment and the shared responsibilities are not clearly outlined. We identified several foundations whose responsible departments were not aware of each other's role and the rights and duties were not coordinated. Therefore, we believe that departments should internally organise institutionalised provisions to guarantee sufficient in-house expertise and continuity in the relationship with foundations.

The different approaches of ministries and foundations are also related to different time perspectives. Foundations, on the hand, require funding that goes beyond the annual appropriations to give them the financial stability needed for the medium- and long-term planning. Ministries, on the other hand, are reluctant to long-term funding agreements because it leaves them little leeway to modify the conditions during the agreed period. In addition, the moment of renewal of the funding agreement is a crucial stage in the departmental evaluation and ensures the foundations' adherence to the agreements' terms and conditions. Yet, there is a shared interest that foundations have enough stability to develop a long-term strategy. This need for stability is also accepted jurisprudence of administrative

courts based on the principle of legal security and that, therefore, departments can only unilaterally end a long standing subsidy after a reasonable transitional stage.¹⁶

Another issue that the responsible ministries have poorly arranged and regulated, is the privatisation of government foundations. A considerable number of government foundations evolve into semi-privatised enterprises by developing commercial activities or entering competitive markets. In most cases, previous approval from the responsible department was not necessary to gradually jettison a foundation's initial public philosophy. That is remarkable and worrisome because such a commercial strategy poses not only opportunities but also serious financial risks that often have to be covered by the state. In addition, it has consequences for European legal matters concerning state aid and distortion of competition (see 3.5).

3.4 Dissolution of a foundation

Due to the foundations' dependence on public funding provisions it is a rightful question to arrange the recovery of unspent funds in the event a foundation is wound down. We found many different regimes, outlined in the foundations' articles, that mostly authorise the governing council under the eye of a supervisory board to liquidate the assets in accordance with the foundation's goal. Many articles mention the ministerial approval for the liquidation and that can lead to judicial conflicts when a foundation is dissolved and partially integrated in another existing foundation. Sometimes, it is the minister himself who decides the allocation of a credit, and in exceptional cases the remaining sum is divided per ratio under the founding organisations of the foundation.

We found two points of concern in relation to the dissolution of government foundation. The first one is the lack of information of Parliament that is involved in the establishment of a foundation through a legal procedure, but is not informed about its dissolution. This means that Parliament loses sight once a foundation is established and is not able to supervise the foundations' activities and the developments in the fields they operate. This could be solved by an obligatory procedure in which the responsible ministry announces the dissolution and explains how the foundation's public goals will be addressed in the future. The second point is the settlement of the remaining revenues of a foundation when it is wound down. The minister has not always the authority to decide what happens with the remaining money, although the capital was accumulated through public funding. This could

¹⁶ Schlössels, R.J.N. and F.A.M. Stroink. 2006. Kern van het bestuursrecht, Den Haag: Boom.

easily be repaired by making the necessary provisions in the funding agreement and the foundation's statutes.

3.5 European regulations

3.5.1 The prohibition of subsidies and state aid¹⁷

The EC Treaty generally prohibits State aid unless it is justified by reasons of general economic development. The European Commission has to determine whether an undertaking has received State aid, which is the case if the support meets the following criteria:

- there has been an intervention by the State or through State resources which can take a variety of forms such as grants, tax reliefs, guarantees, etc.)
- The undertaking is engaged in economic activity
- the intervention confers an advantage to an undertaking on a selective basis;
- competition has been or may be distorted and the intervention is likely to affect trade between Member States.

Government foundations receive public funding and fulfil in general the first criterion, except some special cases such as the Dutch National Lottery (*Staatsloterij*). A government foundation may be considered to be an undertaking in so far as it carries out economic activities, but art. 81 and 82 will not apply if it is entrusted to carry out 'services of general economic interest' such as social work, issuing licences, food control, or air traffic control. This concept of 'services of general economic interest' is not static and it is, therefore, possible that, over time, functions that may once have been considered as such will come to be regarded as economic. This has already happened for activities such as telecom, post services, and outplacement. It As a result, foundations that render services that could be considered or evolve into competitive markets have to be aware of new EU jurisprudence.

For the third criterion is stated that subsidising or other forms of financing are not considered as state aid if this is a compensation for not-for profit public services This

¹⁷ Source: www.europadecentraal.nl

comprises that the compensation is not higher than necessary to cover the costs of a public service and taking into account reasonable costs and benefits.¹⁸

3.6 International comparison

Governments in a number of Western countries establish autonomous or semi-autonomous organisations that are legal equivalents of the Dutch 'government foundation'. We investigated the situation in Belgium, France, Canada, and Sweden, where authorities are also addressing the relationship between these independent organisations and central government.

Belgium

In neighbouring Belgium there is no legal form that legally and administratively coincides with the Dutch government foundation. Yet Belgian authorities also establish private-law organisations that are designed to perform public tasks. They frequently use the legal form of a not-for-profit association called '*vereniging zonder winstoogmerk*', widely known by the acronym VZW. Most VZWs are privately organised associations operating independently of the state, but state agencies are also involved in their establishment or become part of an existing association in order to participate in its management. In such cases, the authorities establish VZWs with a view to performing public tasks chiefly in cultural and social areas. These VZWs have close ties with state departments in terms of funding and responsibilities (Velaers 1999).

In 2002 the Flemish authorities introduced a legal framework for independent agencies, including VZWs. It consists of a set of basic conditions that allow organisations to be considered external autonomous agencies, known as *extern verzelfstandigde agentschappen* (EVAs). The Flemish authorities sign a cooperation agreement with an EVA when it is recognised. The agreement regulates the basic operation of the agency and allows it a relatively large degree of operational freedom and statutory autonomy. EVAs are always governed by private law, with an emphasis on autonomy and independence from the state. This does not guarantee public accountability and transparency, however. To that end, the Flemish authorities can hold certain EVAs in strategic areas or those with significant public funding accountable through complementary agreements. These agreements contain provisions that allow the responsible minister to carry out evaluations and audits of compliance with funding agreements. They also include provisions for intervention if

¹⁸ Altmark arrest 2003

there are indications of significant departures from the terms of the funding agreements (Falke *et al.* 2005).

France

Government foundations in France are known as *Fondations reconnues d'utilité publique* (FRUP). This category of foundation represents more than a third of the almost 1,500 foundations in France. FRUPs operate mainly in the health, social and education sectors. These three sectors account for 80% of the FRUPs' total revenues, which amounted to €3.6 billion in 2005 (Fondation de France 2008).

FRUPs were regulated as from 1987 by means of complicated procedures on their establishment and operation in which state departments and the *Conseil d'Etat* had a decisive say. The regime has been liberalised since 2003 and the ensuing deregulation has diminished state control. The government can no longer appoint a state representative to a foundation's board of directors but may appoint a government commissioner without voting rights. FRUP status requires a minimum fixed capital of €1 million and is a privilege because it enjoys special legal protection and a favourable tax regime. A peculiarity in France is that public funding may represent only a minority of a FRUP's revenue and, consequently, foundations have to generate their own revenue from self-managed activities, legacies, donations and investment profits (Fondation de France 2008).

Canada

In Canada¹⁹ foundations are defined as independent, not-for-profit organisations that have received upfront federal assistance and serve a particular interest of their members or the general public in a wide range of areas such as research and development, education and the environment. Foundations can be created by separate legislation approved by parliament or by individuals or organisations under the Canada Corporations Act.

In 1997 the government introduced a new alternative service-delivery mechanism to better serve the long-term interests of Canadians and address specific challenges and strategic national needs – foundations. Between 1997 and 2005 the Canadian government transferred over €6 billion to various foundations that have become

¹⁹ Department of Finance 2008. Accountability of Foundations. www.fin.gc.ca, visited on 14-8-2009.

important vehicles for implementing policies in areas such as research and development and education. Remarkably, foundations are provided with guaranteed funding to give them the financial stability needed for medium and long-term planning and they have the ability to lever additional funds from other levels of government and the private sector.

Foundations operate independently of, and are not controlled by, the government. Although the government may appoint some individuals to the board of directors, the majority of the directors on each board are appointed by others. Foundations are accountable to the responsible ministers only for their use of federal assistance in accordance with the terms and conditions of the funding agreement. These include requirements for independent evaluations and provisions that allow the responsible minister to carry out programme evaluations, audits of compliance with funding agreements and provisions for intervention if there have been significant departures from the terms of the funding agreements.

Sweden

The Swedish legal form for a foundation (*stiftelser*) corresponds to a large extent with that for a government foundation in the Netherlands. Swedish foundations that are established or co-established by the state receive a single upfront endowment and have a well-defined object. After their establishment, foundations are responsible for obtaining funding from other sources than the government, which provides continuous funding to only a few specific foundations.

In 2003 the government called a halt to the establishment of new government foundations. The 145 government foundations remaining today have total assets of approximately €3 billion. They resort under regional supervisory boards but a new law requires government foundations to be fully accountable to the responsible ministry as from 2010.

Concluding remarks on the international comparison

These different regimes and arrangements provide valuable comparative material to assess the need for similar solutions in the Netherlands. Each of the four countries considered has created a regulatory framework in one form or another for government foundations that is appropriate to their own legal and administrative system. The Flemish region has introduced a legal framework that provides a large degree of autonomy and flexibility for independent agencies, known as VZWs. In

France the government has issued rules on FRUPs, which are a privileged category of foundation, and has also limited its financial contribution to them. In Sweden the government offered only upfront funding assistance and has recently halted the establishment of new government foundations. Canada has the most liberal regime for government foundations and takes a facilitating approach to them, providing upfront financial assistance and guaranteeing a fair degree of independence.

4. Conclusions

The reality of Dutch government foundations shows much diversity in their relationships with responsible departments and is only regulated by a minimal legal framework. This raises the question whether the present regulatory regime is prompting accountability risks and – in case that is true – which consequences and solutions are deriving from these risks.

Most government foundations are addressing the public interest and that justifies special attention of the responsible departments. However, the present situation does not impose sufficient regulation and this allows departments to dodge their responsibility, because they do not acknowledge their special responsibility and consider these foundations as normal receivers of subsidies. This leaves many blank spots in relation to transparency and accountability, but our case study did not reveal serious structural problems, just some incidents.

We conclude that the public interest that government foundations are serving is not or insufficiently articulated and safeguarded. We call, therefore, for a minimum set of arrangements for the establishment, functioning and dissolution of a government foundation. This should not be a legally binding set of rules, because it needs to be tailored to the specific context in which foundations are established. It is more appropriate to design a set of principles that guides the establishment procedure of a government foundation.

We consider the ministerial responsibility a crucial issue for government foundations, especially for those that are no RWT or ZBO. This group represents 75 of the foundations and can not fall back on a clearly defined set of regulations although

they address the public interest in some way or another. Many regimes arrange the relationship between foundations and responsible departments. In some cases, the minister takes his responsibility, but in many cases he considers that relationship as purely financial, which does not go further than the control of a governmental subsidy to a private organisation. This narrow interpretation of the ministerial responsibility for government foundations should be an element of concern for all those who think that the spending of tax payers' money and the public interest require special attention.

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