

Non-statutory Rulemaking and the Rule of Law: towards a ‘Law of Rules’?

Inspiration from private actors and autonomous public bodies

Cedric Jenart / Stéphanie De Somer *

In various European legal systems, autonomous public bodies and private actors are increasingly invested with rulemaking powers. The phenomenon is usually assessed through the looking glass of the democracy principle, because these actors have a weaker electoral connection to the People than other (non-statutory) rule makers such as e.g. the Government and its ministers. What is still largely missing from legal scholarship is an analysis of how the rule of law, and more specifically legal certainty, is safeguarded when private actors and autonomous public bodies receive rulemaking powers. This contribution reveals that the rules and practices applied by these actors sometimes lead to higher degrees of legal certainty than those in place for central administrations. Hence, these ‘non-politically-accountable actors’ offer inspiration for the development of an overarching Law of Rules that can further the Rule of Law for all non-statutory rulemaking.

I. Introduction.....	160
II. Definition of ‘non-politically-accountable actors’ (NPAAs)	161
1. Non-institutionalized private actors	162
2. Institutionalized private actors	163
3. Autonomous public bodies (APBs)	164
III. How private actors and APBs achieve legal certainty when they make rules	164
1. Accessibility	165
2. Foreseeability	167
3. Intelligibility	168
IV. Conclusion and tentative suggestions	170

Zitiervorschlag: Cedric Jenart/Stéphanie De Somer, Non-statutory Rulemaking and the Rule of Law: towards a ‘Law of Rules’?, in: *sui-generis* 2017, S. 159

URL: sui-generis.ch/41

DOI: <https://doi.org/10.21257/sg.41>

* Cedric Jenart, PhD candidate FWO and Stéphanie De Somer, postdoctoral fellow FWO, University of Antwerp, Faculty of Law, research group Government & Law.

I. Introduction

- 1 Constitutions typically contain detailed provisions on how statutory rules should be adopted, proclaimed and made public.¹ This is often not the case, however, for non-statutory, i.e. non-legislative or non-parliamentary rulemaking. We define a rule as any legal act that enacts, accepts or establishes abstract, general and obligatory norms that have the purpose and effect of altering legal rights, duties and relations of persons.² Non-statutory rules can emanate from a variety of actors, many of which hold a political mandate, such as the Government (the political executive), individual ministers, local government, etc.
- 2 Increasingly, however, rules are made by private actors and autonomous public

bodies (APBs). These actors lack (direct) political accountability.³ They are establishing themselves as rule makers in various European legal systems at a quick pace.⁴ As a result, the rule of law faces several uncharted challenges. The [Venice Commission](#) endorses the following definition of the rule of law: 'All persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts'.⁵ It further distinguishes benchmarks for the rule of law such as legal certainty, hierarchy of norms, legality, access to justice, prevention of abuse of powers and equality before the law.⁶ In this contribution, we focus on one aspect of the rule of law specifically: legal certainty.⁷ Legal certainty consists of the no-

¹ E.g. for the publication requirement: article 84 Albanian Constitution, article 63 Andorran Constitution, article 190 Belgian Constitution, article 31 Cameroonian Constitution, article 141 Congolese Constitution, article 90 Croatian Constitution, Article 77 Cuban Constitution, article 3 Cypriot Constitution, article 225 Egyptian Constitution, article 139 Salvadoran Constitution, article 42 Eritrean Constitution, article 82 German Basic Law, article 125 Haitian Constitution, article T, 1 Hungarian Constitution, article 129 Iraqi Constitution, article 93 Jordanian Constitution, article 52 Macedonian Constitution, article 72 Mexican Constitution, article 107 Burmese Constitution, article 74 Omani Constitution, article 109 Peruvian Constitution, article 142 Qatari Constitution, article 78 Romanian Constitution, article 91 Turkish Constitution and article 215 Venezuelan Constitution (www.constituteproject.org).

² This definition is based on among others Dumon's definition of 'law' in his 1978 opening address of the legal year for the Belgian courts and on CJ Burger's majority opinion of SCOTUS in *INS v Chadha*: F. Dumon 'De motivering van de vonnissen en arresten en de bewijskracht van de akten' [1978-1979] *Arr.Cass.* 1, 23; *INS v. Chadha* 462 U.S. 952 (1983); See as well: Arnaud Haquet, Le pouvoir réglementaire des autorités administratives indépendantes. Réflexions sur son objet et sa légitimité [2008] *Revue du droit public*, 395.

³ For a more precise description and definition of private actors and autonomous public bodies, see II below.

⁴ See for private actors (defined in an even broader sense than this contribution does): Fabrizio Caffaggi 'The many features of transnational private rule-making: unexplored relationships between custom, jura mercatorum and global private regulation' [2015] *University of Pennsylvania Journal of International Law*, 876-938; For APBs see e.g. Dominique Custos, 'The Rulemaking Power of Independent Regulatory Agencies' [2006] *American Journal of Comparative Law*, 615-640.

⁵ European Commission for Democracy through Law, *Rule of Law Checklist in Venice 11-12 March 2016* (106th Plenary Session, 18 March 2016) 7, referring to Tom Bingham, *The Rule of Law* (Allen Lane 2011).

⁶ *Idem* 2 etc.; European Commission for Democracy through Law, *The European Standards of Rule of Law and The Scope of Discretion of Powers in the Member-States of the Council of Europe* (CDL-JU[2013]020, 10 December 2013) 3.

⁷ See for the concepts rule of law and legal certainty: Patricia Popelier, *Rechtszekerheid als beginsel voor behoorlijke regelgeving* (Intersentia 1997) 35-107, especially 107-177 and 555-561 respectively.

tions of accessibility, foreseeability and intelligibility.⁸

3 At first sight, private actors and APBs share the lack of a constitutional or legislative framework that embeds their powers in a set of guarantees or requirements on e.g. transparency. After closer scrutiny, however, one could wonder whether their rulemaking does not sometimes offer *more* rule of law guarantees than rulemaking by other executive or administrative bodies. APBs may apply procedures and offer levels of transparency that most politically accountable actors that make rules do not. This contribution addresses the rule of law challenges for rulemaking by private actors and APBs. Moreover, it tests the water for the hypothesis that these modern rule makers could offer inspiration for the development of a theoretical framework on the guarantees that should govern *all* non-statutory rulemaking from a rule of law perspective, irrespective of *who* makes the rules. This theoretical framework could be referred to as a 'law of rules'.

4 Private and APB rulemaking is discernible in various European countries. This contribution takes the Belgian case as a starting point, but also compares with other national legal systems and even touches on EU law. We begin by defining the type of actors that fall within the scope of this contribution (II). Subsequently, we look at the law and practice governing rulemaking by private actors and APBs before scrutinizing the challenges that this practice entails. At the

same time, we find inspiration in the reply of private actors and APBs to these challenges for a more general theory on non-statutory rulemaking and the rule of law (III). Finally, we conclude and formulate some tentative recommendations (IV).

II. Definition of 'non-politically-accountable actors' (NPAAs)

5 *Private* actors and autonomous *public* bodies may seem to be two wholly different categories. Still, given the growing awareness that the public/private divide has lost much of its explanatory power⁹, we discern an important communality. Private actors and APBs are usually subject to content-oriented accountability mechanisms¹⁰ and may trigger the accountability of a traditional rulemaking actor (typically an elected assembly) that outsourced its powers.¹¹ Yet, they do not (for private actors) or not sufficiently

⁸ European Commission for Democracy through Law, *Rule of Law Checklist in Venice 11-12 March 2016* (106th Plenary Session, 18 March 2016) 15-17.

⁹ Matthias Goldmann, 'A Matter of Perspective: Global Governance and the Distinction between Public and Private Authority (and not Law)' [2016] *Global Constitutionalism*, 75; Michel Rosenfeld, 'Rethinking the boundaries between public and private law in the twenty first century: an introduction' [2013] *I-CON*, 128; Anne Peters, Till Förster and Lucy Koechlin, 'Towards non-state actors as effective, legitimate and accountable standard setters' in Anne Peters, Lucy Koechlin, Till Förster and Gretta Fenner Zinkernagel (eds.), *Non-state actors as standard setters* (Cambridge University Press 2009) 536-537; Nancy Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' [1990] *Duke University Press*, 73.

¹⁰ The question arises whether these suffice to compensate for their lack of political (majoritarian) legitimacy. This, however, is not the focus of this contribution.

¹¹ Such as arguably would be the case in Switzerland if Parliament outsourced rulemaking powers 'to public or private organisations, entities or persons that do not form part of the Federal Administration' in accordance with [article 178 \(3\)](#) of the Swiss Constitution.

(for APBs)¹² derive their personal-organizational legitimacy from being part of the democratic legitimacy chain (*Legitimationskette*)¹³, running from the people, to the constitution, the legislature, the executive and the administration. We can therefore coin APBs and private actors: non-politically-accountable actors.

1. Non-institutionalized private actors

6 Private actors are increasingly involved in the development of generally binding norms. The post-welfare state has reached its limits of state intervention and therefore resorts to additional resources.¹⁴ These resources can either be found outside or within the state apparatus.

7 One category of private involvement is omnipresent in the exercise of governmental power, namely when the legislature or the executive merely consult professionals outside of the formal regulatory framework. Advisory opinions, consultations, impact-assessments and even the first drafts of legislation are often out-

sourced to private actors.¹⁵ However, as long as this aid is not institutionalized, this category of private involvement hardly ever seems problematic for three reasons.¹⁶

8 First, these private enactments do not amount to the status of 'rules'. They lack any binding nature. Moreover, they are not directed to the people as abstract or general norms. They merely support the rulemaking activities of the legislature and the executive.

9 Second, the legislature and the executive adopt this preparatory work of private actors and cover it with their legitimacy.¹⁷ Admittedly though, when a law firm prepares draft legislation, it may have an inordinate impact on the final outcome.

10 Third, the rule of law, as a constitutional principle that limits the possibility to outsource governmental power, remains respected. Safeguards that are constitutionally required from the traditional, politically accountable actors still fulfil their ordinary function. If a private, advisory document eventually turns into a statute, it will still be debated in multiple committees – possibly even Houses – of Parliament. This does not merely increase the democratic legitimacy of the rule, but it also ensures the quality of the rule as an aspect of the rule of law.

¹² Some APBs are subject to moderate forms of political oversight by the executive and those who are not are often controlled by Parliament directly, but the intensity of that supervision is lower than is typically the case for central government services or departments.

¹³ Reinhard Hendl, 'Das Prinzip Selbstverwaltung' in Josef Isensee and Paul Kirchhof, *Handbuch des Staatsrechts der Bundesrepublik Deutschland* Volume IV (Beck, 2005) 1128.

¹⁴ W.J. Witteveen, 'Het politieke primaat als regie van de wetgever' in W.J. Witteveen, H.R.B.M. Kummeling and F.A.M. Stroink (eds.), *Het primaat van de politiek. Staatsrechtconferentie 1999* (Tjeenk Willink 2000) 9-13; Patricia Popelier, 'De wetgever in balans: over gewichten en tegengewichten in een constitutioneel netwerk' in M. Diamant, M.L. van Emmerik, J.P. Loof and W.J.M. Voermans (eds.), *The Powers that Be. Staatsrechtconferentie* (Wolf Legal Publishers 2012) 176.

¹⁵ Koen Van Aeken, 'Pushing evaluation forward' in Jonathan Verschuuren (ed.), *The Impact of Legislation: A Critical Analysis of Ex Ante Evaluation* (Martinus Nijhoff 2009) 114.

¹⁶ Fritz Ossenbühl, 'Outsourcing von Gesetzentwürfen – ein Scheinproblem' in Matthias Ruffert (ed.), *Dynamik und Nachhaltigkeit des öffentlichen Rechts* (Duncker & Humblot 2012) 368-369.

¹⁷ Harm Schepel, *The Constitution of private Governance: Product Standards in the Regulation of Integrating Markets* (Hart Publishing 2005) 121.

2. Institutionalized private actors

¹¹ As a second category of private involvement in rulemaking, national legislatures and executives increasingly outsource (a part of) their rulemaking power to private actors. From the outset, the role of the private actor is elementary in the creation of binding rules. These rules can be categorized in three overarching types ranked according to an increasing degree of independence of the private rule maker: (1) First, the extension of private rules to third parties (2) second, the dynamic referral to private documents and (3) third, the outward delegation of rulemaking power. The latter technique of outward delegation is equally used to transfer rulemaking powers to APBs (*infra*).

¹² In first instance, the extension of private contracts occurs when these contracts are given all the hallmarks of rules due to the prior or subsequent intervention of governmental power. The extension of collective labour agreements (CLAs) serves as a typical example. The International Labour Organization's [Recommendation No. 91 of 1951](#) already promoted the extension of CLAs. Many European countries indeed extend collective labour agreements.¹⁸

¹³ The relevant statutory framework of some countries, such as Belgium or France, automatically extends CLAs to the *employees* of all contracting employers, even though they are not all members of the labour unions that made the agreement with those employers. There-

fore, although these employees were in no way parties to the CLA, its rights and obligations apply to them. Moreover, the extension of the private contract is possible through an explicit action of the executive. Through an executive act, the CLAs become rules, binding every *employer* – and therefore also every *employee* – within the 'industrial or territorial scope' of the agreement.¹⁹

¹⁴ There are also other examples of rulemaking through extension in Europe: agreements among practitioners of free professions, such as attorneys and notaries, have regularly experienced a comparable extension by the executive. A deontology code that binds clients or commercial partners of attorneys already hinges towards 'private' rulemaking.²⁰ Yet, Belgium even created a framework through which the executive can recognize codes of free profession associations and extend their binding power beyond the original drafter of the code.²¹

¹⁹ *Idem*; See for the Belgian implementation: Article 19 of the Statute regarding Collective Labour Agreements; Patrick Humblet, Marc Rigaux, Ria Janvier, Wilfried Rauw and Anne Van Regenmortel, 'Collectief arbeidsrecht' in Patrick Humblet and Marc Rigaux (eds.), *Synopsis van het Belgische arbeidsrecht* (Intersentia 2009) 446-447.

²⁰ See e.g. in Germany *Facharzt*-case BVerfG 33, 125, § 126: 'Die Kammergesetze der Länder enthalten keine Vorschriften über Fachärzte; sie ermächtigen die Ärztekammern lediglich, Berufsordnungen zu erlassen, die u. a. auch Bestimmungen über die ärztlichen Berufspflichten treffen können. Auf dieser Grundlage regeln die Facharztordnungen das gesamte Facharztwesen.' Freely translated as: 'The substate statutes on professional organizations do not contain any precise rules on specialist physicians; they merely authorize the physicians' chambers to adopt codes of practice, which may also contain provisions on the duties of a medical professional. On this basis, the rules drafted by specialist physicians regulate the entire profession of medical specialists.'

²¹ Article 15, §1 Belgian Royal Decree no. 79 concerning the order of physicians, 10 November

¹⁸ Folke Schmidt and Alan C. Neal, 'Collective Agreements and Collective Bargaining' in Otto Freund and Bob Hepple (eds.), *International Encyclopedia of Comparative Law – Labour Law* (Mohr Siebeck 2014) 44-45, 68-69, but not e.g. in the UK 36-37.

¹⁵ In second instance, the dynamic referral to a private document implies that the legislature or the executive incorporates a privately made document, by referring to it in its binding statutes or regulations. Citizens will then be bound by a dynamically evolving private standard.²² Dynamic referrals usually appear in highly technical or volatile policy areas, such as norms developed by standardization organizations, with regard to which the legislature and the executive lack time or expertise to regulate.²³

¹⁶ A key example of dynamic referrals is the way in which the legislatures and/or executives competent for sports and preventive health measures in Belgium²⁴ sometimes refer to the [World Anti-Doping Agency](#) and its World Anti-Doping Code. Formally, the World Anti-Doping Agency is a foundation under Swiss private law that has already drafted three version of its Code against doping in sports.²⁵ The Belgian substate legisla-

tures will then refer to the World Anti-Doping Code in their statutory legislation through sentences like: 'in accordance with article of the Code', 'pursuant to article ... of the Code', 'in compliance with article ... of the Code', etc. Regulatees thus first have to consult the (latest version of the) privately made code in order to establish the full extent and interpretation of the rules that bind them.

3. Autonomous public bodies (APBs)

¹⁷ APBs are actors, established by or embedded in the state that enjoy a degree of autonomy *vis-à-vis* the politically responsible institutions of the state.²⁶ The rulemaking powers of such 'independent agencies', 'QUANGOs' or 'arm's length bodies' and the like through the delegation technique have been the subject of many academic contributions. Most of these have, however, approached the subject from the viewpoint of the so-called 'democratic deficit' that such a delegation is believed to entail.²⁷ Much less attention has been paid to the compatibility with the rule of law.

III. How private actors and APBs achieve legal certainty when they make rules

¹⁸ A series of problems that were traditionally associated with the decision-making

1967; Article 15, §1 Belgian Royal Decree no. 80 concerning the order of pharmacists, 10 November 1967; Even though these 'professional orders' are considered to be public law actors in Belgium today, their roots are found in the corporatism before the French revolution. Pierre Bogaerts e.a., *200 jaar orde van advocaten te Antwerpen* (Die Keure 2012) 8.

²² Philip Eijlander and Wim Voermans, *Wetgevings-leer* (Tjeenk Willink 1999) 239.

²³ Peter Marburger, *Die Regeln der Technik im Recht* (Heymann 1979) 297 and 383; Andrea Diehl, *Innovationsfördernde dynamische Regulierung* (Beck 2014) 124.

²⁴ These competent Belgian substates are Flanders, the German Community, the Common Community Council and the French Community. See for the latter e.g. Art. 1, 6°, art. 1, 9°, art. 1, 16°, b), c) and e), art. 1, 30°, art. 1, 32°, art. 1, 60°, art. 5, lid 3, art. 6, 9°, art. 9/1, lid 2, art. 19, a), c), d), e), l) and art. 19/1 Legislative Decree French Community 20 October 2011 regarding the fight against doping.

²⁵ See more broadly Cedric Jenart, 'Zelfreguleren en de bescherming van grondrechten: de casus van doping in de elitesport' [2016] *TBP* 281.

²⁶ For a fully-developed definition, see Stéphanie De Somer, *Autonomous Public Bodies and the Law. A European Perspective* (Elgar 2017), Chapter 1.

²⁷ E.g. Yseult Marique, 'The Rule-Making Powers of Independent Administrative Agencies ('QUANGOs')' (2007) 11(3) *Electronic Journal of Comparative Law*; Dorit Rubinstein Reiss, 'Administrative agencies as creators of administrative law norms: evidence from the UK, France and Sweden' in Susan Rose-Ackerman and Peter Lindseth (eds.), *Comparative Administrative Law* (Elgar 2010) 373.

powers of non-politically-accountable actors are related to issues of legal certainty as an aspect of the rule of law and more precisely to accessibility, foreseeability and intelligibility.

1. Accessibility

¹⁹ Non-politically-accountable actors emerge 'in the shadows' of central government. For a long time, this also implied that much of their 'output' did not meet the light of sunshine. The problem originated most notably with the most basic requirement for the *accessibility* of rules: their publication. Statutory norms are usually published in official journals. Publication requirements for non-statutory rules are more diffuse, especially if the norms do not emanate from central government institutions. This is hard to reconcile with the adage *nemo censetur ignorare legem*: if citizens are presumed to know the law and abide by it, then both the very existence of the law and its contents have to be revealed to them.

²⁰ In Belgium, neither the Constitution, nor any legislative act, make the enforceability of rules created by administrative authorities outside central government ²⁸ dependent on their publication. Pursuant to a general legal principle, acknowledged by the courts, though, all rules have to be published before they become applicable and enforceable. This applies to non-politically-accountable actors as well.²⁹

²⁸ For central government institutions, article 190 of the [Belgian Constitution](#) does prevent rules from becoming binding and enforceable before they have been published.

²⁹ Jan Velaers, 'Artikel 190 van de grondwet: de bekendmaking in de vorm bij wet bepaald als voorwaarde voor de verbindendheid van wetten,

²¹ For one technique of private rulemaking, being extension, the extended documents such as extended collective labour agreements are usually published in the *Moniteur belge/Belgische Staatsblad*.³⁰ However, the publication requirements under the private rulemaking technique of dynamic referral are less straightforward. Even if the referring statute is published, the constituency only holds one piece of the normative puzzle. External norms of international private actors to which the legislature dynamically refers are not so readily published in the official journal.³¹ Moreover, the referred-to document may have been published in a foreign language, such as English, which is not official and/or not generally understood within the national legal system. Ultimately, the question arises whether publication of a referred-to-document in an official journal makes a rule so much more accessible. The Belgian Council of State Legislative Section is therefore slowly but surely relaxing its objections

besluiten of verordeningen van algemeen, provinciaal of gemeentelijk bestuur' in Luc J. Wintgens (ed.), *De verplichting tot bekendmaking van de norm* (die Keure 2003) 31, 34 and 38.

³⁰ Article 25 and 30 Belgian Statute on Collective Labour Agreements; Article 7bis of the 24 January 1977 statute concerning the Protection of the Consumer's Health; Article 34, §4 Statute of 9 August 1963 *tot instelling en organisatie van een regeling voor verplichte ziekte- en invaliditeitsverzekering*; Article VI.121 Code Economic Law.

³¹ After the Belgian Council of State Administrative Section had annulled the adoption of the World Anti Doping Code by the Secretary General of Sports as an unbridled delegation of normative power in the *Sporta* case, this code is no longer declaratorily published in the Belgian Official Journal. This had been the case for the Regulation of the Flemish Government of 20 June 2008 regarding the execution of the statute of 13 July 2007 on medically responsible practice of sports.

against publications of NPAA's rules on the Internet.³²

²² The implementation of the publication principle for APBs in Belgium has been subject to different interpretations. In some cases, the legislation that empowered the APB to enact the rules would contain (detailed or minimalistic) rules on publication. In other cases, however, the legislation would remain silent, implying that it was left to the APB to determine how it would publish its rules.³³

²³ Similarly, concerns have been raised in the Netherlands about the lack of publicity of the decisions made by APBs in general and the rules that they enact in particular. A 2002 study addressed the rule-making powers of so-called ZBOs (*zelfstandige bestuursorganen*). ZBOs are APBs that are not under the full, hierarchical scrutiny of a responsible government minister. The study's most pressing recommendation on the level of formal quality of rules was that the need for an effective publication of ZBO rules had to be taken more seriously. The researchers were worried that publication did not always take place via appropriate media, so that it could not be ensured that all stakeholders had effective access and would hence be able to take note of the rules' contents.³⁴

³² Marc Joassart, Laurent Jans, Claudine Mertes and Marc Oswald, 'Le Conseil d'Etat – Chronique de législation' [2013] *Revue belge de droit constitutionnel*, 123.

³³ Frederik Vandendriessche and Peter De Keyser, 'Verzelfstandigde diensten van de federale en deelstatelijke overheid' in Luc J. Wintgens (ed.), *De verplichting tot bekendmaking van de norm* (die Keure 2003) 141, 169-170.

³⁴ Rijksuniversiteit Groningen, Vakgroep Bestuursrecht en Bestuurskunde, *In zelfstandigheid geregeld: een onderzoek naar de omvang van zelfstandige bestuursorganen en de kwaliteit*

²⁴ Many of these criticisms, however, now belong to the past. Today, many APBs have actually managed to develop strong rule of law guarantees. In the Netherlands, article 3:42 of the General Administrative Law Act (*Algemene wet bestuursrecht*) now subjects all administrative rules made by central government institutions to publication in the official journal (*Staatscourant*), unless a specific statutory provision provides otherwise. This includes ZBOs at central government level.³⁵ In Belgium, such a uniform requirement is still lacking. However, Belgium has also seen increasing attention to the transparency of APB decision-making in the last decade. The statutory legislation that invests APBs with rule-making powers will now often contain specific instructions on how the rules have to be published. Remarkably, these instructions often entail stricter or more detailed requirements than those that apply to the central state institutions. Both the Belgian federal and the Flemish energy regulatory authority, for instance, are *not only* under an obligation to publish their respective tariff methodologies on their websites. They *also* have to add all documents with regard to the participation and consultation procedures that preceded the enactment as well as 'all other documents that are deemed useful' to give reasons for the contents of their tariff methodologies.³⁶ Central government administrations are not usually

van de regelgeving van zelfstandige bestuursorganen, 2002, 101.

³⁵ The version of article 3:42 as valid at the time of the study imposed an obligation to publish in 'an official government publication' or in another 'suitable' way.

³⁶ Article 12, §3 of the federal Electricity Act; article 4.1.31., §4 of the Flemish Energy Decree.

obliged to disclose these types of preparatory documents.

²⁵ Comparative research has revealed that, because independent regulators have to 'earn' their own legitimacy, they moreover often take initiatives themselves to upgrade their transparency, for instance by publishing as much information on their websites as possible in the light of confidentiality requirements. This can also be a 'branding' strategy: it makes their work more visible.³⁷ In that sense, APBs – and especially the most independent ones, such as independent regulatory authorities – may now actually be closer to accomplishing transparency and publicity than most traditional state actors are.

²⁶ A comparable evolution seems to have taken place for private actors that make rules. Article 10 of [WADA's revised statutes](#) and article 23.5.5 of the [World Anti-Doping Code](#) prescribe transparency. The World Anti-Doping Code and the [Prohibited List](#), WADA's most significant norms, are 'properly' accessible.³⁸ They are also clearly accessible at the [homepage](#) of the World Anti-Doping Agency within less than three clicks. Ultimately, stakeholders or athletes even have the possibility to download an application on their smartphone to verify the most re-

cent Prohibited List.³⁹ Such guarantees would appear exceptional for more traditional non-statutory norms.

2. Foreseeability

²⁷ Publication and accessibility do not suffice to ensure legal certainty: rules also have to be *foreseeable*. Non-statutory norms typically pose challenges in terms of foreseeability. It appears to be in their nature that they can be easily adapted, or at least more so than statutory norms. In legal systems that have been inspired by the French tradition, the principle of *adaptabilité* or *mutabilité* (one of the so called '*lois du service public*') enshrines the executive's power to change the rules whenever this is necessary in the public interest. Because private actors and APBs combine this capacity to easily change rules with a decreased amount of political supervision, their rules are assumed to be less foreseeable.

²⁸ Nevertheless, delegation to APBs and especially independent supervisors is often precisely inspired by considerations of predictability and foreseeability.⁴⁰ Indeed, non-politically-accountable actors often take into account stricter procedural guarantees than central government services to adopt new rules or to change existing ones. The UK's electronic com-

³⁷ Annetje Ottow, *Market & Competition Authorities. Good Agency Principles* (Oxford University Press 2015) 83.

³⁸ Advice Council of State 51.790/3 of 18 September 2012 on a draft executive decree of the Flemish government regarding the exercise of the legislative decree of 25 May 2012 regarding the prevention and fight against doping in sport, 9. However, these norms might not be so easily accessible within the sports organizations or international sports federations.

³⁹ Even though this app is only available for Apple devices and solely in English, French, Spanish and Japanese.

⁴⁰ This argument relies on the famous 'time consistency' theory, defended by rational choice theorists such as Majone: e.g. Giandomenico Majone, *Temporal Consistency and Policy Credibility: Why Democracies Need Non-Majoritarian Institutions*, *EUI Working Paper RSC No. 96/57* (European University Institute, Robert Schuman Centre 1996); Giandomenico Majone, 'The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union', (1997) 3 *Eipascope* 1, 2.

munications regulator OFCOM, for instance, is subject to a statutory test that has to be satisfied before it can set or *modify* its so called 'conditions of entitlement'. The regulator moreover has to apply the same procedure than it had to follow to adopt the initial version of the conditions, including the organization of a consultation.⁴¹ The World-Anti Doping Agency attempts to improve legal certainty by consulting stakeholders before each amendment of the World Anti-Doping Code and the List of Prohibited Substances and Methods.⁴²

3. Intelligibility

²⁹ Proper rulemaking also means *intelligible* rulemaking. The explanatory notes preceding the enactment of statutory legislation are usually available to the public. These are not part of the actual statutory act, but they provide guidance on the interpretation of the rules. Often, no similar documents are available for administrative rulemaking, since this tends to be technical and detailed. This entails specific challenges in terms of intelligibility.

³⁰ It may very well be, however, that APBs, because of the procedural guarantees that they are obliged to offer, achieve greater levels of intelligibility for their target audiences than central government institutions.

³¹ First, APBs increasingly apply a 'notice-and-comment' approach to rulemaking.⁴³ Throughout this consultation process, regulatory bodies and their stakeholders enter into a dialogue concerning the contents of the rules. Stakeholders have the opportunity of formulating suggestions as to the contents of the rules, but also of demanding clarity on (proposed) rules that may be unclear or open to interpretation. Hence, participatory procedures do not only lead to increased democratic legitimacy, but can also lead to rules that are more comprehensible and offer more legal certainty. The Dutch ACM (*Autoriteit Consument en Markt*), being the unified independent network regulator for the Netherlands, for instance, organizes consultations regarding the policy rules that it issues. Sometimes, stakeholders are invited to submit comments on the regulator's websites. In other cases, however, the ACM has been known to organize roundtables that allow for a genuine debate.⁴⁴

³² Second, APBs often give reasons for the normative documents that they adopt.⁴⁵

⁴³ For central government departments and agencies, such consultation procedures are often not compulsory. See e.g. for the UK: Paul Craig, *Administrative Law* (Routledge 2012) 440-442.

⁴⁴ J.G. Vegter and P.I.W.R. Maandag, 'Regelgeving en beleid door onafhankelijke toezichthouders: de praktijk van ACM' [2015] *RegelMaat* (special issue on the rulemaking powers of ZBOs) 201, 214.

⁴⁵ Even though they may do this in different ways: some just publish the documents that have inspired their decision (e.g. advisory opinions or reports of consultations) along with the actual normative act. Others use a preamble model and/or dedicate a separate title to the reasons behind the rules in the actual normative act. An example of the latter is found in the [practice of Belgian federal energy regulator CREG](#): its tariff methodology contains a section outlining the general starting points that have inspired the regulation and a section with explanatory notes per article.

⁴¹ Articles 47 and 48 of the Communications Act 2003.

⁴² Irene Mazzoni, Osquel Barroso and Olivier Rabin, 'The List of Prohibited Substances and Methods in Sport: Structure and Review Process by the World Anti-Doping Agency' [2011] *Journal of Analytical Toxicology*, 609.

Most national European systems do not submit administrative *rules* to a duty to give reasons, but limit the duty to give reasons to individual acts. Nowadays, the duty to give reasons is increasingly approached as an instrument that supports administrative accountability.⁴⁶ Traditionally, though, it was regarded as mainly an accessory of the right to access to the courts, a purpose which it still serves and that has been endorsed by the European Court of Human Rights⁴⁷ and the European Court of Justice⁴⁸. Thus, the duty to give reasons has informative value; it assists affected parties in deciding whether seeking judicial redress is worthwhile. The statement of reasons contributes to a proper understanding of the rules.

³³ But why not extend such obligations to all non-statutory rules? This is for instance the case in EU law. It is often presumed that the guarantees provided by the rule of law are reduced once decision-making power is transferred beyond the state.⁴⁹ Just like private actors and APBs, however, the EU depends on powers being outsourced by national political institutions and is often criticized for not possessing sufficient democratic legitimacy. This may be the very reason why the EU sometimes offers *more* guarantees from a rule of law perspective than many national legal systems. A good example is

the duty to give reasons for subordinate legislation. The European Commission is sometimes invested with normative powers.⁵⁰ A distinction is made between 'delegated measures/acts' and 'implementing measures/acts'.⁵¹ Such acts can be challenged before the EU courts, which makes them subject to the duty to give reasons.⁵² Usually, it will suffice for the preamble to indicate the general reasons behind the adoption and the objectives of the normative act. A full statement on the facts that have inspired the rule, which may be numerous and complex, is not deemed necessary by the European Court of Justice.⁵³ This way, the duty imposed on the rule maker does not become too onerous, but retains its usefulness.

³⁴ Further inspiration can be found in the Netherlands, where article 118 of the so-called 'Directions for Legislation' provides that the preamble has to mention the reason behind the enactment of a

⁴⁶ See Ingrid Opdebeek and Stéphanie De Somer, 'The duty to give reasons in the European legal area: a mechanism for transparent and accountable administrative decision-making?' [2016] *Public Administration Yearbook* 97.

⁴⁷ See e.g. decision ECtHR *K.M.C. v. Hungary*, no. 19554/11, 10 July 2012, recitals 34-35.

⁴⁸ See e.g. Case *C-550/09 E and F* [2010] ECR I-06213, recital 54.

⁴⁹ Marco Macchia, 'The rule of law and transparency in the global space' in Sabino Cassese (ed.), *Research Handbook on Global Administrative Law* (Edward Elgar 2016) 261, 262.

⁵⁰ It is assumed that EU agencies, which also pertain to the EU executive, cannot be entrusted with rulemaking powers, pursuant to the *Meroni* doctrine. See e.g. Merijn Chamon, 'EU agencies: does the Meroni Doctrine make sense?' (2010) 17(3) *Maastricht Journal of European and Comparative Law* 281.

⁵¹ Articles 290 and 291 TFEU.

⁵² See Case *C-370/07 Commission of the European Communities v Council of the European Union* [2009] ECR I-08917, recital 42: the duty to give reasons 'which is justified in particular by the need for the Court to be able to exercise judicial review, must apply to all acts which may be the subject of an action for annulment'.

⁵³ Case *C-5/67 Beus GmbH v Hauptzollamt München* [1968] 125; Paul Craig, *EU administrative law* (2nd edn., Oxford University Press 2012) 342 with reference to Case *C-122/94 Commission/Council* [1996] ECR I-881, recital 29 and Case *C-84/94 United Kingdom v Council* [1996] ECR I-5755, recitals 74 and 79; See also e.g. Case *C-304/01 Spain v Commission* [2004] 7655, recital 51; (the references in) Herwig C H Hofmann, Gerard C Rowe and Alexander H Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2011) 199.

regulation. The directions are a form of soft law and assist civil servants who prepare normative acts. They are binding to those civil servants, but citizens do not derive any enforceable rights from them. This direction does not, consequently, have the same legal value as a genuine duty to give reasons, enshrined in legislation. It nevertheless has an important authoritative value.

- ³⁵ For the identified techniques of private rulemaking, the pendulum may also swing from an apparent decreased guarantee of intelligible rules to an effective increased guarantee of intelligible rules. For the extension technique, for example, if a minister asks for an advisory opinion of the Council of State, this opinion will also be divulged together with the extension regulation from 2017 onwards.⁵⁴ As far as the dynamic referral technique is concerned, the World Anti-Doping Agency publishes comments underneath most provisions of its Code, elucidating the interpretation of the anti-doping rules.

IV. Conclusion and tentative suggestions

- ³⁶ Non-statutory rulemaking still finds itself in a constitutional twilight zone. Administrative rulemaking in general lags behind statutory rulemaking when it comes to attention for the quality of the rules. Many European legal systems and their Constitutions have been outpaced by reality: they still approach non-statutory rulemaking as a marginal phenomenon. Hence, they lack a full-fledged constitutional theory that offers general guidelines on how non-statutory rules are pub-

lished, made accessible, foreseeable, intelligible, in compliance with their parent act and so on. In other words: they lack a 'law of rules'.

- ³⁷ Especially non-statutory rulemaking by private actors and by APBs appears to disturb our traditional understanding of the rule of law, which offers a guarantee that a constitutionally defined branch of government should create the law, as opposed to experts or a gathering of stakeholders.⁵⁵ Such a traditional notion of the rule of law is based on the precept that the law should be the product of (traditional, central) state institutions. A more modern conception of the rule of law, however, accepts that rules increasingly emerge from the activities of non-state actors or actors that operate in the periphery of the traditional state organization chart.

- ³⁸ This article has developed the idea that private actors and APBs often reach or surpass the threshold for compliance with the rule of law, set by politically accountable actors, especially on the level of legal certainty. In designing a 'law of rules', the relevant actors (the constitutional framer, the legislature, the courts, public advisory bodies etc.) could find inspiration in the best practices of private actors and APBs. We derive from our research three conclusions and suggestions that could benefit *all* actors with rule-making powers.

- ³⁹ First of all, non-statutory rules should be published systematically and promptly,

⁵⁴ Article 5/2 of the organic statutes on the Council of State.

⁵⁵ Albeit backed by members of the executive. These concerns may be weaker in some jurisdictions such as the UK and its famous voluntary tradition.

in an accessible way. Publication requirements for private actors and APBs are often specifically adapted to their target audiences, which makes them more effective than the publication requirements that apply to other non-statutory rules (which are often limited to publication in an official journal, which in practice has a limited audience). There is no reason why non-statutory rules made by central state actors could not (also) be published in such a way that they effectively reach those that they will (primarily) apply to.

⁴⁰ Second, private actors and APBs (especially independent regulators) use the consultation procedures that precede the enactment of rules not only to increase the democratic legitimacy of the process and outcome, but also to enhance the foreseeability and intelligibility of those rules. By entering into a dialogue with stakeholders, these bodies can anticipate issues of misunderstanding that may hamper effective implementation. Especially in technical fields that have a clearly defined group of stakeholders, drafters of non-statutory rules should consider consultation procedures, preferably of the type that enables interaction;

⁴¹ Third, APBs often give reasons for the rules that they enact, either in the act itself or by making available the preparatory documents that preceded the enactment. This contributes to the intelligibility of the rules, since these documents offer guidance on the correct interpretation. Why not introduce a 'duty to give reasons' for all non-statutory rules in order to enhance their intelligibility? The 'preamble' model, used by the EU institutions, could serve as an inspiration here.

Preferably, the statement of reasons is part of the actual act that anchors the rules and should serve as a basis for an authoritative interpretation.

⁴² Legal certainty is an important, but not the only guarantee that shapes the rule of law. This brief contribution did not yet grant us the opportunity to flesh out the entire content of a 'law of rules'. Respect for the hierarchy of norms, for example, is a further concretization of the rule of law. This latter guarantee implies that subordinate legislation complies with the statutory legislation in which it finds its basis for existence. The most obvious way of ensuring this is to make non-statutory rules subject to judicial review. Those who wish to challenge the rules made by APBs may face particular challenges. Academic studies reveal that judicial deference *vis-à-vis* the decisions made by independent administrative authorities with regulatory powers is high.⁵⁶ This reality is not limited to APBs; it also extends to private norm makers.⁵⁷ More fundamentally, article 26 of the Belgian Statute on Collective Labour Agreements states that collective labour agreements that were made by joint committees may not even be considered to be unilateral executive regulations. Therefore, the Bel-

⁵⁶ See *e.g.* Catherine Donnelly, 'Participation and expertise: judicial attitudes in comparative perspective' in Susan Rose-Ackerman and Peter Lindseth (eds.), *Comparative Administrative Law* (Elgar 2010) 357; Carol Harlow and Richard Rawlings, *Law and Administration* (7th edn., Cambridge University Press 2009) 311; Tony Prosser, 'The Powers and Accountability of Agencies and Regulators' in David Feldman (ed.), *English Public Law* (Oxford University Press 2011) 241, 250.

⁵⁷ See for a parallel reasoning on the deference of national courts towards disciplinary anti-doping bodies: Cedric Jenart, 'Zelfregulerend en de bescherming van grondrechten: de casus van doping in de elitesport' [2016] *TBP* 290-291.

gian Council of State Administrative Section has no authority to annul them. In this respect, the rulemaking powers of private actors appear to lag behind those of the political executive. Sometimes, however, it is not NPAAAs, but central government actors that show more deficits when it comes to legal protection via the courts. In the Netherlands, for instance, the courts are not competent to review subordinate legislation directly as a matter of principle.⁵⁸ An exception has been made for some administrative regulations. Two of the most important normative powers entrusted to the ACM, i.e. the unified independent network regulator, are explicitly named in the General Administrative Law Act as subject to judicial review.⁵⁹ This is again an example of how rulemaking by APBs and especially by those with a substantial degree of independence goes hand in hand with guarantees that most rulemaking by central state actors does not offer.

- ⁴³ The rule of law extends to all types of rulemaking. We believe that a full-fledged theory on the desirable contents of a 'law of rules' could be developed bottom-up, drawing inspiration from the combined best practices of both the political executive and of NPAAAs.

⁵⁸ Article 8:3(1) of the General Administrative Law Act.

⁵⁹ Article 4 of the second addendum to the General Administrative Law Act. Other powers of the ACM that have been qualified by the administrative court as being normative in nature are not explicitly mentioned, however. Hence, the court has declined jurisdiction for these powers (College van Beroep voor het bedrijfsleven 5 March 2014, no. 12/1037).