



II-4.8: European and North American authorities notify the ICANN, a private association in charge of the self-regulation of Internet domain names, that it must adopt more transparent “governance” and adopt public structures’ recommendations

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MAIN INFORMATION

On May 12, 2011, both Neelie Kroes, the European Commissioner for the digital agenda within the European Commission, and Larry Strickling, Assistant Commissioner for Communications and Information within the United States Department of Commerce, sent a notification to the ICANN, a private association that manages Internet domain names. First of all, they agreed with the principle of self-regulation of Internet domain names by the ICANN. But, they requested a reform of its “governance” to improve its transparency and better take into account public authorities’ recommendations.

CONTEXT AND SUMMARY

The attribution and management of Internet domain names, including conflict resolution regarding these procedures, is the responsibility of the ICANN (Internet Corporation for Assigned Names and Numbers). The ICANN, created in 1998, is an international not-for-profit organization that allocates Internet addresses and their IP addresses. Even though the association is organized under the laws of the State of California, it has worldwide jurisdiction because of the particular nature of the Internet.

It is remarkable that the Wikipedia page on the ICANN considers it to be a “regulatory authority of the Internet” that “controls access to all virtual domain names.”

Until 2009, the ICANN was organized according to the terms of a *memorandum* issued by the United States Department of Commerce. Since then, we are either in a situation of lawlessness, or of *de facto* power, or of powers implicitly devolved by the concerned parties, be they States, industries, or internet users.

In this case, both the American government and the European Commission have univocally agreed to maintain the ICANN's management of domain names, even though some have argued that the attribution and management of domain names should be transferred to the UN, for example.

But, in return, both authorities demand that the ICANN function in a more transparent fashion and obey the "recommendations" they sent to it in 2010.

Furthermore, the ICANN is a complex organization. It includes a *Governmental Advisory Committee* (GAC) where States and international organizations are represented and which publishes "recommendations." Europe and the United States want the ICANN to "follow" these recommendations, which are the only way States have to defend their interests.

BRIEF COMMENTARY

This case regarding the ICANN presents the same parameters and problems as in every self-regulated industry (cf. The Journal of Regulation's thematic report on the self-regulation of advertisement, II-3.4). In this case, self-regulation is particularly well suited because since the Internet is a virtual zone, States' regulatory authorities have a difficult time intervening because they are still limited by physical borders. But, first of all, regulatory power is, as always, tempered by procedural rules, whatever the nature of the regulatory authority. Therefore, the principle of transparency must be respected in order to allow everyone to understand how domain names are attributed, conceived (see below), managed, and how disputes are resolved.

The principle of transparency that regulatory authorities must respect is even more legitimate when the institution is a private organization that is in charge of the general interest, and moreover is geographically situated even though it has worldwide jurisdiction. Furthermore, the Political cannot abandon the question. Indeed, the question of domain names is not simply technical. As in all regulatory questions, the political dimension is also present here (cf. report on the colloquium on Neutrality in systems of economic regulation, III-3.11).

The ICANN's October 30, 2009 decision to no longer mandate that domain names be written in the Latin alphabet, but to allow the use of other alphabets (and thereby, other civilizations) is a political decision. Similarly, the fact that the availability of domain names beginning in "www." is starting to run out, and the possibility of addresses ending in ".xxx" have

unleashed an unexpected battle around pornographic websites. It is remarkable that Politics has the means to force the very powerful private regulatory authority to obey (on the question of private regulators, cf. CUOCOLO, Lorenzo, Constitutional Law faced with Globalization's Regulators, I-1.28). First of all, whereas until 2009 the ICANN only had legal links with the American government, the latter now expresses itself in unison with Europe to show that States must "form blocs" in order to exist in the global economic sphere. It is false that the ICANN was born from nothingness and owes nothing to anyone: it is because the American government accorded it the power to manage domain names in 1998 that it exists today. What the Political has given, the Political can take away. Thirdly, this attitude is an example of an evolution that has been observed in other industries, especially in banking and finance: the proximity, or even fusion, between regulation and "governance".

Indeed, governments have an alternative: either they return regulatory responsibilities to ministries, with the difficulties that that entails, or they allow more flexible, better informed, better accepted regulatory authorities to carry out the task, but they put pressure on the way decisions are made within these independent authorities (procedural rules, especially transparency and discussion), and by forcefully intervening in decision making processes (recommendations, internal committees of experts, etc.). Indeed, when Europe and the United States demand that their "recommendations" (soft law) be taken into account, this is one way to regulate by using governance. It is taking back with one hand what was given by the other. Others have referred to the strategy of the Trojan Horse. The essential fact is that this demonstrates regulation's major evolution: its ever stronger articulation with governance.