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Chapter 9

SELECTED COMMENTS ON THEMES DEVELOPED IN THIS VOLUME

9.2 ICT AND CO-REGULATION: TOWARDS A NEW REGULATORY APPROACH?

Yves Poulet

In December 2003,¹ the World Summit on the Information Society (WSIS) adopted the 'Declaration of Principles' which was presented as a first attempt at a Global Information Society Constitution.² Certain provisions of this Declaration directly address the question of how to regulate the Information Society. The answer is clearly 'co-regulation', although the concept is not defined. Beyond this assertion, the text prescribes a clear partitioning of the roles of the different actors in the regulatory process.

I. The management of the Internet encompasses both technical and public policy issues and should involve all stakeholders and relevant intergovernmental and international organizations. In this respect it is recognized that:

- a) The policy authority for Internet-related public issues is the sovereign right of States. They have rights and responsibilities for international Internet-related public policy issues;
- b) The private sector has had and should continue to have an important role in the development of the Internet, both in the technical and economic fields;
- c) Civil society has also played an important role in Internet matters, especially at the community level, and should continue to play such a role;

¹ The World Summit on the Information Society was organised by ITU in Geneva (10-12 December 2003). As previously decided, this first meeting will be followed-up by a second meeting, to be held in Tunis in 2005. The World Summit was the result of difficult, numerous, and intense discussions at regional and global levels. The text of the 'Declaration of Principles' is available at the ITU website: <http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!MSW-E.doc>.

² The language used to introduce the Declaration is very enlightening on this point: 'We, the representatives of the peoples of the world, assembled in Geneva from 10-12 December 2003 for the first phase of the World Summit on the Information Society, declare our common desire and commitment to build a people-centred, inclusive and development-oriented Information Society.'

- d) Intergovernmental organizations have had and should continue to have a facilitating role in the co-ordination of Internet-related public policy issues;
- e) International organizations have also had and should continue to have an important role in the development of Internet-related technical standards and relevant policies.

2. I will come back to this important assertion but before doing so, some clarification on the concept of co-regulation is needed.

Co-regulation is a multifaceted and ambiguous concept encompassing multiple ways to ensure what the OECD,³ in 1998, called the 'effective mix' of public and private sectors in regulating the Internet. This first approach to the concept underlines the fundamental role of co-regulation as regards the 'effectiveness' of the regulation, which is, as Ost and Van de Kerckove have excellently demonstrated, only one of the three criteria as regards the legal validity of a normative instrument beside the two other criteria: legality and legitimacy.⁴

3. In a previous essay⁵ elaborating on these three criteria in the field of ICT regulations and taking fully into account the plurality of the norms,⁶ particularly self-regulation, I have proposed to redefine these three criteria as follows:⁷

- a) Legitimacy is 'source-oriented'⁸ and underlines the question concerning the authors of a norm. To what extent might the legal system accept a norm elaborated without involvement of the actors designated by the Constitution or by constitutional rules? This quality of the norm means that the authorities promulgating the norm must be authorized to do so by the community or communities of the persons who will have to obey this rule. This legitimacy is obvious as regards the traditional State authorities acting in conformity with the competence attributed to them by the Constitution. It is less obvious when the regulation is the expression of private actors, as is the case with self-regulation, particularly when certain obscure associations or even private companies are able to impose their technical standards.
- b) Conformity is 'content-oriented' and designates the compatibility of the normative content with fundamental social values, those undoubtedly embedded

³ In Provision 50 of the WSIS Declaration of Principles, the Secretary General of the United Nations is asked to set-up 'a working group on Internet Governance, in an open and inclusive process that ensures a mechanism for the full and active participation of governments, the private sector and civil society from both developing and developed countries, ... to ... make proposals for action, as appropriate, on the governance of the Internet by 2005.'

⁴ Gérard, Ost & van de Kerckove 1996.

⁵ Pouillet 2001.

⁶ About the *pluralisme normatif*, which means the various possible sources of the norms and their recognizance by the legal systems, see Coipel 2002 and Vivant 1996.

⁷ Pouillet 2001, p. 145 et seq.

⁸ On this distinction between source-oriented tests, content-oriented tests, and effectiveness-oriented tests, see Summers 1985.

in the legal texts but also beyond those considered as ethical values to be taken into account by the legal system, not only those unquestionably embedded in legal texts, but also those considered to be ethical values to be taken into account by the legal system. Again, this criterion is quite easy to satisfy and to verify for traditional texts issued by governmental authorities insofar as these texts must take into consideration of already existing rules with superior values. It seems more complicated to satisfy this criterion when compliance with existing legislative texts is not systematically checked insofar as these texts do not exist or are not clearly identified. Indeed self-regulation is often a way to avoid the traditional and constitutionally provided regulatory methods of rule-making.

- c) Finally, effectiveness is 'respect-oriented'. To what extent will a norm be effectively respected by those to whom the norm is addressed? The question on the information about the existence of the norms, about the sanctions, and the way by which they might be imposed are therefore central for determining the effectiveness of a norm. This criterion refers in particular to the fact that the addressees of the norm must be aware of the content of the norm but also that the cost of a norm's non respect must be foreseeable by its addressees who are so stimulated to follow the rule.

On that point, it is quite clear that technology, as Joel Reidenberg⁹ has pointed out, and self-regulatory mechanisms like code of conduct labeling systems or ODR might bring additional ways for promoting and enforcing the normative instruments.¹⁰

4. These criteria will definitely be interesting in order to appreciate the legal validity of the different mechanisms designated by this concept. Certain mechanisms are more or less clearly defined. Among the more clearly defined mechanisms, count the French approach which has been defined in the context of the setting-up of the 'Forum des droits de l'Internet'¹¹ and the European vision which has been

⁹ Reidenberg 1998. On the same point, my remarks about the relationship between law and technology in Pouillet 2004, and finally, Lessig's fundamental reflections in Lessig 1999.

¹⁰ Notably Marais 2002. About the characteristics of the Internet which justify a self-regulatory decentralized approach rather than the traditional top-down approach based on a legislative and nationally bounded approach, see Post & Johnson 1997: 'The ideal of national debate among wise elected representatives regarding the overall public good may be replaced, on-line at least, by a new architecture of governance that allows dispensed and complex interactions among groups of individuals taking unilateral actions and seeking more local goods and solutions. Instead of attempting to rely even upon the best of our democratic traditions to create a single set of laws imposed on the net from the top down, we may all be better off if we allow the emergence of diverse and contending rule sets, in distinct areas of the net, which pull and tug against each other (and that help to recruit or drive off potential participants) – with the result that an optimal overall combination of rules arises.'

¹¹ The Forum des Droits de l'Internet is a non-profit organization created with the financial support of the French Government. This Forum was created on the basis of the famous C. Paul's Parliamentary report, submitted at the request of the French Prime Minister to the Parliament in July 2000. About the history of the Forum's setting-up, see Falque-Pierrotin 2002 (I. Falque-Pierrotin is the Chair-

described in the Inter-institutional agreements on Better Law-Making recently approved by the European Parliament.¹² These mechanisms can be seen as a ‘third way’ next to legislation and self-regulation.

Apart from these two approaches, a wide variety of co-regulatory mechanisms has to be considered, which means a combination of private and public normative interventions in order to regulate the Information Society. We shall introduce these different approaches.

5. Paul’s Parliamentary Report already defined ‘co-regulation’ as a method and not as a normative source.¹³ It justified recourse of this method as follows:

‘Si les institutions démocratiques veulent remplir leur rôle sans se trouver court-circuitées par la réalité, elles doivent être capables de traiter les questions posées avec la rapidité et la pertinence nécessaires. Elles doivent le faire en écoutant davantage, en collaborant mieux avec l’ensemble des acteurs et des parties prenantes aux débats. Elles doivent savoir se focaliser sur les sujets dont les enjeux sont essentiels et où leur intervention est décisive, et laisser différentes formes – pas uniquement marchandes – d’autorégulation s’exercer là où elles suffisent à répondre aux attentes sociales. Il s’agit donc, non pas de définir une nouvelle forme de régulation, mais de trouver une méthode adaptée aux temps nouveaux.’

So, co-regulation aims at organizing a co-operation on rights and usage issues raised by the Information Society development between all stakeholders. Co-regulation is a consensus-building process giving all the players the opportunity to express their views and to agree on certain solutions which will have to be enacted in the legal system by state intervention. These legal solutions insofar they have been discussed between all actors will be more easily implemented and respected. The Forum’s mission can be deduced from this aim:

- to submit opinions on the problems brought about the use of ICT technologies;
- to inform and sensitize the public on these issues;
- to organize, notably through a public forum discussion, a broad discussion on crucial topics among all parties interested;
- to make its best efforts to reach a consensus and, finally to address recommendations to the ‘legislation’ if needed.

Co-regulation in this sense is a pre-normative process. It intervenes in the preliminary phase and appears as a way to reinforce the legitimacy of State intervention

man of the Forum). See also the Forum’s website: <<http://www.foruminternet.org>>. The French example was followed in Belgium through the creation by the Ministry of Economy in 2001 of the Internet Observatory (see the Observatory’s website: <<http://www.internet-observatory.be>>).

¹² The European Parliament Decision of 9 October, 2003 (OJ C 81 E/84, 31.3.2004) is based on the Commission White Paper ‘European Governance’ (COM (2001)428 final).

¹³ Ch. Paul’s Report, *supra* n. 11, at p. 17.

insofar as the decision taken by the State after this consultation process will take into account the interests of all the players. At a certain point, this co-operation in the drafting of regulation will ensure its better effectiveness since each partner present during the preparatory phase will commit itself to respect the consensus searched and since enacted.

6. The European conception of co-regulation considerably enlarges the role of co-regulation and envisages this mechanism not as a way to prepare future public regulation but as a tool to refine the content of the regulation enacted by the public bodies and to concretely implement it. On this point, I would like to comment very briefly the recent Inter-institutional agreement called ‘Better Law-Making’, concluded between the three legislative authorities of the European Union: the European Parliament, the Commission, and the Council of Ministers in order to improve the legislative production and the quality of European legislation.¹⁴ In doing so, the Agreement underlines the essential place of co-regulation.

Without denying the interest of close co-operation between public and private players in the preliminary phase, the European Agreement clearly distinguishes this preliminary discussion from the co-regulatory mechanisms. The first concern is envisaged through the obligation imposed upon the European bodies to ensure the participation of all stakeholders at any step of the legislative process. As pointed out by the White Paper, ‘the quality, relevance and effectiveness of EU policies depend on ensuring wide participation throughout the policy chain – from conception to implementation. Improved participation is likely to create more confidence in the end result and in Institutions which deliver policies’.¹⁵ The White Paper thus suggests a ‘more effective and transparent consultation at the heart of EU policy-shaping’ through multiple channels: advisory committees, hearings, on-line consultations, etc.

The recently adopted inter-institutional agreement gives a precise definition of co-regulation: ‘Co-regulation means the mechanisms whereby a Community legislative act entrusts the *attainment of the objectives* defined by the legislative authority to parties which are recognized in the field (such as economic operators, the social partners, non-governmental organizations, or associations).’

7. This definition induces a clear partitioning of the responsibilities of the State, on the one hand, and of the co-regulation, on the other hand in the regulatory pro-

¹⁴ The agreement (2003/2131(ACI)) does envisage all the societal issues and not only those raised by the Information Society development, even if these specific issues are mentioned as a test case by the White paper, *supra* n. 12.

¹⁵ White Paper, *supra* n. 12, at p. 9. In that consultations process, the White Paper insists on the need to involve civil society: ‘Civil society plays an important role in giving voice to the concerns of citizens and delivering services that meet people’s needs. (White Paper, p. 14; see also: Opinion of the Economic and Social Committee on ‘The role and contribution of civil society organizations in the building of Europe’ (OJ C 329, 17.11.99, p. 30).

cess: the legislative authorities have to identify the *essential public policy objectives* when the means, by which they are met, are established by the public and the private sectors together. The private sector is mainly responsible for defining the means whereas the end result and objectives are identified by the legislative instruments. In short, the private sector must answer the question of 'how to implement them'. This partitioning of responsibilities is precisely the one also promoted by the WSIS Declaration of Principles when this Declaration asserts: 'Policy authority for Internet-related public policy issues is the sovereign right of States ... The private sector has had and should continue to have an important role in the development of the Internet, both in the technical and economic fields'.

It is therefore clear that public and private ordering mechanisms are not on the same footing. There is a sort of hierarchy insofar as co-regulation is viewed not as a substitute to public intervention but as a way to achieve (choice of the means) the end results imposed by the framework fixed by the State.

8. At the same time, through the provision quoted, the EU Agreement imposes certain limits upon the public legislator: 'The three institutions recall the Community's obligation to legislate only where it is necessary They recognize the need to use, in suitable cases or where the Treaty does not specifically require the use of a legal instrument, alternative regulation mechanisms.' The text clearly confirmed the double 'subsidiarity' of the legislative approach.¹⁶ The first one was already asserted as a fundamental principle of the European Union functioning by Article 5 of the European Treaty and means that: the European Union institutions may only act on matters that might not be more adequately ruled at another inferior level.¹⁷ According to that statement the subsidiarity principle clearly states that local solutions are still needed and must be preferred to international or global solutions, even if this international or European level might establish the general framework wherein these local solutions will take place and interoperate: 'Think globally, act locally'. In other words, local or sectoral solutions are the best way to take into account the cultural and business peculiarities of each situation and to develop adequate solutions otherwise, the regulation will be reduced to an enumeration of vague and broad common principles.

The second subsidiarity principle is quite new.¹⁸ It provides not to legislate when other means to achieve the public objectives might be met in other ways, particu-

¹⁶ On this principle, see Delpérée 2002.

¹⁷ About this first traditional meaning, see Verhoven 2002.

¹⁸ On that point see Timsit's reflections (Timsit 1996) about this new normative approach 'Lorsque l'Etat moderne est apparu, il a en effet trouvé sa traduction dans un droit qui conservait des origines historiques de son Auteur, l'Etat, le caractère mystique et abstrait dont celui-ci était paré. C'est ce droit qui a été le premier corps du droit- un droit abstrait, général et désincarné que j'appelle le droit-réglementation... Abstrait et désincarné il ne correspond plus aux exigences de la gestion des sociétés post-modernes. Trop complexes pour être gérées aussi généralement, abstraitement et pour ainsi dire d'aussi loin, elles requièrent un autre droit - actuellement en formation - qui se caractérise, au contraire par son adaptation au concret, son rapprochement des individus, son adéquation au contexte exact des

larly self-regulation,¹⁹ or to legislate only to the extent necessary to establish these public objectives, leaving the decision to the private sector as regards the right way to reaching these: co-regulation. Thus the second meaning of the concept envisages the subsidiarity principle as a way to validate and to specify the limits of the co-existence of the traditional regulatory model: the public one and the 'modern' ones: self-regulation and co-regulation. Everything that can be better addressed by co-regulatory or self-regulatory solutions must be fixed so addressed. Many prestigious authors have broadly asserted the complementarity of the two regulatory models.²⁰

9. Two exceptions are foreseen by the text: 'These mechanisms will not be applicable where fundamental rights or important political options are at stake or in situation where the rules must be applied in a uniform fashion in all Member States.' As regards the second exception, it may be feared that, under the pretext of ensuring a really unique market for Internet services, the European legislator pleads for having detailed legislation, leaving no place for co-regulatory or self-regulatory mechanisms. The second exception is questionable. Recently, in order to fight illicit or harmful content on the Internet, which undoubtedly is a question of public order, the European Council Declaration on Freedom of Communication on the Internet adopted on 26 May 2003,²¹ has urged all Member States to encourage self- or co-regulation as regards Internet content regulation. About privacy, Directive 95/46 asserts that a code of conduct must be promoted and it is quite clear that self-regulatory mechanisms including technological solutions will ensure the needed data protection more efficiently than certain legislative texts.²²

sociétés qu'il prétend régir. Concret, individualisé, contextualisé, c'est un droit que j'appelle de régulation. Le paradoxe est que ces deux corps du droit-de réglementation et de régulation- le second n'a été jusqu'à présent, ni connu, ni reconnu...' (p. 377).

¹⁹ About the different merits of self-regulation compared to State regulation, read the sound synthesis and the references by C. Lazaro (Lazaro 2002).

²⁰ See recently Trudel 2002: 'Pour y obtenir des énoncés normatifs efficaces, il faut exprimer le droit en ménageant des ouvertures vers les autres normativités.' Cf., also Slaughter 1997, Reidenberg 1996, Katsch 1995. This principle of complementarity is developed broadly in environmental regulation where one call on the assistance of a multiplicity of self-regulatory and co-regulatory initiatives beyond the legislative intervention. On this point, see notably Jadot 2002.

²¹ On 26 May 2003, the EU Council decided to extend by two years the previous Decision and Action Plan for promoting the safer use of the Internet by combating illegal and harmful content on global networks. The Decision focuses on the need to reinforce a certain number of actions which might be deemed as co-regulatory measures insofar as their enforcement will require full support, including financial and administrative support of the States, thus completing and improving the existing network of hotlines, ensuring co-operation between self-regulatory initiatives, development of quality site labels, benchmarking of filtering software and services, promotion of self-rating systems, etc. On that issue see our remarks on the progressive trend towards an EU co-regulatory system, d'Udekem-Gevers & Poulet, 2001.

²² On the valuable interdependence of law, technology and self-regulation as regards privacy protection, see Reidenberg 2001: 'Each of the distinct forms of regulation embody inherent limitations that preclude adequacy for effective protection of Privacy.'

Perhaps, through this restriction, the Agreement wanted to recall the Council of Europe Convention principle whereby limitations to fundamental liberties might be enacted only through legislation in the formal sense. However, that principle does not forbid the possibility of co-regulatory measures next to the legislative material and compliant with it.

10. Other remarks might be made on the basis of the text. As regards the application of the triple criterion of the legal validity of a norm, the following can be stated:

As regards the 'legitimacy' criterion: the text requires the representativeness of the parties involved and the transparency of the procedures followed within the co-regulatory process.

As regards the 'conformity' criterion, the principle of 'added value' is repeated. The mechanisms may be used on the basis of criteria defined in the legislative Act. The idea is again to fight against the rigidity of the legislative solutions and for a supple mechanism for ensuring a continuous adaptation to the problems and sectors concerned. The European Commission ensures conformity also through mechanisms of notification, even control.²³

Finally, as regards the 'effectiveness' criterion, the co-regulation mechanism is deemed as being the way to attain the objectives defined by the legislative authorities. The main 'added value'²⁴ of self-regulation or co-regulation relies on this criterion insofar as co-regulation might set-up better adapted enforcement mechanisms more rapidly and efficiently (through label, accreditation, standardization, and ADR mechanisms) than the traditional judicial remedies.

11. The European approach of co-regulation is fundamentally a 'top-down approach'²⁵ rather than a 'bottom-up approach' following the distinction proposed by the Mandelkern Report written for the German Bundesministerium des Innern (BMI).²⁶ Under the 'top-down approach' or 'new approach',²⁷ that the essential

²³ 'These measures may provide, for example, for the regular supply of information by the Commission to the legislative authority on follow up to application or for a revision clause under which the Commission will report at the end of a specific period.' (Interinstitutional Agreement, n° 21 in fine).

²⁴ The 'added value' principle has been enacted quite clearly by the 'e-confidence forum' set-up by DG Sanco in order to define key principles as regards the acceptability of the self-regulatory methods (code of conduct, labelling system and ODR). As regards these principles, see the e-confidence website at: <http://econfidence.jrc.it/default/show.gx?Object.object_id=EC_FORUM000000000000000000D>. These principles and, more broadly, the attitude of the EU authorities *vis-à-vis* self-regulation were commented on in: Pouillet 2001a.

²⁵ On that point see, A. Massimo, The 'Better Regulation' Action plan and the Framework Action 'Up-Dating and Simplifying the Community Acquis', Rome, October 2003, available at: <http://www.astrid-online.it/qualitate/regolazione/Riunione-d/Iniziativa/EC-Presentazione-Roma_def.ppt>.

²⁶ Mandelkern report, *Moderner Staat – Moderne Verwaltung: Der Mandelkern-Bericht: Auf dem Weg zu besseren Gesetzen*, available at: <http://www.staat-modern.de/dokumente/sm_bestellservice/,-548850/dok.htm>.

²⁷ As asserted in the European White Paper, COM (2001) 130 final, p. 7.

objectives, fundamental mechanisms, and mechanisms as regards the implementation and control of these objectives must be regulated by Governmental regulations and, insofar as it is possible, by legislation.

By contrast, the 'bottom-up approach'²⁸ designates any self-regulatory mechanism at a certain moment transformed or taken into account by Public Authorities. Schultz and Held²⁹ distinguish four cases illustrating the two approaches:

A legislative text provides the co-regulatory mechanisms and encourages actors of the private sector involved to transpose by self-regulation the objectives pursued by the legislation (top-down approach).

Self-regulatory mechanisms are surveyed or controlled by the State (top-down, bottom-up approach).

Self-regulatory mechanisms developed in a first step beyond all intervention by the State are integrated within a legislative text (bottom-up, top-down approach).

Public and private actors co-operate under diverse arrangements. Through their mixed interventions, which are placed on an equal footing, a better enforcement is given to certain rules (bottom-up, top-down approach).

The three last mechanisms clearly escape from the too strict definition given by the European text. However, they are illustrated by other ICT regulation mechanisms as will now be demonstrated, and must be considered 'co-operative approaches to regulation' following the OECD expression.³⁰

12. The Australian way to regulate Internet content is often quoted as the perfect example of a co-regulatory approach. It illustrates perfectly the top-down approach suggested by the European Union by giving plenty of room for private actor intervention and free developments. In mid-1999, the Australian Parliament passed new laws aimed at regulating content on the Internet and setting up the Australian Internet Content Regulation Scheme.³¹ In summary the scheme:

enables the industry to set out procedures for itself through codes of practice, registered by the Australian Broadcasting Authority (ABA), which aim to provide a balanced and responsible approach to certain content issues;

²⁸ Palzer 2002; White Paper, *supra* n. 12, at p. 9.

²⁹ W. Schulz and T. Held, *Regulierte Sellsregulierung als Form modernen Regierens*, Hans Budow-Institut für Medienforschung, Hamburg, October 2001, available at: <http://www.tauss.de/sys_files/1030028087.54/Gutachten-Bredow-Institut>.

³⁰ Co-operative Approaches to Regulation, PUMA (Public Management) Occasional Papers, OECD, 97, available at the OECD website: <<http://www.oecd.org/>>. The Paper analyzes different cases of co-operation between public and private bodies in different sectors (chemical sector regulation, environmental regulation, and food safety regulatory issues).

³¹ On the Broadcasting Services Amendment Act 1999 see, n° 90 amending the Broadcasting Services Act 1992. The text is available at: <<http://www.scaleplus.law.gov.au/>>. About the genesis of this text and a comparison with other approaches, see Granger 2000.

includes a complaints system in which any person in Australia can complain to the ABA about offensive content they have accessed on-line; provides for an investigation process where the ABA is required to investigate the complaints and, based on classification decisions from the Office of Film and Literature Classification (OFLC), determine whether the content complained about falls into prohibited categories. If it does, the ABA may notify to the Internet Content Host (hereinafter: ICH) who hosts the content, requiring it to stop hosting the content. If the prohibited content is hosted overseas, the ABA notifies the makers of approved filters; includes a graduated scale of sanctions against ISPs and ICHs who fail to comply with the codes, notices to take down content, or ABA directions; and includes a community advisory body called NetAlert.³² Its role and that of the ABA is to educate and inform the public about managing access to content on the Internet.

13. The second case is 'TRUST UK'.³³ The multiplication of labeling systems in UK has provoked as elsewhere, confusion about the quality of each label. To tackle this problem the UK government³⁴ created a consortium (joint venture) together with consumer and business representatives in order to accredit the labeling systems which are committed to abiding the Trust UK Code of Practice. A Trust UK Complaint form has been drawn up so that consumers can appeal if neither the Web Trader nor their Code Owner have been able to resolve the problem.

This scheme was proposed in the White Paper 'Modern Markets: Confident Consumers', issued by the British Government,³⁵ and as an alternative to direct intervention by the State. Under this scheme, it is assumed that the private stakeholders will bear the entire responsibility for implementing the solution outlined by the public authorities after having consulted all interested parties. It is also clear that if the system were to fail, it would be the responsibility of the government to take-up its regulatory role again.

14. The last case is quite controversial and its complete analysis would definitely go beyond the scope of this study. I do limit myself to a few reflections.

The WIPO Internet Domain Name Process might be considered another way of co-regulation or, as Froomkin³⁶ called it, as a 'semi-private process', which means 'a cooperative endeavour between a public body and private interests that is designed to create a body of rules enforced by some mechanism other than direct promulgation by the public body'.³⁷

The Uniform Dispute Resolutions Procedures rules were drafted by an international public body not as an intergovernmental resolution³⁸ or convention but as a simple Experts' Report finally approved ICANN,³⁹ a US private non-profit organization. Without repeating all the details of the WIPO drafting procedure, broadly criticized by a number of authors, it may be concluded with Froomkin that: 'A semi-private process led by a public body (like the WIPO Internet Domain Name Process) risks combining some of the worst features of both traditional regulation and private ordering: opaque decision-making is easy. In some cases, the process may be managed by a body acting outside its jurisdiction. The public-private blind may also insulate the process from judicial review since it falls outside the categories that courts would tend to think of as within their purview'.⁴⁰

All these issues might be also raised as regards the functioning of ICANN itself. The origin of ICANN demonstrates the deep link between the US government and this 'independent' private body.⁴¹ This US governmental control is still present even if, according notably with European Union pressure,⁴² a more democratic way of rule making ensuring a better participation of the different continents and a

that will be affected by the regulation, and seeks to find agreement on rules that can be promulgated and enforced by the Government. True self-regulation excludes the participation of a public body.

³⁸ As a follow-up to the US White Paper: 'Statement of Policy on Management of Internet Names and Addresses' (U.S. Department of Commerce, 1998), the World Intellectual Property Organization (WIPO) initiated an international process to develop recommendations on certain intellectual property issues associated with Internet domain names (First Internet Domain Name Process: Compatibility between trademarks and domain names (started 8 July 1998, ended 30 April 1999); Second Internet Domain Name Process: Compatibility between certain names and domain names (ended 3 September 2001). It is quite interesting to underline the adoption by the WIPO during this process of the Request for comment (RFC - 1 and 2) procedure which is typically used by private bodies like ICANN, IETF and private standardization bodies and the fact that governments (especially the European Commission, see the EU Commission Reply - 29 October 1998) have intervened in the context of this procedure. Source: The Management of Internet Names and Addresses: Intellectual Property Issues, Final Report of the WIPO Internet Domain Name Process, 30 April 1999, ANNEX II, List of Governments, Organizations and Persons Submitting Formal Comments: <<http://arbiter.wipo.int/processes/process1/report/index.html>>.

³⁹ It must be underlined that only the WIPO secretariat was involved in the drafting of the rules. The rules were forwarded to ICANN without first being approved by the WIPO General Assembly. ICANN adopted the UDR Policy aimed at settling disputes arising out of abusive registration and use of domain names.

⁴⁰ The comparison between this WIPO rule-making and the US Federal Agencies' rule-making is quite interesting on that point. According to the Administrative Procedure Act, certain requirements have to be taken into account by the Agencies. So the obligations: 1. to issue a notice of the proposed rule-making and to ensure its large publication 2. to give to everyone the opportunity for comments, 3. to consider these comments and motivate the attitude of the Agency *vis-à-vis* these comments. Finally, it must be underlined that each person affected by the Agency's decision might challenge it before the Court and that for different reason ('arbitrary and capricious rule', 'outside of the reasonable'). On all these points, see Froomkin 2000a.

⁴¹ See Mounier 2000; Iteanu 2002; Froomkin 2002, quoting S. LYNN, ICANN President: 'Each of ICANN's accomplishments to date have all depended, in one way or another, on government support, particularly from the United States' and Delmas 2002.

⁴² On these pressures, see Delmas 2002.

³² About NetAlert, see website: <<http://www.netalert.net.au/00051-What-is-Co-regulation.asp>>.

³³ See the Trust UK website at: <<http://www.trustuk.org.uk/>>.

³⁴ About the history of Trust UK, see De Bruin 2002, p. 146 et seq.

³⁵ Available at: <www.dti.gov.uk/consumer/whitepaper>.

³⁶ Froomkin 2000 and 2000a.

³⁷ According to Froomkin, semi-private rule-making should not be confused with either negotiated rule-making. A Government agency or other public body meets with representatives of the group

more transparent way of deliberating has been progressively installed.⁴³ It is quite interesting to underline that one of the major modifications introduced has been the setting-up of a Governmental Advisory Committee (the GAC). This creation illustrates that co-regulation might lead to a reversal of the traditional hierarchy insofar as governmental authority has a simple consultative voice in the ICANN's process of rule-making. Very severely concerned is Albert⁴⁴ 'This ultimately means we are left with a self-regulatory organization managing core resources of the Internet, directly controlled neither by the governments of this world, nor by the users of the virtual world. Instead at the end of the day ICANN is controlled by the industry protecting their profitable monopolies and to make everybody outside the US even more concerned about the future of self-regulation by representatives of the unilateralist US Administration.'

15. These criticisms highlight the dangers linked with certain co-regulatory schemes. The main fear is what economists call the 'regulatory capture',⁴⁵ i.e., the fact that the regulatory power is given to certain bodies in a non-transparent way. This may be the case when decisions are taken in a non-transparent way. Insofar as co-regulation could create confusion between public authorities' and private bodies' competences, this fear might be founded. The risk of seeing rule-making deeply influenced by the interests of a specific group as regards the content of the rule leads to a 'spill-over effect.'⁴⁶ Another concern is definitely the difficulty to ensure that 'those who are affected by conduct that is the subject of particular rules must have some voice in determining the content of their rules.'⁴⁷ This 'legitimacy' question of certain co-regulatory norms especially when the co-regulation is not organized by the law itself, is not easy to solve. It requires a transparent rule-making process and all the opportunities given by the Internet to reach a maximum of transparency and open debate.⁴⁸ It is quite clear that intervention in certain co-regulatory schemes of public bodies like GAC or WIPO might create a false appearance of legitimacy, which would be an additional risk.

⁴³ Read the interesting debate between Palfrey, Chen, Hwang, Eisenkraft: 'Public Participation in ICANN' and Mc Laughlin: 'The Virtues of Deliberative Policymaking: A Response to 'Public Participation in ICANN'.

⁴⁴ Albert 2003.

⁴⁵ On that issue, see Brousseau 2001 and Mueller 1998.

⁴⁶ So a number of authors have denounced the fact the WIPO rules focus mainly on the protection of IPR holders and have not sufficiently taken into account other general interests like competition and privacy questions (see notably Mueller 1999).

⁴⁷ Post & Johnson 1997 and 1999. These authors emphasize the absolute need to control the spill-over effects of self-regulation or co-regulation by a systematic assessment of the different rules adopted by the self-regulatory bodies.

⁴⁸ See the constant reference to the procedural Ethic developed by Habermas as a way to solve the legitimacy problem raised by these new normative approaches, in Froomkin 2003, p. 800, and Maesschalk & Dedeurwaerdere 2002.

16. In conclusion, my intention is definitely not to reject any form of co-regulation. On the contrary, certain schemes like those promoted by the WSIS and the European Union, might bring what is needed by the Internet: more decentralized and adapted regulatory framework allowing each community to take its own responsibility and providing certain added value to the legal framework enacted by national or even international constitutional authorities. Other forms of co-operation between public and private authorities do not have to be excluded but, in these cases, respect for the three fundamental criteria of legitimacy, conformity, and effectiveness must be scrupulously evaluated.