

(Self)regulation of numbers and domain names

(Zelf)regulering van nummers en domeinnamen

Mr. N. Sitompoel
Mr. F. Tonkens
Dr. N.A.N.M. van Eijk
Prof. Mr. E.J. Dommering

Summary

This study portrays both the International Telecommunication Union (ITU) and the Internet Corporation for Assigned Names and Numbers (ICANN). This last chapter takes a closer look at the analogies and the differences between the organisations. It also aims to determine if both organisations comply with the aspects of self-regulation depicted in Chapter 1, as well as the requirements imposed by the Dutch government.

The ITU was founded 135 years ago as a result of the requirement to co-ordinate telegraphy internationally. The ITU is a state initiative that has always been governed by public law. Over time, the ITU developed from an internationally regulated organisation into a delegate organisation in which markets, in addition to states, are also represented. The increasing influence of the private sector enables the ITU to consider their interests more closely. The ITU's internal procedures and their effect on the national organisations clearly show that the ITU operates in a public law environment.

ICANN was founded in 1998 when the American government privatised the management of the domain name system. ICANN is positioned as a self-regulating organisation. However, it should be noted that the American government is directly or indirectly involved and that the organisation has strong ties with the United States. The need for representation and/or social legitimacy within ICANN's mainly private law organisation is constantly increasing. Because organisations such as the ITU, the WIPO and the European Commission are moving in on ICANN's territory – and thus increasing the level of government involvement – ICANN started to move towards more official forms of regulation.

The agreement between the organisations documents the shift in focus; the ITU is slowly but surely moving in the direction of increased private sector involvement, and ICANN is moving towards more formal relationships that increase the role of governments and international treaty organisations and regulate the relationships.

In order to guarantee worldwide communication, assigned numbers must be unique. For this reason, it is essential that the parties reach an agreement that enables numbers to be assigned from a central location. Managing the international number space – which is a question of distribution – is, and will remain, one of the ITU's most important activities. The same applies to ICANN with regard to the distribution of domain names and IP numbers – yet another question of distribution.

Since the 60's, the ITU has been applying a numbering policy that includes country codes. ITU's country code assignment procedure is fairly simple. Country codes are

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grouped into regions that consist of the first number of the one to three number country codes. Upon request, a country is assigned the country code that corresponds to its region. Country codes are comparable to ccTLDs, which ICANN assigns to requesting countries. Both ITU and ICANN are authorised to withdraw country codes and ccTLDs respectively. The E.164 800 Global Freephone Service code is equivalent to the .com domain. 800 numbers are universal and have no country-specific characteristics. In this respect, the same routing problems and policy issues that apply to the gTLDs such as the .com domains are valid for the international 800 numbers.

As far as the numbers are concerned, a national government's authority is limited to the framework defined by the ITU, which includes the country codes. The Ministry of Transport and Public Works draws up – in agreement with OPTA – numbering schemes for the telephone numbers that belong to the country code 31. There is no comparable function – yet – for domain names. In the 80's, .nl domain management was – more implicitly than anything else – left to the National Research Institute for Mathematics and Computer Science in the Netherlands (Centrum voor Wiskunde en Informatica, CWI), who later transferred it to the Foundation Internet Domain Registration the Netherlands (Stichting Internet Domeinregistratie Nederland, SIDN). SIDN's authority is limited to creating an IP numbering scheme for the purpose of filling the .nl domain, and to issuing domain names within that specific domain. SIDN also limits the number of .nl domains that companies and institutions are allowed to register. However, the government wants to become more involved in SIDN's domain name strategy – not its IP address strategy. The Dutch government is also interested in reserving specific domain names for itself.

One of the ITU's biggest advantages is its intergovernmental nature and large number of members: it has more than 185 Member States and more than 540 Sector Members (mainly private organisations). The ITU has always worked with strict models, enabling it to create a stable and legally secure policy over the years. The downside of being governed by public law and adhering to strict processes is inflexibility. It can take a long time before a decision is made within the ITU.

Although the ITU is not primarily concerned with self-regulation, it does adhere to a number of the self-regulation requirements that were passed in the electronic superhighway legislation. According to the Dutch government, the concerned target groups must be sufficiently organised, equally interested in protecting the relevant social interests, must have sufficient common interests and ensure that the agreements are adhered to.

Two of the three target groups – Member States, Sector Members and telecommunication end-users – are sufficiently organised within the ITU's institutional framework. It goes without saying that states are well organised, are able to influence the decision making process and can defend their interests. The same pretty much applies to Sector Members. Although the end-users are not

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organised, their interests are, considering the ITU's objective, well represented.¹ It is, however, desirable, especially considering the influence of the private sector, that end-users be directly represented.

The rules and regulations that are stipulated in the Constitution, the Convention and the Administrative Regulations are binding for all Member States. ITU's organs are bound to their own procedures by the voting and decision-making processes that are formulated in detail in both the Constitution and the Convention. The adherence to these regulations is guaranteed by the provision that Member States are obliged to inform each other of violations to the Constitution, the Convention and the Administrative Regulations; it is not clear from the procedures if the ITU is authorised to apply sanctions in the event of non-compliance. The Constitution and the Convention contain provisions for arbitration and the settlement of disputes. The Sector Members are 'voluntarily' bound to the rules and regulations. Although recommendations have a non-binding character, they are fully accepted by all of the concerned Sector Members because they guarantee the global interconnectivity and interoperability of networks and services. Sector Members would only harm themselves by not accepting and complying with ITU's standards. In this case, acceptance and compliance with the recommendations is a given.

In order to determine if ICANN complies with the aspects of self-regulation depicted in Chapter 1, as well as the requirements imposed by the government, it is necessary to look at ICANN under a slightly different light. We reached the following conclusions:

With regard to the legal basis of self-regulation, we can conclude that ICANN was not established within a legal framework. The American government's white paper, which formed part of the basis on which ICANN was established, is "not a substantive rule, does not contain mandatory provisions and does not itself have the force and effect of law."² The Memorandum of Understanding between ICANN and the Department of Commerce does not provide a legal framework either. The MoU is just an "agreement between the U.S. Department of Commerce (...) and the Internet Corporation for Assigned Names and Numbers,"³ thus a normal agreement that has a bilateral termination period of 120 days. Termination must be submitted by both parties in writing.⁴ The American government put pressure on the concerned parties to switch to self-regulation. The white paper contains a detailed list of the requirements that ICANN must comply with in order to obtain the right to manage the domain name system. ICANN can be considered a substitute self-regulating organisation. However, there is a catch to legal self-regulation: the DOC can withdraw ICANN's nomination if performance is not up to par.

¹ As opposed to the consumers, the Dutch Association of Major Business Telecommunications Users (Nederlandse Vereniging van BedrijfsTelecommunicatie Grootgebruikers), a sector member in the category 'Regional and Other International Organisations', has the guarantee that its interests will be represented within the ITU by the International Telecommunications User Group.

² White Paper, under 'Administrative Law Requirements'.

³ MoU DOC-ICANN, under 'Parties'.

⁴ MoU DOC-ICANN, under 'Period of Agreement and Modification/Termination'.

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ICANN was established as the result of a unilateral enactment. Although the American government clearly specified the conditions with which ICANN must comply, it did not formally play a role in establishing ICANN. The government only 'selected' one of the proposed forms of self-regulation. The "DOC has determined that this [DNS] project can be done most effectively with the participation of ICANN."⁵ Although the so-called International Forum on the White Paper (IFWP) played an important role in establishing ICANN, ICANN is not a direct result of this process. The IFWP resulted in a number of different proposals. ICANN's proposal actually came from the Internet Assigned Numbers Authority (IANA) – which should not be considered as a legal body, but as a group of tasks – and was signed by Jon Postel.⁶ The American government subsequently entered into a relationship with ICANN by means of a unilateral legal act.

In the Memorandum of Understanding, the Statute of the Articles of Incorporation, ICANN was not given the authority to apply sanctions. There is also no mention of government involvement – mandatory or other – to ensure that the regulations are adhered to. ICANN is – with the exception of the previously described relationship with the American government – embedded in a system of private law relationships. In this private law system, ICANN is at the top of the DNS hierarchy, which provides it with a powerful weapon: ICANN can exclude any party that violates an agreement from the DNS.

In the area of DNS management, there is no alternative to ICANN; ICANN has the monopoly. Although there are plans to set up competing root servers in the future, nothing is expected to happen any time soon. New root systems are capital intensive and require substantial investments. Moreover, it is fairly obvious that the American government, which has to approve the process, is not in favour of it: "(t)he introduction of a new management should not (...) create competing root systems."⁷

Before we can determine if ICANN complies with the requirements imposed by the Dutch government, we must first take a look at the concerned target groups. A distinction needs to be made between the internet industry and the internet users. Within ICANN, the industry is represented in almost all of the different constituencies of the Domain Name Supporting Organization (DNSO) and thus appears to be sufficiently organised. The group of internet users, on the other hand, is hardly or not even organised at all. Those organisations that set out to defend the interests of internet users have little to no backing.⁸ ICANN created the At Large Membership to accommodate the low level of internet user organisation. At first, At Large members were only able to elect an electoral college. Following heavy protests, At Large members were able to directly elect five of ICANN's 19 directors in 2000, and will be electing nine of its directors in 2002. ICANN used the At Large

⁵ MoU DOC-ICANN, under 'Purpose'.

⁶ Ballon 1998.

⁷ Revised Policy Statement, under 'Stability, White Paper'.

⁸ Examples of organisations that defend the interests of internet users but that have no to little backing can be found at <<http://www.icannwatch.com>> and <<http://www.isoc.org>>.

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Membership to compensate the lack of democracy; after all, ICANN doesn't have any real members and its internet users are not represented by their own 'individual's constituency' in the DNSO.⁹ In short, the internet industry appears to be well organised. However, and despite the creation of the At Large Membership, the question of an illustrative representation for internet users remains to be answered.

The question if the relevant social interests are being defended equally is directly tied to the target groups' level of organisation. It is not easy for a badly organised target group to defend its interests. The industry is well represented within ICANN by the DNSO's constituencies. With the creation of the At Large Membership, internet users have limited but direct influence on the constitution of the board of directors. With the exception of the comment previously made on the representative character of the At Large Membership, there will be no equal representation until the internet users' representatives have been elected to the board of directors. One should also note that the At Large Membership will never have a majority on the board of directors.

In order to determine if all of the parties are sufficiently bound to their contracts and agreements, we must first define who these parties are. The parties consist of ICANN, the internet industry and the internet users. The parties are sufficiently bound if they document the agreements they reach in a contract. ICANN is an American company that can be forced to respect a contract by a civil court. The biggest problem is getting ICANN to respect its own Statutes and Articles of Incorporation. The only way to bind ICANN to them is by appealing to the Committee of the Board on Reconsideration. However, the committee has limited authority and the board of directors decides if the committee's recommendations are followed. In addition, the board of directors can amend the Statute or the Articles of Incorporation according to Article XII of the Statute and Article 9 of the Articles of Incorporation if they have a two third majority.¹⁰ There is little guarantee that ICANN will respect its own Statutes and Articles of Incorporation.

The concerned parties may have to be bound to their agreements by a civil court. As we have just seen, ICANN's board of directors cannot be held responsible for any actions that may be in contradiction with its Statutes and Articles of Incorporation. ICANN's 'members' only have the rights that are stipulated in the Statutes¹¹, which do not determine the board of director's liability.

In summary, we can say that, despite its original State-bound character, the ITU is an organisation wherein all of the concerned parties are represented, their interests

⁹ The Non-Commercial Domain Name Holders Constituency, one of the DNSO's constituencies, defends "non-commercial speech and activity on the internet", but according to the membership criteria, is only open to organisations, thus not to individual internet users (see <<http://www.ncdnhc.org>>).

¹⁰ Article 9 of the Articles of Incorporation determines that ICANN members must have a two third majority in order to ratify an amendment. However, according to Article 1, Section 1 of the Statute, ICANN has no members in the sense of the California Non-Profit Public Benefit Corporation Law that could appeal to this provision.

¹¹ Article II, Section 1.

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defended and ITU's binding is guaranteed. ICANN is a non-statutory, unilateral form of self-regulation that is governed by private law and for which there is no alternative. The industry is well represented and its interests well defended. User representation is limited. The importance of At Large Membership will increase in 2002 when all of the At Large members have a seat on the board of directors. By this time, ICANN will have passed decisions on the issues that it is currently confronted with. A mechanism must be put in place that binds ICANN to its technical mandate and penalises ICANN if it doesn't.

The study shows that there are substantial formal differences between the international number and domain name frameworks. They are mainly expressed by ITU's public law character and ICANN's civil law character. However, at the same time, we can establish that the models show substantial similarities and that they are moving towards each other. The ITU is no longer a government ivory tower and ICANN is a private organisation that is trying to lose its government character. At the same time we can establish that the ITU has the better framework when it comes to democratic legitimacy, legal structure and guarantees.

Looking towards future convergence issues such as IP telephony, the stated differences can no longer be ignored. In order to enable communication between public telecommunication networks – for which E.164 numbering is used – and the internet – for which IP addresses are used – the IP telephony addressing system must be able to translate both types of numbers. Considering that ITU-T manages the E.164 numbers and that ICANN manages the IP addresses, the IP telephony addressing system will need a new form of (joint) management to guarantee that the numbers conform the pattern that is required to translate them.

We must now determine if these differences can be maintained under all circumstances or if either of the models would be preferable. From a purely legal perspective, applying ICANN's current model as is, is not an option. The waves that (international) governments are sending in ICANN's direction (the EU's position is a perfect example) are transmitting the same message. We can also establish that ITU's base is increasing. Although it may take some time, we can safely assume that both organisations will continue to move more towards each other, and that any self-regulating aspects will be embedded in a regulatory framework.

The national situation is similar. Numbers are entirely embedded in a public law framework. Domain names are assigned by the SIDN within a private law framework. The Dutch government is currently evaluating SIDN's position. It is possible that this evaluation will further formalise the relationship between SIDN and the government. At the same time, the government is becoming more involved in domain name assignment, and claiming the exclusive right to certain domain names. The latter resembles activities that the government performs when assigning numbers by entering them in a numbering scheme. At a national level we can also safely assume that both management and distribution systems (for numbers and domain names) will grow towards each other or at least become more and more similar. Self-regulation will play a less important or a different role altogether than it does today.