

July 2005

Report on “Internet Governance”

EICN
*EUROPEAN INTERNET
COREGULATION NETWORK*

European Internet Coregulation Network

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Internet governance is a controversial issue. For some observers, it should be limited to the production of technical norms for the network, for naming and the future of ICANN. For others, it should cover other issues, including content, evolution of uses...; in any case, everyone questions the specific role of the States and the other actors (civil society or private sector) in the management of this internet governance.

The subject has been submitted to the World Summit on the Information Society (WSIS) and it appears as a critical one.

In the absence of consensus between the States, and the various parties concerned, a working group has been launched under the United Nations Secretary-General. The mission of the group, chaired by Nitin Desai, is:

- to elaborate a practical definition of Internet governance;
- to identify issues of general interest related to it;
- to elaborate a common conception of the roles and the areas of responsibilities of governments, inter-government and international organizations, and other existing forums, as well as the private sector and civil society, in developing and developed countries;
- finally, to elaborate a report on the results of the mission, which will be examined in the course of the second phase of the Summit in Tunis in November 2005.

This is the context and the reflection to which the **European Internet Coregulation Network (EICN)**¹ wishes to contribute.

A working group was launched in April 2004 under the supervision of the French Internet Rights Forum. These conclusions were adopted by the members of the Network in July 2005.

The objective of the EICN is to feed the public debate with its own vision of the notion of "internet governance". This vision is built on the expertise of its members in the legal and policy issues related to the internet. It is directly linked with the philosophy of regulation shared by the EICN members. It inspires recommendations or guidelines for a good internet governance.

¹ The European Internet Coregulation Network (EICN) was initiated by the French organization, Le Forum des droits sur l'internet, in partnership with organizations from 6 European countries during the WSIS in Geneva in December 2003. One of its objectives is to feed the European institutions with proposals on the subjects of common interest. The members of the EICN are: Institutet för Rättsinformatik (Sweden), Observatoire des droits de l'internet (Belgium), Forum per la tecnologia della informazione (Italy), Internet Watch Foundation (United Kingdom), Oxford Internet Institute (United Kingdom), Információs Társadalom-és Trendkutató Központ (Hungary), Le Forum des droits sur l'internet (France), Österreichisches Institut für angewandte Telekommunikation (Austria) and the Confederation of European Computer User Associations.

The IWF is not a party to this paper because the subject matter is outside its remit.

1- EICN philosophy of regulation

from regulation and self regulation to coregulation

The Internet is a complex media because of three main characteristics: international geography without border, plurality of participants and decentralized organization without a central point of control. In the recent years, as it is an expanding social space, different ways of defining and implementing public policy issues have been applied with more or less success.

The first reaction of the States in 1996 was **regulation** because Internet was viewed as a new media which could be regulated as a broadcast media. But this attempt failed because of the very characteristics of the Network closer to « *an endless world conversation* » than to a traditional medium. Therefore, States interventions have been limited to monitoring the activities (liability regimes for Internet access providers, data hosts, technical intermediaries, users) and not the material circulating online.

In order to compensate for the limits of national laws, a policy of **self-regulation** has developed in the private sector, especially the trade sector. In many areas (protection of minors, e-commerce, etc), self-regulation was viewed as a method to set the rules without State intervention. This method has been criticized, its professional objectives pointed out as unable to take into account issues of public interest.

Since 1998, several States have adopted laws in order to regulate the circulation of material on the Web (DMCA in the United States, European directives on electronic signature, on e-commerce or on copyright and related rights in the information society, the Council of Europe's Convention on Cyber-crime, etc.). While binding norms are spreading, self-regulation tends to evolve to a more realistic vision: implement general principles set by the laws. For example, the new codes of conduct provide private parties with advice and implementation tools regarding the applications of recent laws.

But again, this way seems a bit limited in order to handle the policy issues of the internet.

In facts, the complexity of the **Net challenges traditional modes of regulation and** specifically the ability of the States to set rules in given physical spaces between all parties and regulate behaviours according to social or moral norms.

Two examples can be given:

- Spamming: the 2002 European legislation has set an opt-in obligation to the direct marketers but it cannot do anything to prevent from spam messages coming from unregulated countries collecting illegally addresses on the Web;
- Sharing and downloading music and video on P2P networks: it is not only a European directive that can prevent millions people to share music and films and being considered as "pirates".

A new path has to be elaborated, adapted to the specificities of the network. **It must be based on a new scheme of cooperation between the public and the private actors**, more balanced, more flexible, more open.

This smooth procedure, associating all parties in the elaboration of the rules of the network is called **coregulation**.

The word “coregulation” was born in France in 1998 and it is often quoted in international texts. Nevertheless, it can describe two ways of understanding the regulation philosophy generated by the internet:

In the first meaning, coregulation stands for “regulated self-regulation”: in this form of governance, the business entities or the civil society is associated with the public authorities in order for these latter to control or frame the self-regulatory tools. It generally leads to code of conducts elaborated by a group of actors, then validated and guaranteed by the public authorities.

In the second meaning, coregulation has a wider prospective and leads to a real “multi-stakeholder partnership”.

This approach is based on the belief of shared responsibilities between the public and private actors on internet issues. The parties have to manage their interdependencies and articulate their specific tools of regulation. It leads to open and balanced discussions between the business sector, the public authority and the civil society in order to elaborate common solutions. These solutions are combining regulatory tools and preferences at the disposal of each actor (laws and decrees, codes of conducts, technical tools, self-awareness...)

This pattern of governance involves a matter of principle: all parties concerned in the development and the uses of the Internet have a legitimate right to contribute to the definition of the rules governing them. It is also built on a matter of efficiency: many problems quite simply cannot be solved without the active contribution of all parties.

The EICN believes that this meaning of coregulation is the governance pattern best adapted to the internet.

Nowadays, the coregulation principle is gaining widespread acceptance at the international level. In France, the Internet Rights Forum is implementing this approach since 2001 with great success. Furthermore, after the Paris meeting in June 2004 on the fight against racism, anti-Semitism and xenophobia on the Internet, the Organization for Security and Cooperation in Europe (OSCE) recommended the development in every State of areas for consultation between all parties concerned. Lastly, the United Nations have been trying to enhance greater participation of the private actors and the civil society in international conferences.

2- Recommendations for a good "internet governance"

The EICN believes that the expression "internet governance" should be clarified. For its members, it is less a question of subjects to be addressed (technical standards, contents issues...) than the way it is possible to address them. In fact, the characteristics of the Network generate specific processes to handle the policy issues and this is what internet governance is about.

The following recommendations tend to sum up the best practises and the knowledge gained by the EICN members in the recent years in this matter.

- 1) **Internet is a social space which needs regulation** in all its aspects according common social values

Internet cannot evolve in the future if the social dimension of this space is not recognized. Most of the human activities are now transferred on the internet and it implies new responsibilities for all the actors, public and private. At the same time, it is a new and very exciting frontier of our humanity.

Europe can play a distinguished role in defining the ways and the values which must be promoted at the international level.

- 2) Because the internet is decentralized, the method of regulation needs a **bottom-up process**

The Internet favours not only technological, but also methodological innovation. This is due to the fact that the complexity of this new social space (international, pluralist, borderless, decentralized) has fostered new ways of establishing rules. For example, in technical areas, an open, decentralized and participative process is operated by the entities in charge (W3C, EITF) and this process has allowed the production of legitimate, flexible and efficient standards.

Any governance pattern must be built on this type of methods that guarantee that all the parties concerned can express their views and that the solution adopted takes into account the needs from ground level.

- 3) **Opening to all the stakeholders** (business and civil society representatives) as a sign of their interdependence to contribute to every stage of the preparation of norms

Internet issues involve three kinds of stakeholders:

- the **States**, traditionally monitoring international bodies, but having more and more difficulty setting and upholding rules;
- the **private sector**, which have gradually taken over the roles of builders and strategists in the information society;
- lastly, the **civil society**, a heterogeneous and scattered sum of actors focused on the defence of fundamental values (humans rights, access to culture...). Each of these components participates in the bodies under study in various ways.

All of the stakeholders must be associated in the elaboration process of the norms because **they all have shared responsibilities in defining and implementing them**. This cooperation process is not an addition of bilateral dialogues between the States and the two others. It should be a real balanced dialogue between the three.

The cooperation can work at different levels:

- the stakeholders can participate to the body itself that elaborate the norm;

- they can be consulted in the preparatory stage of the norms (right of initiative, participation within working groups);
- they can, eventually, be part of the decision-making process.

4) **Reaching for consensus:** procedures need to seek acceptance of proposals by every participant

The Internet is a space where it is difficult to enforce rules. Each actor can easily bypass the constraint of a national obligation. One answer is that all the actors agree on the objectives of the rule and on the solutions to implement it. Therefore, each actor appropriates the rule and works at its enforcement.

If consensus is not reachable because of high political divisions, there is still an objective to pursue: establishing common information and understanding on the subjects concerned.

5) **Combining regulatory tools of each stakeholder:** regulation, best practices, information and pedagogy

Public and private actors have specific regulatory tools they can use to foster their vision of the internet; none of these tools are entirely satisfying but they can be combined to draft effective solutions for internet policy issues. Depending on the subject, these latter will be based on more or less statutory interventions, codes of conducts, self-awareness.

6) **Combining the national and international dimension** of the internet

The Internet is not a network which could be controlled at the local level. Many examples show that a regulation at least regional or international is necessary (spamming, child protection, etc.).

7) **Recognizing a specific role for public authorities**

Public authorities must be part of the open consultation process between all the stakeholders in order for it to take into account public policy concerns. In the decision phase, the States have full and specific competences in three ways:

- they are the only ones able to transform consultation process deliverables into legal norms;
- they can arbitrate between the parties if the consensus has not been reached;
- they are the natural vouchsafe of public interest.

8) **Recognizing the necessity of a cultural change**

Coregulation is not an easy path. It calls for a cultural change for all the stakeholders:

- the Governments, because a lot of them still consider internet as theirs; without challenging their specific role, they have to accept open dialogue with the other stakeholders, sometimes on an equal basis;
- the private sector has to understand that coregulation does not mean only regulated self-regulation, in other words, "regulation of their corporate interests"; they have to commit themselves to real discussions with all the actors involved, including the users;
- the civil society is very heterogeneous; this diversity is an asset as long as the actors work in a constructive way.

