TRANSNATIONAL PRIVATE GOVERNANCE OF THE INTERNET IN THE EUROPEAN UNION:

the Case of the dot eu Top Level Domain

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Abstract

The EU has played a significant role in policy developments on economic aspects of Internet governance. In the late 1990s, it created the dot eu Internet Top Level Domain (TLD) which provides a means for Internet users to register their names under a European label, thereby giving them a European address and identity on the Internet. This paper explores the emergent governance system for dot eu, considering three of its dimensions: the core norms and associated practices underpinning it; its structural makeup; and its operational "mechanics". Dot eu provides an interesting case of new European transnational private governance. The system draws upon and will comply with several core practices of Internet governance developed globally, most outstandingly, private interest self-regulation and alternative dispute settlement. Nonetheless, the governance of dot eu has been "customised" by the EU. When fully operational, it will involve a part-public, though predominantly private, trans-European regulatory network across which the governance of dot eu will occur through a process of 'dispersed agencification'. Here, Eurid - the private, transnational, not-for-profit, company responsible for the dot eu registry - will become the central node in a regulatory network also comprising the European Commission (responsible for public policy rules governing dot eu), private alternative dispute resolution companies, temporarily deployed private validation agents, private registrar companies and, finally, registrants under dot eu.

Introduction[1].

The task of creating a global governance system for the Internet has exercised the minds of governmental, commercial and civil society interests since the mid 1990s (see Mueller 2002). The Internet is significant, and possibly unique, since it has been considered from the outset of its relatively short commercial life to be most usefully developed and exploited as a global medium. In particular, the Internet's potential as a global economic resource, as well as a global electronic marketplace, placed a high value on securing a stake in new structures and processes for its governance, as well as the values and norms underpinning them (see Christou and Simpson 2004). It is unsurprising, therefore, that many of the features of the current phase of economic globalisation (Dicken 2003) are recognisable in the policy discourses and practices of governance of the Internet economy, not least the emergence of transnational private governance. It is the development of the latter key element of Internet governance which is the focus of this paper.

The emergence of transnational private Internet governance is strongly evident in the system designed for naming and addressing on the Internet, which has been at times controversial and hotly contested given its strategic economic importance. This paper focuses on the emerging international political economy of the governance of the Internet's system of naming and addressing - known as the Domain Name System (DNS) - and the particular policy activity of the European Union (EU) here. Given the historical origins of the Internet in the technical and academic communities of the United States (US), the EU was not a forerunner in earliest moves to create a governance system for the Internet as it became increasingly commercialised. Nonetheless, the political-economic and social significance of the Internet having been realised, as the 1990s progressed, the EU developed a series of policy positions on the future course of development which it argued the Internet should take and a set of strategic actions stemming from these. For the EU, Internet policy has become a vital, if not yet the central, plank of its policy for the Information and Communications Technologies (ICT) sector, taking on in the process important 'domestic' (that is intra-EU) and 'international' (that is global inter-state and global institutional) dimensions.

In the important policy area of the Internet DNS, the EU launched a policy initiative, in the late 1990s, whose objective was the creation and operationalisation of the dot eu Internet Top Level Domain (TLD). Put very simply, the dot eu TLD provides a means for Internet users - commercial, public sector, and private alike – to register their names under a European label, thereby giving them a European address and identity on the Internet. This paper specifically explores the emergent governance system for dot eu, in the process considering three of its dimensions: the key norms underpinning it; its structural makeup; and its likely operational 'mechanics'. We contend that dot eu provides an interesting case of new European transnational private governance. In particular, the system has drawn upon, absorbed, and will comply with (when fully implemented), a number of core practices for the governance of Internet domain names developed globally, most outstandingly, private interest self-regulation and alternative dispute resolution (ADR).

Nevertheless, the governance of dot eu has also been 'customised' in a European way – a form of European 'domestication' - by the EU. When fully operational, the dot eu governance system will involve a trans-European regulatory network whose central and arguably most important node will be the European Registry for Internet Domains (Eurid), a private, transnational, not-for-profit, company responsible, *inter alia*, for the dot eu registry. The other private actors in the network are ADR providers, registrar companies, validation agents[2] and, finally, registrants under dot eu[3]. However, the network will also contain a crucial and influential 'public' dimension in the shape of the European Commission, acting as the agent of its Member States, which is responsible for ensuring the implementation of, and compliance with, the series of recently agreed public policy rules (PPR) to govern dot eu.

The conceptual framework for this paper draws on Majone's (2000) work on trans-European network governance. Contemplating problems with ensuring the credibility of EU regulation - such as insufficient administrative resources and the increasingly political role of the European Commission - Majone argues for the creation of public European regulatory agencies (Majone 1997) to undertake tasks in sectors perceived to require economic and social regulation. In this paper, we argue that the emerging system of governance for the dot eu TLD represents a specific type of trans-European network governance in which hybrid public-private 'dispersed agencification' has taken place. When fully operational, the governance of dot eu will be shared among the European Commission and Eurid primarily, but the latter will be required to devolve to a range of private registrant companies, ADR providers and validation agents, key elements of the 'nuts and bolts' regulation of dot eu, for which it will be accountable, ultimately. Thus, the regulation of dot eu will take place across a predominantly, though, not exclusively, private trans-European Internet governance network.

We argue that the creation of this novel type of governance system represents a 'reconciliation' resulting from a governance 'cultural clash' between the European 'regulatory state' on the one hand, and what can be described broadly as the Internet community, on the other. Specifically, the EU has decided to create a system of co-regulatory governance for dot eu in which it has adopted, and is in the process of internalising, a 'negotiated' reading of the discourse and practices of self-regulation widely articulated in the Internet community over the last decade and developed institutionally in well established (notably the World Intellectual Property Organisation) and new (notably the Internet Corporation for Assigned Names and Numbers) global fora which have addressed issues of Internet governance (see Simpson 2004).

The next section of this paper explores in greater detail the significance of agencies and trans-European regulatory networks in the European and global political economy with emphasis on the work of Majone. We also show how the chosen system of governance for dot eu was born from different elements of both the European 'regulatory state' and the global Internet community. We then proceed to a brief historical account and analysis of the emergence of TLDs as an issue of paramount political significance in Internet governance and the proposal by the EU of the dot eu TLD. Thereafter, our attention turns

to the trans-European regulatory network for dot eu, where we describe and analyse in detail its essential features. Finally, we offer our conclusions on the significance of our case for the study of private governance in the global political economy.

Agencies, Trans-European Networked Governance and the European 'Regulatory State'

The development of a governance framework for the Internet has been inextricably linked to wider regulatory changes that have occurred because of the exigencies of an increasingly globalised economy. Such changes have been characterised at domestic level by a shift to negative coordination in the 'regulatory state' (see Jayasuriya 2001), based on economic governance through regulation (see Scharpf 1993, 1994, 1996) with an emphasis on the role of independent, though often publicly funded, agencies and institutions in ensuring credibility and a commitment to market order. This decoupling of government from governance (see Reinicke 1997) has according to Tshuma (2000: 130) 'entail[ed] the delegation of tasks by policy makers to other actors and institutions that are better able to implement global public policies…includ[ing] public sector agencies…but also business, labor and non-governmental organizations'. It has also been argued that globalisation, as well as the development of more complex public policy has made traditional 'command-and-control' techniques employed by governments less efficacious (Majone 1997: 268).

Debates about the movement to a regulatory state have also taken place in Europe in the context of Europeanisation, involving, in part, the creation of new regulatory governance arrangements at the EU level (Green Cowles, Caporaso and Risse 2001), which have had varying degrees of impact on national Member States (Burch and Bulmer 2001). Strong claims have been made that within Europe there has been a replacement of the positive state with the regulatory state (Seidman and Gilmore 1986; McGowan and Wallace 1996; Majone 1994, 1996, 1997). The central argument is that due, in part, to the impact of European integration, emphasis has changed from a directly interventionist approach to one which addresses market failure through rule making using strategies of privatisation, liberalisation, re-regulation at the national level delivered through independent public regulatory bodies, and increased EU regulatory activity (Thatcher 2002a: 860) (see Table 1). Majone (1997) has argued that the EU has played a vital role in the further development of the 'regulatory state' in Europe. A key idea here is that the EU has been so significant that, through time, that it has shaped its own characteristic approach to core elements of the 'regulatory state in action', notably re-regulation and liberalisation. Here, the European Commission has emerged as a central agent of its Member States in this process[4].

Majone's concept of trans-European networked governance and his work on regulatory agencies in Europe (1997, 2000) have developed within the context of the European 'regulatory state', with a focus on the EU level. This work addresses the makeup, viability and credibility of governance frameworks in the European governance space. Importantly, it is contended that the credibility of EU regulation is undermined by a lack of sufficient administrative resources, as well as the increasing politicisation of the

European Commission. The Commission has also encountered 'serious problems when it seeks to establish itself as a credible actor in the arena of international regulatory cooperation', according to Majone (2000: 277). In an internal context, a 'mismatch between the Community's highly complex and differentiated regulatory tasks, and the available administrative instruments' (2000: 279) is discerned.

A solution to these key problems of economic and social regulation is the creation of independent European regulatory agencies 'embedded in transnational networks of national regulators and international organizations' (Majone 2000: 274). Majone argues that only through 'agencies' and 'networks' (1997, 2000) can the requirements of subsidiarity, accountability and efficiency be adequately met and regulatory credibility ensured, ultimately. Very importantly for us, it is asserted that the 'Delegation of powers to regulatory bodies distinct from the [European] Commission itself, or at least enjoying significant decisional autonomy, may provide a feasible solution to the credibility problem' (Majone 2000: 289). The decision to undertake such delegation raises questions over the exact design of regulatory arrangements and places particular onus on ensuring the accountability of agencies to those who have designated power to them. This paper will analyse the set of public policy rules (PPR) which have been created by the EU for the governance of the dot eu TLD and will consider key issues and key relationships which are likely to determine the efficacy or otherwise of the chosen governance system, which at the time of writing not fully operational.

For Majone, the key question in relation to EU regulation is not whether independent European regulatory agencies should exist, but what they should look like, and how they should be designed and made accountable to their political principals. To this end, he proposes that the issue of credibility can adequately be dealt with by the emergence of a transnational regulatory network agency model. Critical here is the definition of agency specified by Majone, in that it is decisional autonomy, rather than institutional separateness, that is essential in any defined policy area, a definition which is deliberately elastic. European agencies can sit centrally within a trans-European network, which might include national and European regulators, and incorporate agencies and organisations from national, as well as the global, levels.

Importantly for us, Majone (2000: 291) asserts that 'Agency status does not require that an agency exercise its power with complete independence, either vertically (in terms of being subject to administrative review) or horizontally (in terms of being required to act in concert with others)', though agency independence should have a legal basis. Majone has tended to emphasise the creation of public agencies, though we argue that the model can be instructive for explaining the kind of public-private 'dispersed-agencification' of Internet governance which the EU has set up for the dot eu TLD. In our case, the agencification of dot eu has placed a key role in the hands of Eurid which is private and thus legally separate from the EU. Very importantly, its organisational relationships with other actors, most particularly the European Commission, are clearly mapped out in the set of PPR. Our analysis extends Majone's idea that an agency must be de-facto in *complete* charge of a programme. The agencification we witness in our case involves a significant dispersal of responsibility across a trans-European regulatory network, which

has also important links to the global level. In this way, we provide more evidence of exactly how agencification within a trans-European regulatory network can take shape. Majone also outlines several essential characteristics of, and criteria for, the success of any transnational regulatory network. Clear procedural rules must be provided to ensure agency transparency and accountability. Political principals (the EU Member States, partly through the European Commission, in our case) design agencies and therefore must ensure that satisfactory procedures are put in place to achieve the optimal regulatory outcome. In the case of the dot eu governance framework, the European Commission was keen to ensure that the PPR created transparency and accountability. A priority for Member States was the accomplishment of the politically delicate task of distributing competence for the regulation of dot eu between the European Commission and the dot eu Registry, Eurid. Concern was expressed, at the time, that the EU, in choosing this form of governance, would relinquish too much control in areas traditionally within its sphere of direct competence[5] (author's interview). The issue of delegation of powers is important to how agencies operate in practice and their impact on the politics of governance and regulation (the work of Thatcher 2002a is instructive this area). Finally, Majone (2000) argues that to be successful, a transnational regulatory network needs to develop mutual trust and cooperation, high levels of professionalisation of regulators and a common regulatory philosophy.

The European 'Regulatory State' and the Communications Sector
An important strand of the conceptual argument in this paper is that the essential features of the European 'regulatory state', and in particular its pronunciation in the communications sector (of which the Internet has become an essential part), has been embodied in the governance framework for dot eu. Specifically, regulatory 'agencies' and 'networks' have been most evident in recent years in the telecommunications sector. A second and equally important constituent of the dot eu governance system is a number of essential practices and associated norms of Internet governance emerging at the global institutional level (see Christou and Simpson 2004) (see Table1).

Table 1: Key Characteristics of Governance Activities Underpinning dot eu

European Regulatory State Activity	Internet Governance Activity
Liberalisation	Private self-regulation
Agencification	Codes of Conduct
European Networks	International networked governance
'Europeanisation' of public regulatory activity	Self-management/Non-interference

Since the early 1980s, a gradual process of telecommunications regulatory reform began across the EU, gaining momentum into the 1990s, recognisable in the transition towards the 'regulatory' (Majone 1996) and 'competition' state (Cerny 1997) (see above). This was deeply influenced by fundamental structural changes in the global political economy, which had important practical and ideological dimensions. The economic imperatives of globalisation were underpinned and infused by neo-liberal political ideology which advocated strongly the pursuit of nationally and internationally open and liberalised

markets as the way to realise technical progress and broad economic and social welfare enhancement. Thus, in a situation where the strategic choices facing public and private actors were changing fundamentally, there was the opportunity, and even the necessity, for institutional innovation to support chosen paths. The emergence of globalising economic sectors, such as communications, based on highly influential US-originated neo-liberal economic discourse (see Marsden 2000) and practices presented new challenges to existing state order and function, though it by no means produced the much heralded decline of the nation state. For its Member States, the EU has been developed as an important policy context within which changes in the governance of key economic sectors, such as communications, have occurred.

For example, in telecommunications, a whole new battery of legislation has been created at EU level framing a more uniform, though by no means identical, liberalised set of telecommunications markets across the EU (Thatcher 1999). As a consequence, the shape of European telecommunications has been transformed from a series of nationally compartmentalised, highly uncompetitive sectors based on public ownership into a competitive series of markets shaped and governed by a detailed regulatory framework, containing national (in the shape of a series of independent, though publicly funded, National Regulatory Authorities) and European level elements. Aside from its legislative dimension, the European Commission has played an important role in promoting the new national and European 'regulatory state' approach to telecommunications governance (Sandholtz 1998), as well as ensuring the implementation of the agreed framework. Whilst the former task has been accomplished to completion (given the acceptance of liberalisation by all EU Member States), the latter is very much a work in progress (see Humphreys and Simpson 2005). Throughout this process of change, the Commission has acted as a 'principal agent' for its Member States (Thatcher 2001), though it has undoubtedly been politically significant in other aspects of a complex reform process.

The regulation of the Internet, in contrast to telecommunications, has been located in neither European national or supranational governance tradition and practices. Indeed, to many, in particular those 'pioneers' from the computer science and academic communities who used it before its popularisation and commercialisation, the idea of having any form of governance for the Internet was alien. There was particular concern from libertarian quarters about the need to maintain the Internet free from interference by the state, many conflating the notions of governance with restriction and censorship. The decentralised technical architecture of the Internet was seized upon, somewhat deterministically, to advance the claim that the pursuit of a regulatory framework with economic, political and social goals in mind was impracticable in any event, though this took no account of the hierarchical technical order of the Internet whose small number of root servers determine, ultimately, its ability to function.

As the 1990s progressed and the commercialisation of the Internet proceeded apace, the opportunities for communications companies - particularly service providers and content creators, as well as those commercial users who would employ the Internet as a means to conduct at least part of their business - became an issue of paramount political-economic significance. Paradoxically, there was a concern, on the one hand, to ensure that the

Internet was unencumbered by strict governmental regulation of the kind that had characterised certain other parts of the electronic communications sector historically, notably telecommunications but also broadcasting. Thus, the pursuit of an unfettered, liberalised Internet-based economy became a priority. On the other hand, there was a concern voiced by those with intellectual property interests, in particular, that robust systems of legal protection be put in place for Internet-based commerce. The general increase in the value of the Internet as a source of economic wealth primarily, but also as a powerful communications tool, ensured that state governments took a keen interest to secure a stake in the evolving arrangements for the control and management of the Internet. As a consequence, states and in particular the world's 'great powers', including notably the EU and its Member States, have played a key role in recent evolving Internet governance arrangements (see Dresner 2004).

A central contention of this paper is that the approach taken by the EU in developing and implementing a framework for dot eu epitomises a juxtaposition of the new liberalist imperatives of the Internet with the more 'paternalistic' patterns of EU governance of the telecommunications sector, even in its relatively new 'regulatory state' incarnation. Thus, the EU has argued, on the one hand, that 'Internet management has generally been based on the principles of non-interference, self-management and self-regulation. To the extent that this is possible and without prejudice to Community law, these principles should also apply to the .eu ccTLD'. On the other hand, however, the EU declared that 'the Commission shall adopt public policy rules concerning the implementation and functions of the .eu TLD and the public policy rules on registration' (European Parliament and Council 2002: 2 and 4). We argue that the governance system created for dot eu is an attempt to reconcile two *potentially* contradictory regulatory philosophies which has produced a co-regulatory approach combining key features of the European 'regulatory state', on the one hand, and 'the Internet community', on the other.

Thus, the EU has accepted two key practices for governing aspects of the Internet economy which have been promulgated in key global governance fora (notably ICANN and the World Intellectual Property Organisation (WIPO) and by the Internet community: self-regulation and ADR. However, we argue, that the EU has 'domesticated' these through adaptation to fit with its preference for core 'regulatory state' governance approaches.

The Emergence of the dot eu Top level Domain

The emergence of the dot eu TLD must be seen in the context of the increasing commercialisation of the Internet and its importance as an economic resource (see Waesche 2003). As Internet activity expanded, so too did the political-economic and strategic significance of the management of its technical and organisational resources, an important element of which was the hierarchically ordered DNS, with TLDs, as they are known, playing the most crucial role at the 'root' of Internet addressing[6]. Domain names, which developed historically along the two lines of generic (e.g. dot com) and country code names (dot de, dot uk) respectively, allowed expansive visibility for business and governments in an emerging global marketplace. This in turn had a significant effect on

the demand for TLDs, as they could provide a presence and identity on the Internet for those possessing them (see Froomkin 2000, Weinburg 2001, Froomkin and Lemley 2001).

In the mid to late 1990s, the global political-economic significance of domain name allocation led to efforts by policy makers, governments and the private Internet community, to attempt to create a governance system for these lynchpin resources. As a result, in 1999, the Internet Corporation for Assigned Names and Numbers (ICANN) was formed and since then ICANN has played an important role in the management of TLDs and the still evolving framework of global governance for the Internet.

The EU's role in ICANN's initial structural development was relatively marginal. The creation of ICANN brought much initial criticism and unease with the self-regulatory norms that underpinned the workings of the organisation. The possibility of creating dot eu was vaunted prior to the establishment of ICANN. Both process and broad political-economic considerations determined its emergence and, crucially, the speed at which it developed as a policy initiative. In the mid to late 1990s, developments within the European Commission on Internet commerce and Internet governance evolved within almost watertight departments with little horizontal linkage between the Directorate Generals involved in formulating policy (DG Internal Market and DG Information Society). The EU commenced a debate on the Information Society in 1994 with the release of the Bangemann Report, soon followed by the launch of the first phase of an Action Plan for the Information Society (European Commission 1994). There was only fleeting recognition of the Internet and its escalating presence in either of these developments, with no indication of its prioritisation as a policy issue over what were seen as the more pressing issues of telecommunications reform.

The popularisation of the Internet in the mid 1990s led European policymakers to consider its evolution more closely. Christopher Wilkinson, an official in the European Commission's DG Information Society (DGIS) personally followed developments in the US and was concerned to ensure that any evolving governance model for the Internet should be truly global in nature. He was the lead negotiator for the EU in its request for the creation of a GAC in ICANN and within the EU he chaired the Internet Informal Group (IIF) which prepared the EU's policy positions for GAC meetings due to the lack of interest and expertise on issues of Internet policy at the time within the European Council of Ministers[7]. The recommendation (which came from Christopher Wilkinson[8]) for the creation of a dot eu TLD followed the European Commission's initial involvement in the discussions on creating ICANN. The Commission's policy objective had overwhelmingly practical constituents. It wished to take advantage of business interest in a favourable global economic environment in the years of the 'dot com' boom and to exploit the limited choice within the generic TLD industry (dot com, dot net and dot org). The EU intended to provide business interests with a European trademark for operating in 'cyberspace' to allow the creation of a European 'territory' in the global Internet market. The Regulation which the EU eventually produced on the matter argued that dot eu would raise the profile of the Single European Market and would act as an effective complement to existing national ccTLDs (European Parliament and European

Council of Ministers, 2002). Thus, the creation of dot eu and its governance system could be seen to demonstrate Europeanisation as a response to new global political-economic phenomena (Anderson 2003).

Despite the ambitions of DG IS and Christopher Wilkinson[9] for an early launch of dot eu, there were procedural obstacles that constrained and ultimately thwarted any hope of swift progress. The proposal for dot eu initially received a negative reaction from the ICANN Board, being viewed as an initiative from a regional organisation dominated by governmental interests, anathema to many in the Corporation at the time. In order to overcome this scepticism, and to limit the ICANN Board's room for manoeuvre, the European Commission consulted widely with European 'Internet community' interests through a collective grouping known as European Community Panel of Participants in Internet Organisation and Management (EC-POP). This proved a critical factor in ICANN's acceptance of dot eu. An important practical question soon arose after ICANN's agreement had been secured, over where this unparalleled international regional domain name would be accredited, since it did not appear to fit with the existing national or 'organisational' conceptualisation of the existing bi-dimensional domain naming system, based on the International Standards Organisation table (ISO-3166-1 table). The ICANN Board passed a resolution to allow dot eu to be used, based on the reserved code (alpha-2 code 'EU') that was expressly set aside for use, but did not actually appear on the ISO-3166-1 table. Because of the special status of the European Union and the decision of the Maintenance Agency to allow it for 'all uses, including Internet uses', the EU was allowed to utilise it as a country code or regional domain name. What could have been a potentially awkward and challenging situation was thus resolved in a straightforward manner through existing procedures within the domain naming system, in which ICANN was eventually quite happy to facilitate the EU's request (authors' email[10]).

At EU institutional level, formal process, and, fundamentally, EU legal requirement determined the shape of dot eu's progress. Advocates of the swiftest possible implementation argued that dot eu should be dealt with as a technical matter and launched as an EU project. This would have taken a matter of months and represented the best scenario for business and industry and the 'product champions' of dot eu in the Commission. However, after consultation with the Commission's legal services division, it became clear that that this proposed method was not viable and that an appropriate legal process had to be undertaken. The rationale here was that dot eu raised issues of public policy and, therefore, a legal Community text was required to provide a framework establishing the EU's regulatory role and the dot eu Registry's responsibilities, management functions, and obligations. The decision was thus taken that a Regulation was needed to provide a broad legal and policy framework to define the responsibilities of the actors involved in administering and managing the dot eu TLD.

Importantly, the subsequent EU Regulation on the implementation of dot eu (European Parliament and Council 2002) defined the terms by which the dot eu Registry was to be selected by the European Commission, which launched a Call for Expressions of Interest in August 2002. The Eurid consortium, a collaboration between the Belgian, Italian and

Swedish country code TLD registries[11], was chosen on the 22 May 2003 to run the dot eu TLD. After considerable delay, as a result of protracted negotiations between Member States over the PPR to govern dot eu (eventually agreed in April 2004 - see next section), Eurid concluded a 'Service Concession Contract' with the European Commission (12 October 2004) to operate the dot eu Registry. At the time of writing, Eurid is negotiating with ICANN to have dot eu put 'in the root' (see http://www.eurid.org). As is discussed in more detail below, key operational aspects of the governance framework for dot eu have yet to be established.

**The Trans-European Regulatory Network for dot EU.**
Self-regulation, where market players are invested with the responsibility and authority to mandate and enforce standards of appropriate behaviour for those involved in the sector in question, has not been associated, historically, with the electronic communications sector in Europe. Thus, in the proposed system of governance which the EU has set out for its dot eu TLD, there is evidence of 'domestication' at the European level of the concept and practice of self-regulation to create co-regulatory governance with distinct public and private constituents more suited to recent policy approaches of the EU to the communications sector, notably in telecommunications. The regulation of dot eu will occur within a governance system which, we argue, takes the shape of a specific type of trans-European network whose defining characteristic is hybrid public-private 'dispersed agencification'. When fully operational, the governance of dot eu will be shared among the European Commission and Eurid primarily, but the latter will devolve to a range of private companies key elements of the 'day to day' regulation of dot eu, for which it will be accountable, ultimately. In setting out this governance system, EU Members States have attempted to reconcile the *modus operandi* of the current European 'regulatory state' in communications, on the one hand, with the exigencies of the global Internet community's system of governance for TLDs, on the other. Figure 1 provides an overview of the shape of the trans-European regulatory network for dot eu. Here, the bi-directional relationship that is developing between the European Commission and Eurid is likely to be most important, since it represents the interface between two culturally different approaches to Internet regulation and will play a key role in determining the extent to which this experiment in governance will prove efficacious.

The public dimension to the 'dispersed agencification' of dot eu centres on the role which the European Commission has been assigned by its Member States in being responsible for enforcing the series of public policy rules (PPR) which will form a crucial backdrop to the functioning of dot eu and which mark out the key policy 'ground' on which the Commission-Eurid relationship is developing. The PPR, agreed in April 2004, provide detailed guidance to Eurid regarding how it should carry out its role as the private, not-for-profit registry for names to be registered under the dot eu TLD.

The onset of dot eu will be marked by a phased registration period which Eurid must organise and manage, and regarding which the PPR provide explicit instructions. In its first phase, public bodies with prior rights to domain names will have a two month period in which they can apply to secure them. Thereafter, a second stage will occur in which, for two more months, both public and private interests can apply to assert prior legal

rights to a domain name to be registered under dot eu (European Commission 2004). This stipulation also gives an indication of how the EU has incorporated, but also adapted, practices of Internet governance developed at the global level. It has been claimed by Mueller (2002) that the system for the management of Internet names and addresses developed in the late 1990s at the global level and operationalised most notably in ICANN, has privileged established trademark interests of companies in the 'real' economy who wish to branch out into the 'virtual' world of Internet commerce. The EU's approach to dot eu is consistent with this but, in its prioritisation of the rights of public bodies to register their domain names under dot eu, there is also evidence of the stronger public policy traditions of the EU. In the phased registration period, a series of private validation agents will become a temporary, but important, part of the trans-European regulatory network for dot eu. Eurid will devolve the task of investigating the validity or otherwise of the claims to prior rights asserted by parties during this time[12] to these agents.

Figure 1. Main Relationships in the Trans-European Regulatory Network for Dot EU
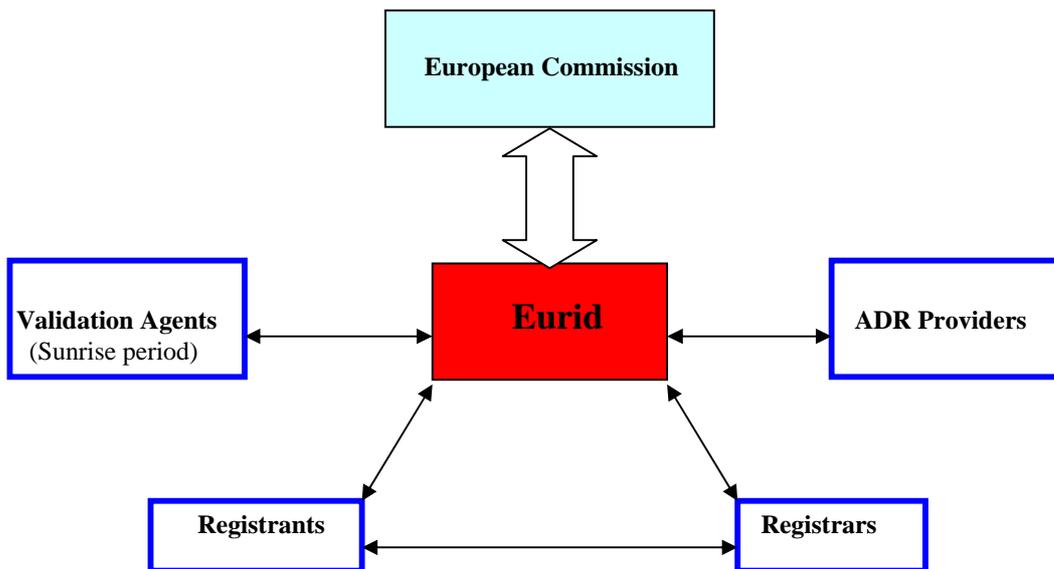
The PPR rules also specify in detail the relationships and procedures to be developed by Eurid in relation to the day to day process of registering names under dot eu. Here, Eurid's responsibilities for appointing and managing a series of private (profit making) registrar companies are set out in almost arcane detail. For example, it is stated that a 'registrar who receives more than one registration request for the same name shall forward those requests to the Registry in chronological order in which they are received' (European Commission 2004: article 5). It is also stipulated that registrars must require applicants to submit contact details of a person responsible for the technical management of the domain name to be registered. This is arguably something that any good professional organisation would do as a matter of course. It is indicative of the rather 'hands on' dimension which has characterised European 'regulatory state' activity in the

communications sector and suggests that the shadow of public policy may cast long over the governance of dot eu. Whilst Eurid is responsible for creating a code of conduct for registrars, this must ultimately be approved by the Commission, something which may deter Internet companies - used to a much more out-and-out self-regulatory commercial environment - from becoming registrars for dot eu (authors' interview). There are nevertheless, classic elements of self-regulation emerging for the governance of dot eu here, even though, at the time of writing, the picture is at best partial. Notably, Eurid will aim to develop a voluntary code of conduct for the network of registrar companies, which will include elections from the body of dot eu registrants to form a panel to hear complaints against registrars which have allegedly breached this code (see www.eurid.org)

Finally, the PPR lay out a series of specifications with regard to the ADR process to be employed in the regulation of dot eu. In a recent Green Paper on the use of ADR methods in civil and commercial law, the European Commission (2002: 2) noted that renewed efforts have been made to 'regulate their development, particularly in the information society context, in order to improve the trust that consumers and small and medium-sized businesses place in electronic commerce'. The EU gave a clear indication of the extent to which global norms for Internet governance have been adopted, since ADR is a core element in ICANN's management of TLDs. It also declared that dot eu ADR provision should 'take into consideration the recommendations of the World Intellectual Property Organisation' (European Parliament and Council 2002), though this also clearly leaves scope for adaptation to the EU's own specifications.

In the PPR, two circumstances are specified in which the ADR (which is compulsory for a domain name holder and Eurid to take part in) can take place: first, where a plaintiff alleges speculative or abusive registration of a domain name and, second, where it is alleged that a decision taken by Eurid contravenes the PPR or the specifications of the EU Regulation on the implementation of dot eu (European Parliament and Council 2002). Eurid has been charged with the task of appointing a range of ADR providers, who will have responsibility for conducting the ADR procedure devolved to them. Importantly, however, consistent with recent European 'regulatory state' practices in the communications sector, the PPR specify the core elements of the ADR process in almost minute detail. For example, it is stated that 'Any written communication to a complainant or respondent shall be made by the preferred means stated by the complainant or respondent, respectively, or in the absence of such specification electronically via the Internet, provided that a record of transmission is available' (European Commission 2004: article 22, paragraph 9). The adjudication of disputes will be undertaken by an ADR panel containing either one or three members (whose judgment will occur on the basis of simple majority voting in the latter case). However, should any party decide not to abide by the ADR panel's ruling it can initiate formal court proceedings to get a public legal resolution of the matter (European Commission 2004: article 22, paragraph 13).

It has been argued that the stipulation of rules and procedures by its principals for an agency to follow provide transparent, accountable and cost-effective arrangements for delegation (Majone 2000: 293). However, the PPR, typical of the quite far-reaching and

detailed approach of the European 'regulatory state' are uncharacteristic of the more laissez-faire arrangements for Internet governance at the global level in organisations like ICANN. The task of drafting the PPR was undertaken by a PPR Expert Group of the EU's Communications Committee, an intergovernmental group of experts, chaired by the Commission which is charged with reviewing the development of the EU's Electronic Communications Regulatory Framework, a predominantly telecommunications policy-focused set of measures (Humphreys and Simpson 2005). From the outset, evidence of the EU's regulatory culture differing from that of the Internet community was apparent in its developing relationship with Eurid. It took several months before the latter was permitted to get involved in the formulation process for the PPR (authors' interview). The level of detail laid out in the PPR is very far from archetypal self-regulation and reflects the very significant level of co-regulatory authority which the Commission will hold over the regulation of dot eu. Ultimately, the Commission has exclusive and irrevocable rights to the data on the dot eu database and has the authority to re-designate the registry (to an alternative company) should Eurid not comply fully with any aspect of its contract (European Commission 2004: article 15).

Overall, the shape of the PPR for dot eu differs significantly from the one Eurid had in mind on bidding to be awarded the contract to operate the dot eu registry[13]. The extent to which the public 'agencification' of responsibility in this trans-European regulatory network translates into practical influence in its private 'agencified' component remains to be seen. A lot is likely to hinge on the performance of Eurid, which will play the central position in the trans-European regulatory network for the governance of dot eu. It is likely to be required to achieve a balance between its European 'regulatory state' responsibilities on the one hand, and its out and out self-regulatory instincts, on the other.

Eurid was designated as the dot eu registry in 2003 (European Commission 2003) with the overall remit to 'organise, administer and manage the .eu TLD in the general interest and on the basis of principles of quality, efficiency, reliability and accessibility' (European Parliament and Council 2002: article 4). These are classic elements of agency delegation within the 'regulatory state'. EU Member States took great pains to illustrate the institutional and functional separateness of the dot eu registry from the administrative apparatus of the Commission in a draft services concession contract attached to the 2002 Regulation on the implementation of dot eu, which contained the assertion that 'Under no circumstances may the contractor [that is, the registry] or his staff be integrated into the Commission's administrative organisation…The contractor shall not represent the Commission…[and] shall inform third parties that he does not belong to the European public service, but that he is exercising tasks on behalf of the European Community' (European Parliament and Council 2002: Annex 4, article 2). Nonetheless, the contract eventually formulated and signed in October 2004 between Eurid and the Commission - the details of which are unavailable at the time of writing - was much more complex than Eurid anticipated (authors' interview), providing another indication of the cultural differences between the DNS registry industry and the European Commission.

However, by contrast, Eurid's make up is reflective of global organisational structures which have developed for TLDs in ICANN within a self-regulatory context. Table 2

provides a more detailed description of the specific responsibilities which Eurid will assume in its role The work which it delegates to validation agents, ADR providers and registrants – evidence of private dispersed agencification in our terms - must meet criteria established by ICANN's Governmental Advisory Committee regarding the delegation and administration of country code TLDs of which, as noted above, dot eu is regarded as a special case (European Parliament and Council 2002, annex 4, article 8). When fully constituted, its Board will contain a quite eclectic mixture of representatives, from the Eurid consortium, European industry, European Internet Service providers, the dot eu registrar companies, the Internet technical community and the academic and research community.

Table 2: Eurid's Main Tasks in the Governance of dot eu

- Register domain names in the dot eu TLD through registration agents
- Set up extra-legal procedures for settling disputes related to dot eu
- Negotiate with relevant international bodies to delegate dot eu
- Establish principles and procedures for accreditation of registration agents and competition between them
- Assist in drafting and implementation of the dot eu registration policy
- Maintain integrity of databases
- Provide publicly available information services
- Promote dot eu in the EU's official languages
- Consult and cooperate with the European Internet community
- Maintain contact and participate in international organisations for Internet governance
- Develop and promote best practice and self-regulation regarding registration agents
- Contribute to the further development and efficient management of the DNS at national and international level

Source: Adapted from Eurid – Articles of Association.

Another important self-regulatory element of Eurid's make up is its Policy Council which will contain as many as 25 representatives from across the European Internet community. Eurid's Board must consult the Policy Council regarding any decision that it takes regarding its registration policy. Eurid can only ignore the opinion of the Policy Council if it can demonstrate that to comply with it would be detrimental to Eurid's welfare[14] and remit. Eurid's relationship with ICANN will be significant as the former is likely to assume the role of a country code TLD registry in this global forum, though it is difficult at this stage to predict its exact form. Given the rather more hands on co-regulatory system which Eurid will be intimately involved with in the 'domestic' (that is EU) context, Eurid may find itself more closely attuned to ICANN's way of working and this could have an impact on the way the governance of dot eu evolves in the future[15]. There is evidence, however, that ICANN itself has moved in a more co-regulatory direction in recent years not least due to the influence exerted by the European Commission in its Governmental Advisory Committee (Christou and Simpson 2004).

Conclusions.

This paper has argued that the case of the dot eu TLD provides evidence of the creation of transnational private governance in the Internet economy. The EU's choice of governance system and regulatory methods is, we argue, an example of the emergence of a specific case of Majone's (2000) trans-European regulatory networks. The governance of dot eu will take place across a hybrid public-private trans-European regulatory network across which 'dispersed agencification' of the governance of dot eu is being put in place. Most of this is likely to be conducted in an electronic form providing evidence of new electronic networked governance, facilitating, in part, the political-economic network necessary for dot eu. It is also important to note that whilst the dot eu TLD is primarily intra-European in operational terms, it has important links to the global system of governance for TLDs embodied in ICANN. In choosing this approach, we argue that EU Member States have aimed to reconcile the elements of 'regulatory state' activity which they have instigated in the communications sector in recent years, most notably in telecommunications, with the stated imperatives of the Internet community.

The *raison d'etre* of the agency-network approach to regulation is the provision of credible, independent institutions that function efficiently and accountably. The dot eu governance framework is suggestive of the emergence of such a model, though it is too early to determine how independent, efficient and credible Eurid will be in practice. First, the framework represents a classic compromise, in which the European Commission has cast an overarching 'public' shadow through the PPR, which reflect the EU's concern about relinquishing too much control in areas traditionally within its sphere of direct competence. Although unproblematic *per se*, this potentially could have repercussions in practice, given that the private actors within the network favour self-regulation, as defined by the Internet business community. The fear of over-bureaucratisation in the day to day running of dot eu may prove a deterrent to actors entering the network as interested commercial players or customers.

Second, Eurid's position at the centre of a hybrid public-private regulatory network characterised by dispersed agencification raises the interesting issue of the extent to which it will be able to exercise coercive power. The network for the governance of dot eu contains obligatory elements only to the extent that its actors are willing to remain participants in it. Eurid can be challenged through the ADR process and the ultimate 'default' option of taking any dispute to the public legal system is open. However, a rationale for self-regulation is that it provides more stream-lined, cheaper and time-efficient methods of governance and thus there may be significant elements of lock-in in this system which could make Eurid, *de facto*, a powerful actor in the network despite its, on the surface, relatively weak coercive power.

Third, as Majone (2000) argues, to be successful a transnational regulatory network needs to contain mutual trust and cooperation, high levels of professionalisation of regulators and a common regulatory philosophy. Such characteristics take time to develop and are a matter of familiarisation and socialisation. Although the key elements of the governance framework for dot eu has been agreed, its operationalisation has been delayed by the

complexities of EU policy making. The private actors in the dot eu governance network will be required to operate under a common framework which should facilitate a process of continuous exchange of views on how the system is functioning (see above). Eurid must ensure that the other key private agencies within the network comply with its procedural rules defined by the public policy framework. Here a lot will hinge on the extent to which these actors trust the mechanisms put in place to resolve any disputes which arise. Majone (2000) contends that one of the problems with agencies is that they are poorly suited to solving value conflicts and balancing different interests, due to their highly specialised nature. The kind of public-private 'dispersed agencification' in the dot eu governance network may well militate against such potential difficulties, however. Whilst Eurid is arguably ill-equipped in this area and may eschew involvement in it consequently, the European Commission is an experienced political actor, despite its administrative remit. The dot eu regulatory network may prove to be a skilful political construct in this regard.

Fourth, at the time of writing, the trans-European regulatory network for dot eu is only partially formed. The current negotiations which are taking place between Eurid and ICANN to have dot eu inserted 'in the root' are expected to be concluded in mid 2005. Thereafter, the accreditation of registrars, selection of validation agents, and ADR providers for the phased registration period must take place, as well as other administrative and technical tasks. It is thus likely to be towards the end of 2005, at the earliest, before the phased registration period for dot eu, of four months total duration, can begin. Thus, the onset of registration proper for dot eu is unlikely to occur before the beginning of 2006 and may take longer given previous delays. A number of very practical factors will determine the extent to which dot eu will be successful, such as the how reactive the system will be given the EU's proceduralism juxtaposed by the Internet commercial sector's penchant for swift, flexible decision-making. The success or otherwise of the sunrise period will be crucial to the attractiveness of dot eu. In the first instance, there is likely to be a lot of defensive registering. Evidence so far suggests that the parties with the most interest in dot eu are the EU tourist industry, new entrant countries to the EU and not for profit organisations (authors' interview) and thus the wider appeal of dot eu is open to question. Eurid (2003), somewhat optimistically, recently estimated that 'although the .euTLD is a relative latecomer to the market...a potential of 1 million domain names after 1 year is still possible'.

Launching dot eu through issuing an EU Regulation has had significant consequences from a commercial perspective. The excessive bureaucracy of the EU is indicated by the now infamous Maltese language example where registration services for dot eu must be made available in Maltese even though it is not possible to register a domain name in Maltese under its national country code domain name system (authors' interview). Such bureaucracy has arguably been in part responsible for the delay in the creation of dot eu and its system of governance[16] since, three years after the Regulation was agreed, the operational details are still not fully in place. The dot eu TLD Regulation, necessarily, has had to make its way through the formal EU process, delaying its operationalisation considerably and leading many to question its the original political-economic rationale.

Several lessons might be learnt from the case of the dot eu TLD about why transnational private governance emerges in the global political economy. First, the Internet economy provides a prime example of a context within which transnational private governance is likely to occur. Despite other parts of the communications sector having developed historically in Europe within strong state led traditions, the Internet originated in the US and emerged outside 'mainstream' communications, albeit with government funding. Second, after many years of technical development and usage by the computer science and academic communities, the Internet became commercialised and popularised at a time when the discourse of neo-liberal globalisation was paramount, undoubtedly reinforced by its origins in the US political economy (see Schiller 1999). It was thus imbued with a global logic from the outset. Third, the emergence of dot eu within the Internet economy illustrates how Europe is proving resistant to wholesale transnational private governance. The corollary is that, whenever the EU is chosen as a vehicle for policy development, it will 'domesticate' the agenda of private governance to suit both its traditional approaches to governance, as well as more recently developed 'regulatory state' approaches to globalisation. Fourth and finally, our case study provides more evidence that transnational private governance in an era of globalisation does not represent a withering of the state, but is, rather, part of states' efforts to execute the product of strategic political decision making on key economic issues.

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Notes.

[1] The research for this paper was undertaken as part of the UK Economic and Social Research Council-funded European Regulation of Internet Commerce (ERIC) project (Grant number RES-000-22-0356). The ERIC project ran from September 2003 to August 2004.

[2] These agents will be temporary members of the network during a four month phased regstration or 'sunrise' period for dot eu in which parties, both public and private, claiming prior rights to a particular domain name can apply to have that name reserved.

[3] It should also be noted that public sector organisations, for example those responsible for aspects of regional government across the EU, are also likely to register a name under dot eu.

[4] It is important to note in this context, however, that the EU Treaties delimit severely the extent to which Member States can create additional bodies with formal legal powers to undertake tasks such as regulation (Majone 1997).

[5] As Majone (1996) suggests the 'agency' model – specialised, independent bodies with broad regulatory powers - does not fit well with the traditional European administrative culture.

[6] Technically the structure of the Internet's system of communication is significant - ultimate control is held at a pyramidal pinnacle by a series of 13 "server" computers – which have been referred to as the 'root' (Mueller 2002) because of the reliance on these resources for the effective operation of the Internet. In organisational terms, the DNS manages and allocates mnemonic addresses – or put simply, it matches numerical Internet Protocol (IP) addresses which identify individual host computers on the Internet with domain names via the 'root' server. In other words, the DNS assigns specific names (written as unique numerical addresses) for individual machines on the network, so that being on the network requires connection to a machine that has been assigned a specific name. When a message is sent to a specific name, the message is automatically sent first to a DNS server, operated by Internet Service Provides (ISPs) in most cases, to find the numerical address for the name. Each of these DNS servers then goes to one particular computer (the 'root') to find the numerical addresses that would enable the servers to send the message on its way (see Franda 2001: 47)

[7] The reason for the formation of this particular 'ad hoc' or informal group was because the Council working group that had responsibility were telecommunications oriented – and they always claimed to be 'too busy' to deal with issues relating to the Internet. The complexity of the issues involved combined with a very low level of knowledge meant that the Presidency of the Council did not have the competence to deal with such issues and so the IIG become the collective voice of the EU in matters of Internet governance (author's interview).

[8] Verified in several interviews with leading officials in DG IS.

[9] This became the responsibility of George Papapavlou once Christopher Wilkinson was moved to the GAC secretariat.

[10] Email exchange with a former ICANN director (29.1.04) and a former ICANN CEO (29.1.04)

[11] The Belgian partner in Eurid is DNS BE; the Italian partner IIT-CNR and the Swedish partner NIC-SE

[12] Consistent with the 'regulatory state' approach to dot eu, Eurid must select validation agents in an 'objective, transparent and non-discriminatory manner, ensuring the widest possible geographical diversity' (European Commission 2004: article 13)

[13] An informant noted in an interview that Eurid's model 'by stealth has been adjusted' and that it had 'gradually been dragged towards more regulation'.

[14] The Policy Council can also issue opinions on any issue of its own volition, though these are non-binding on Eurid's Board of Directors. The Chair of the Policy Council will sit on the Eurid Board.

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[15] An informant from Eurid noted that 'We're so tied up to the Commission, nothing in the ICANN contract is a fear'

[16] An informant noted in an interview that the process would have evolved much more quickly 'had we all sat down together', namely EU Member States, European Commission legal services, other relevant parts of the European Commission and Eurid.