

The Constitutional Council was asked on 9 July 2010 by the Council of State (ruling number 337320 of 9 July 2010), under the conditions set out in article 61-1 of the Constitution, to consider a priority question of constitutionality presented by Mr Matthew P., in relation to the conformity of article L.45 of the Postal and Electronic Communications Code with the rights and freedoms guaranteed by the Constitution.

THE CONSTITUTIONAL COUNCIL,

Considering the Constitution;

Considering Ordinance no. 58-1067 of 7 November 1958 amended by the Organic Law on the Constitutional Council;

Considering the Postal and Electronic Communications Code;

Considering the ruling of 4 February 2010 on the proceedings before the Constitutional Council on priority questions of constitutionality;

Considering the observations by the Plaintiff, registered on 29 July 2010;

Considering the observations for the Association Française pour le Nommage Internet en Coopération [AFNIC] by SCP Piwnica et Molinié, Barristers before the Council of State and the Court of Cassation, registered on 9 August 2010;

Considering the observations by the Prime Minister, registered on 10 August 2010;

Considering the observations in response for the AFNIC, registered on 24 August 2010;

Considering the observations in response by the Plaintiff, registered on 25 August 2010;

Considering the documentation submitted and appended to the file;

Having heard Mr François Gilbert for the Plaintiff, Mr Emmanuel Piwnica for the AFNIC and Mr Thierry-Xavier Girardot, appointed by the Prime Minister at a public hearing on 27 September 2010;

Having heard the Rapporteur;

1. Considering that under the terms of article L.45 of the Postal and Electronic Communications Code:

"1. The Minister responsible for electronic communications shall, after public consultation, appoint the bodies responsible for allocating and managing domain names, within the first level domains of the internet domain addressing system that correspond to the national territory. Discharging this responsibility does not confer upon the organisations thus designated any intellectual property rights over domain names.

The allocation of a domain name is done by the said bodies in the public interest, according to non-discriminatory rules which are published and which ensure that the requesting party respects intellectual property rights.

In the event that the said bodies cease their activities, the State has the right to use the database of domain names that was managed by them.

The Minister responsible for electronic communications shall ensure that the said bodies comply with the principles set out in section 2. It may withdraw this status from a body, having given the said body the opportunity to submit its own observations, in the event that the said body fails to comply with the stipulations of this article. An appeal may be brought

before the Council of State against a decision by the Minister responsible for electronic communications to designate body or to withdraw its designation. Each body shall submit an annual activity report to the Minister responsible for electronic communications.

The allocation and management of the domain names attached to each first level domain will be centralised within a single body.

A decree issued by the Council of State shall stipulate the conditions for the application of this article as required.

II. Without prejudice to their application, ipso jure, to Mayotte by virtue of Article 3 I 8° of law no. 2001-616 of 11 July 2001 on Mayotte, the stipulations of I shall be applicable to Wallis and Futuna and within French Southern and Antarctic territories.

The bodies charged with the allocation of domain names in New Caledonia and French Polynesia do not hold intellectual property rights over the said names";

2. Considering that the Plaintiff objects that these stipulations give the administrative authority and the bodies designated by it excessive scope to define the principles for the allocation of domain names and that they consequently fail to establish a minimum framework and limitations upon their actions, whereby the legislator misconstrues the scope of its own competence;

3. Considering that, under the terms of article 61-1 section 1 of the Constitution: "If, when a case is brought before a court, it is found that a stipulation of the law infringes the rights and liberties guaranteed by the Constitution, this question may be brought before the Constitutional Council by the Council of State or by the Court of Cassation, and the former shall rule within a fixed period"; that the misconstruction by the legislator of its own competency cannot be invoked in the context of a priority question of constitutionality unless a right or freedom guaranteed by the constitution is affected;

4. Considering, on the one hand, that under the terms of Article 34 of the Constitution: "The law determines the fundamental principles... of civil and commercial obligations"; that, in particular, the fundamental principles governing civil and commercial obligations include such stipulations as call into question their very existence;

5. Considering, on the other hand, that the freedom of enterprise follows from article 4 of the 1789 Declaration of the Rights of Man and of the Citizen; that, under the terms of its article 11: "The free communication of thoughts and opinions is one of the most vital rights of man: Every citizen may therefore speak, write, print freely, except in the event of the abuse of that liberty in such cases as are determined by law"; that property is one of the human rights conferred by articles 2 and 17 of the 1789 Declaration; that, in the current state of means of communication and in view of the general development of public online communication services to the public, and the importance of those services in economic and social life, particularly for those who pursue their business online, the framework, for both private individuals and enterprises, within which domain names are chosen and used on the Internet affects intellectual property rights, freedom of communication and freedom of enterprise;

6. Considering that article L.45 of the Postal and Electronic Communication Code entrusts the organisations designated by the Minister responsible for electronic communications with the management of domain names "within the first level domains in the Internet domain addressing system corresponding to the national territory"; that it confines itself to stipulating that the allocation of a domain name is done by these bodies "in the public interest, according to non-discriminatory rules which are published and which ensure that the requesting party respect intellectual property rights"; that, furthermore, this article stipulates that its conditions of application shall be defined by a decree of the Council of State; that, if the legislator has thus preserved the intellectual property rights, it has fully delegated the power to define the conditions under which domain names are allocated or may be renewed, refused or withdrawn; that no other legislative stipulation provides guarantees allowing any

infringement of the freedom of enterprise or of article 11 of the 1789 Declaration; that, consequently, the legislator has misconstrued the extent of its own competency; that, consequently, article L.45 of the Postal and Electronic Communications Code must be declared contrary to the Constitution;

7. Considering that the Constitutional Council does not have a general discretion equivalent to that of Parliament; that it is not responsible for defining the fundamental principles of the civil and commercial obligations that should form the basis for remedying the confirmed failure of constitutionality; that, in view of the number of domain names that have been allocated in accordance with the stipulations of article L.45 of the Postal and Electronic Communication Code, the immediate abrogation of the said article would have manifestly excessive consequences for legal security; that, consequently, the date of its abrogation should be delayed until 1 July 2011 to allow the legislator to remedy the negative failure of competency that has been established; that regulatory acts that have been carried out on the basis thereof shall not be left without a legal basis until that date; that other acts carried out before that date in accordance with the same stipulations cannot be contested on the basis of the said unconstitutional status,

DECIDES:

Article 1.- Article L.45 of the Postal and Telephonic Communications Code is declared to be contrary to the Constitution.

Article 2.- The declaration of unconstitutionality set out in Article 1 shall take effect on 1 July 2011 under the conditions defined in Consideration 7.

Article 3.- This decision will be published in the Official Journal of the Republic of France and publicised under the conditions set out in Article 23-11 of the above-mentioned Ordinance of 7 November 1958.

Deliberated by the Constitutional Council at its session on 5 October 2010, at which the following were present: Mr Jean-Louis DEBRÉ, President, Mr Jacques BARROT, Mrs Claire BAZY MALAURIE, Mr Guy CANIVET, Mr Michel CHARASSE, Mr Renaud DENOIX de SAINT MARC, Mrs Jacqueline de GUILLENCHMIDT and Mr Pierre STEINMETZ.

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Official Journal of 7 October 2010, p. 18156 (@ 53)