

Workshop on Member States' experiences with ccTLD

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DOCUMENT FOR ccTLD WORKSHOP

Source: Federal Office for Communications (OFCOM) and SWITCH, Switzerland

Title: Relations between the government and the ccTLD operator: the Swiss model (part I)

Terms and abbreviations

Federal Council: The name of the Government of Switzerland

OFCOM: Federal Office for Communications (telecommunication oversight authority)

Other abbreviations

GAC Governmental Advisory Committee

IANA Internet Assigned Numbers Authority

ICANN Internet Corporation for Assigned Names and Numbers

LTC Telecommunications Law

ORAT Decree concerning Addressing Resources in the Telecommunications Sector

Introduction

Over the past few years the Internet has become an essential factor in the economy, particularly through the development of electronic commerce and the information society more generally. As a result, the importance of domain names has greatly increased. For this reason, the Swiss Government (Federal Council) decided that it was necessary to create a formal legal framework for the registration of domain names in the ".ch" zone. A regulation on the subject was adopted with the Decree concerning Addressing Resources in the Telecommunications Sector (ORAT). This new regulation came into force on 1 April 2002.

The SWITCH foundation, responsible for the operation of the Swiss academic network, has taken an interest in the worldwide development of the Internet from its earliest days. At a time when Switzerland was without any legal framework for administering addressing resources, the foundation set up a technical and administrative organization for business and private users to register ".ch" domain names.

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In the course of the preparations that led to formalization of the process of delegation of ".ch" domain names, consideration was given to the question whether the domain name registration market should be opened to organizations other than SWITCH. It was felt that consumers should have full freedom to choose from a diversified range of services, and service providers should be put in a position to supply a combination of services.

The Federal Office for Communications (OFCOM), the oversight authority for telecommunication in Switzerland, accordingly drew up a draft regulation for Internet domain names for the ".ch" zone, in which a partly distributed model was proposed under which service providers would compete to make those allocations (registry-registrar model). The draft was submitted for consultation to the groups concerned. Their reaction was, in general, that the registry-registrar model was not viable on the Swiss market and they did not wish to become providers. They wanted the existing sole-provider arrangement to be kept, with that provider having full latitude to promote or facilitate service provision by involving other organizations.

At that time the Federal Council concluded that it was neither desirable nor appropriate to open the allocation of ".ch" domain names to competition. Nonetheless, it is entirely conceivable that, sooner or later, the question of the sole provider will have to be looked at again, if the domain-name management and allocation market in Switzerland undergoes further changes.

History of ".ch" domain name registration

The history of ".ch" domain name registration is described in a separate contribution (ccTLD Document xxx).

Legal basis for formal delegation

Domain names are considered to be addressing resources under the Swiss Telecommunications Law (LTC). Under that law, OFCOM is responsible for managing addressing resources in Switzerland. In specific cases OFCOM may delegate the management and allocation of certain resources to another entity. This option was exercised in two cases, that of the management of telex numbering plan resources and that of Internet domain names. The arrangements are contained in the ORAT decree. Annex 1 gives the provisions that concern the delegation of Internet domain name management (articles 13 and 14).

Form of delegation for the management of addressing resources in general and ".ch" domain names in particular

The following is a synopsis of the regulation governing delegation of the management of addressing resources in general and ".ch" domain names in particular.

- OFCOM designates one or more delegees, defining conditions that must be met to exercise the delegated activity or issuing a public call for offers. OFCOM determines any necessary arrangements for the delegation process, respecting the principles of impartiality, non-discrimination and transparency, while at the same ensuring the confidentiality of applicants' data is fully protected. Delegation of the management and allocation of addressing resources must take the form of an official authorization or a contract. Delegation is for a specified period of time. In the case of domain names, delegation takes the form of a renewable five-year contract under administrative law.
- When domain name reservations are abused, for example by registering domain names in bad faith, in deliberate violation of others' intellectual property rights or name rights (cybersquatting), the possibilities for recourse include ordinary civil law but also a dispute resolution procedure, to be set up by the delegee.

- ORAT contains general rules governing the delegation of addressing resources by OFCOM (article 13 and following). Those rules apply to management and allocation of domain names as well, except where specific provisions to the contrary exist. This allows OFCOM to delegate management and allocation of addressing resources other than domain names without necessarily requiring any further revision of the decree. In addition, the general rules on delegation apply to telex addressing resources the management of which has been delegated.
- Specific rules have been set up to cover the delegation of domain name management and allocation (article 14 and following); their provisions cover gaps in, add detail to, and in some cases replace those of the general rules where the unique nature of domain names requires it.
- While the relationship between OFCOM and the delegees is governed by public law, the same is not true of the relationship between domain managers and the customers who make use of their management and allocation services for addressing resources. The latter falls under private law, and any disputes are subjects to civil jurisdiction.
- In view of the nature of the task and the public interest involved, delegees have a responsibility to respect the principles and general rules of public law that apply to the management and allocation of addressing resources, particularly the principle of transparent, non-discriminatory allocation of those resources. The delegee must take the rules and principles into account in contractual, private law customer relationships.
- Delegees are free to determine the prices they will charge for their services in management and allocation of addressing resources if there is a situation of effective competition on a given market. The prices of certain services may in some cases be subject to approval by the Office, particularly if the manager does not have any competitors offering the same service - as is the case for domain names. In this case the registry determines the prices to be charged for those services, on the basis of incurred cost and fair profit.

Relations between ICANN, SWITCH and the Swiss government (OFCOM)

Under the principles for delegation and administration of ccTLDs elaborated by the Governmental Advisory Committee (GAC) of ICANN, governments have ultimate authority over their ccTLDs. In Switzerland, the Telecommunications Law (LTC) provides the legal basis conferring this authority over the top-level domain name ".ch" on the Government and its oversight authority, OFCOM. In addition, the delegated operator of the ccTLD ".ch", the SWITCH foundation, depends on the technical functions of ICANN/IANA to ensure the ccTLD functions correctly. There is thus a three-way relationship between the Swiss Government, SWITCH and ICANN/IANA.

To allow OFCOM to fulfil its role as ultimate authority, under the principles elaborated by GAC, SWITCH is obliged to submit for its approval any proposed contract with ICANN/IANA. This provision allows OFCOM, among other things, to verify that such a contract is in compliance with Swiss regulations concerning domain names.

Conclusion – advantages of the adopted solution

The solution adopted by Switzerland depends on broad consensus among the groups concerned. For all the parties involved, formalizing delegation puts the process of registration and management of domain names on a foundation that is legally and commercially more secure than was the case under the previous regime. At the same time, it does not constrain the entrepreneurial freedom of the delegee, as the state plays a secondary role, limited to oversight and vetting of the general terms and conditions under which the delegee offers its services and the prices it charges for them. Intervention is reserved for the case that a serious problem arises, involving the possible need to

reassign the delegation of authority to manage the ".ch" domain name. In this hypothetical case, the Swiss Government or its telecommunication oversight body, OFCOM, would be the authority that regulates the process of reassigning ccTLD delegation.

The new, post-1 April 2002 legal framework did not cause any noticeable changes among domain name holders, since it incorporates much of what was in the rules before. This strengthens the credentials of the registry in the exercise of its activity, the registration of domain names.

Annex 1

The Swiss model for delegation. Excerpts from the 1 April 2002 regulation

(Excerpted from the Decree concerning Addressing Resources
in the Telecommunications Sector, ORAT)

Important: The version of the text given below is provided for information purposes only. The complete definitive texts in French, German and Italian are available under the following URLs:

French version: http://www.admin.ch/ch/f/rs/c784_104.html

German version: http://www.admin.ch/ch/d/sr/c784_104.html

Italian version: http://www.admin.ch/ch/i/rs/c784_104.html

The Federal Council of Switzerland,

considering article 28, paragraph 2, article 62 and article 64, paragraph 2 of the law of
30 April 1997 on telecommunications (LTC),

decrees as follows:

Chapter 1 General provisions

Section 1 Terms and abbreviations

Article 1

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Section 2 Management and allocation of addressing resources

Article 2 Numbering plans and regulations for the management of communication parameters

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Article 3 Publication

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Article 4 Allocation

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Article 5 Shared utilization

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Article 6 Subordinate addressing resources

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Article 7 Duration of use; re-allocation

...

Article 8	Assignment
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Article 9	Information about addressing resources
...	
Article 10	Decisions of the Office
...	
Article 11	Revocation
...	
Article 12	Effect of revocation
...	

Chapter 1a Delegation of the management and allocation of addressing resources

Section 1 General rules

Article 13 Delegation procedure

- 1 The Office may delegate the management and allocation of specific addressing resources to third parties.
- 2 The Office shall designate the delegee or delegees. In doing so, it may define the conditions to be met to exercise the delegated activity or issue a public call for offers.
- 3 The Office shall determine any necessary arrangements for the delegation process, respecting the principles of impartiality, non-discrimination and transparency, while at the same ensuring the confidentiality of applicants' data is fully protected.

Article 13a Form of delegation

Delegation of the management and allocation of addressing resources shall take the form of an **official** authorization or a contract.

Article 13b Duration of delegation

- 1 The Office shall deliver an official authorization or conclude a contract for a limited duration. It shall establish the duration based on the nature and the magnitude of the delegated management and allocation of addressing resources.
- 2 The Office may renew the official authorization or contract.

Article 13c Transfer of essential tasks

The essential tasks stipulated in the official authorization or contract shall not be transferred without the agreement of the Office.

Article 13d Amendment of official authorization or contract

- 1 The Office may amend the provisions of the official authorization or contract prior to their expiry if there is a change in circumstances or in the law and such amendment is necessary to protect overriding public interests.
- 2 The delegee shall be awarded an appropriate indemnity for any financial damages arising from such amendment of the official authorization or contract that are associated with the delegated management and allocation of addressing resources.

Article 13e Management and allocation of addressing resources by delegees

1 Delegees shall manage addressing resources in a rational and efficient manner. They shall allocate those resources in a transparent and non-discriminatory manner.

2 Articles 4 to 12 shall apply in analogous manner to the management and allocation of addressing resources by delegees.

3 The Office may arrange in the authorization or contract for specific rules to govern management and utilization of addressing resources by delegees.

Article 13f Record of activities

1 Delegees shall maintain a record of all their activities in connection with the allocation, revocation and retirement of addressing resources.

2 Delegees shall conserve the recorded data and supporting documents for a period of ten years.

Article 13g Disclosure's obligation

1 Delegees shall be obliged to provide the Office with any and all information and documents that may be necessary for the execution of the present Decree and the associated arrangements. In particular, the Office may demand a list of the allocated addressing resources and a copy of the record of activities.

2 Delegees shall communicate to the Office such information as may be necessary for the purpose of establishing official statistics, free of charge. In general articles 73 to 80 of the 31 October 2001 Decree on telecommunication services¹ shall apply in analogous manner.

Article 13h Prices

1 Delegees may freely determine the prices they charge for addressing resource management and allocation services if that market is characterized by effective competition.

2 The prices for certain services may be subject to approval by the Office, particularly if there are no competing suppliers.

3 The Federal Department of Environment, Transport, Energy and Communications may fix price ceilings, particularly if price levels on a given market indicate the likelihood of abusive practice.

Article 13i Oversight function

1 The Office shall oversee the delegees' compliance with applicable law, in particular the present Decree and the associated arrangements, and with their official authorization or contract. It may delegate certain oversight activities to organizations under private law and collaborate with them.

2 As a general rule a review of the manner in which addressing resources are being managed by the delegees shall be conducted once a year.

3 In the event of any suspicion that a delegee is no longer complying with its obligations under the present Decree, its implementing arrangements or the applicable official authorization or contract, the Office shall conduct an investigation. The delegee shall grant access to its premises and facilities and provide any necessary information.

¹ RS 784.101.1

4 If the outcome of such an investigation leads to the conclusion that the delegee fails to meet or no longer meets its obligations, the delegee shall bear the costs of the investigation.

Article 13j Oversight measures

1 In cases where a delegee no longer meets its obligations, the Office may:

- a) instruct the delegee to remedy the failing or take steps to prevent recurrence; the delegee shall inform the Office of the action taken;
- b) order the delegee to turn over to the Confederation any illicitly acquired proceeds;
- c) incorporate charges in the official authorization or contract;
- d) restrict or suspend the official authorization or contract, or revoke the official authorization or terminate the contract without notice, as per article 13k paragraph 1.

2 The Office may promulgate provisional measures as it may see fit.

Article 13k Termination of delegated activity

1 The Office may revoke the official authorization or terminate the contract without compensation if a delegee stops meeting the conditions for exercising the delegated activity, goes out of business, or is declared bankrupt. The Office may revoke the official authorization or terminate the contract, awarding the delegee an appropriate indemnity, if there is a change in circumstances or in the law and revocation or termination, respectively, is necessary to protect overriding public interests.

2 The Office may delegate the management and allocation of the resources in question to a new delegee. In the absence of a candidate who meets the conditions for exercising the delegated activity, it shall revert to the Office.

3 Holders' claims upon addressing resources allocated to them shall be preserved against the new delegee or the Office.

4 The delegee or the corpus, in the case of a bankruptcy, shall cooperate with the new delegee or the Office and provide any assistance and technical and organizational support that may be necessary to protect the continuity and the security of the delegated resource management. In particular, they shall make available their record of activities and other data or information and the databases and technical or computerized infrastructure that may be required for the purpose of continuing the delegated activity. The delegee shall be entitled to an indemnity based on the useful value of the assistance provided. The indemnity shall be fixed by the Office if it is requested to do so.

5 The delegee or the corpus, in the case of a bankruptcy, shall ensure that holders to whom they have allocated addressing resources are aware of their going out of business and of the procedures required to safeguard their claims.

Article 13l Personal data

1 Delegees may use their customers' personal data, to the extent and for the duration necessary for the purposes of the delegated management of addressing resource, in performance of their tasks and the fulfilment of their obligations arising from the present Decree and its implementing arrangements, and in order to obtain due payment for their services.

2 In general, the use of data by delegees and the oversight to which they are subject shall be governed by the federal Law on data protection of 19 June 1992² which applies to federal organs.

² RS 235.1

Article 13m Technical and administrative regulations

1 The Office may order the delegees to make proposals for numbering plans or regulations for the management of communication parameters, or to assist with the elaboration of such plans or regulations.

2 The Office shall establish numbering plans and promulgate regulations for the management of communication parameters proposed by the delegees. It shall make them public.

Section 2 Domain names within the ".ch" domain

Article 14 Scope

The present provisions dealing with domain names govern the management and allocation of second-level Internet domains within the ".ch" domain (.ch domains). The Office may extend certain rules to further domain levels if necessary.

Article 14a Registry

1 The Office shall designate a registry. It shall conclude an administrative-law contract with the registry.

2 The registry's duties shall include the following:

- a) provide for installation, management and updating of the technical infrastructure required for the allocation and management of the ".ch" domains;
- b) provide for reliable and professional operation of the domain name system within the ".ch" domain in accordance with the applicable technical standards;
- c) offer services in the allocation and management of ".ch" domain names to Internet users;
- d) provide for installation, administration and updating of a central public database providing any interested persons with guaranteed real-time access to information about domain name holders in accordance with article 14h, paragraph 1;
- e) take the necessary precautions to ensure reliability, accessibility, availability, security and operability of the infrastructure mentioned in paragraphs a) and d) above;
- f) ensure that the infrastructure mentioned in paragraphs a) and d) above conforms to the state of the art and is compatible with international standards used for the domain name system; and
- g) in the context of its duties to allocate and manage ".ch" domains, work towards the stability of the domain name system.

Article 14b Obligations of the registry

1 The registry shall employ persons possessing the professional knowledge and qualifications necessary to fulfil the duties listed in article 14a, paragraph 2. It shall designate a technical manager.

2 The registry shall certify that it has obtained sufficient insurance coverage for its activities in the management and allocation of domain names.

3 The registry has to offer its services to all Internet users, excepting cases of non-payment or dubious solvency. The registry may demand deposits against the risk of non-payment or dubious solvency, such deposits to collect interest payable at a level commensurate with a savings account. The amount of the deposit shall not exceed what is required to cover the likely risk to the registry.

4 The registry has the obligation to offer its services in the management and allocation of addressing resources to prospective agents.

5 Except as otherwise provided in the federal Law on international private law of 18 December 1987³ and the Convention on judicial competence and the execution of civil and commercial decisions of 16 September 1988⁴, the registry shall submit to Swiss law and jurisdiction in all disputes relating to the management and allocation of domain names that have been delegated to it.

Article 14c Approval

1 The registry shall establish the general terms and conditions under which it offers its services and submit them to the Office for its approval.

2 The registry may set the prices it charges for its services on the basis of costs incurred and fair profit. Prices shall be submitted to the Office for approval.

3 The Office will have ninety days from the time all necessary information has been received during which to grant or refuse approval.

Article 14d International relations

1 The registry shall conclude a contract with the body that controls domain names at the international level. The contract must be approved by the Office prior to being signed.

2 The registry shall, jointly with the Office, participate in the work of relevant forums and international bodies that deal with domain name issues and look after the interests of Switzerland.

Article 14e Contract

1 A written contract for a fixed duration of time will be concluded. The registry shall provide the Office with the necessary information and documents.

2 The Office shall be informed of any subsequent changes in the circumstances underlying the conclusion of the contract.

3 Requests for renewal of the contract must be submitted at least three months before contract expiry.

4 The Office may terminate the contract at any time, respecting the minimum period of notice of twelve months, if this is demonstrated to be necessary because of the needs of society or of the economy, or due to the state of technology.

Article 14f Management and allocation of domain names

1 The registry allocates domain names on demand, on the principle of "first come, first served".

2 The registry is not responsible for verifying whether applicants are entitled to use the combination of letters and numbers that make up the requested domain name. Disputes concerning private rights which other parties may hold thereto shall be governed by civil law.

3 Article 4, paragraphs 2 and 3a and c, article 5 and article 7, paragraphs 2, 8, 9 and 11, sub-paragraph 1.c do not apply to the management and allocation of domain names. Registry authorization is not required for a holder to use subordinate addressing resources as per article 6.

³ RS 291

⁴ RS 0.275.11

4 The Office may reserve certain categories of names if there is an overriding public interest in doing so or if it is perceived necessary to conform to international recommendations.

5 Applicants who have expressed an interest in obtaining the allocation of a domain name must be informed about the existence of, and the means of gaining access to, directories listing the distinctive marks protected under Swiss law or international conventions, or, in the absence of publicly accessible directories, the relevant legal basis.

Article 14g Dispute resolution service

1 The registry shall set up a dispute resolution service.

2 The registry shall determine its organization and procedures, which must be fair, rapid and appropriate. The rules for resolving disputes shall be based on accepted best practice.

3 The approval of the Office is required for the organizational structure, the rules governing dispute resolution, the rules of procedure and the appointment of panel members. Before granting approval the Office will seek the opinion of the Federal intellectual property institute and the Federal justice office.

4 The right to litigation in civil court remains unaffected hereby.

Article 14h Information made available to the public

1 The following information shall be included in the central public database described in article 14a, sub-paragraph 2.d:

- a) the domain name allocated;
- b) the full name of the holder of the domain name;
- c) the mailing address at which the holder resides or has its principal offices, to include the street address or post office box number, location, postal code, state or province (in Switzerland, the canton), and country;
- d) in cases where the holder is an artificial person, a partnership or a limited-liability company, the name of the natural persons authorized to represent it;
- e) the electronic address of the holder;
- f) the name, electronic address and mailing address of the technical manager, to include the street address or post office box number, location, postal code, state or province (in Switzerland, the canton), and country; and
- g) the date of allocation of the domain name and the date of the most recent amendment of the allocation.

2 The registry shall take appropriate precautions to prevent misuse of the information that is made public, in particular its use for purposes of advertising or commercial campaigns.

Article 14i Review

The Office shall periodically review the sole-registry system set forth above beginning with article 14, with a view to confirming whether it meets the needs of society and of the business world and is appropriate given the state of technology.

Article 15

Annulled.

Chapter 2 Addressing resources of the E.164 numbering plan

Section 1 Geographical codes

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Section 2 Call numbers

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Section 3 Short numbers

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Chapter 3 Addressing resources of the X.121 (DNIC) numbering plan

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Chapter 4 Communication parameters

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Chapter 5 Final provisions

Section 1 Execution

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Section 2 Transition arrangements

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Section 3 Entry into force

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