



Telecoms and Media 2010

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Switzerland

Marcel Meinhardt and Astrid Waser

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Communications policy

1 Policy

Summarise the regulatory framework for the telecoms and media sector. What is the policymaking procedure?

In Switzerland, the regulation of the telecoms and media sector falls into the competence of the Confederation. The policymaking procedure is rather complex. The Federal Office of Communications (OFCOM) is generally taking the lead in drawing up new regulations. It develops proposals for measures and prepares draft legislation for the Federal Council (ie, the federal executive government). The Federal Council then presents the proposals to the Federal Parliament, which has the competence to enact new legislation.

The telecoms and media sectors are regulated separately.

The Federal Act on Telecommunications (TCA) dated 30 April 1997 (as amended on 1 August 2008) and the Federal Ordinance on Telecommunications Services (OTS) dated 9 March 2007 (as amended on 1 January 2010) represent the main sources of law with respect to telecommunications. The TCA regulates the transmission of information by means of telecommunications techniques, including the transmission of radio and television programme services. The aim of the TCA is to ensure that a range of cost-effective, high quality and nationally and internationally competitive telecommunications services are available to individuals and companies in Switzerland and that effective and fair competition among carriers, operators and service providers will be guaranteed.

The broadcasting, processing and the reception of radio and television programme services are regulated by the Federal Act on Radio and Television (RTVA) dated 24 March 2006 (as amended on 1 February 2010), the Federal Ordinance on Radio and Television (RTVO) dated 9 March 2007 (as amended on 1 April 2010) and related decrees.

2 Convergence

Has the telecoms-specific regulation been amended to take account of the convergence of telecoms, media and IT? Are there different legal definitions of 'telecoms' and 'media'?

With respect to communicated contents, radio and television programme services on the one hand and telecommunications on the other hand are still regulated separately. In view of the ongoing convergence in the media industry, a distinction between regulated programme services and unregulated on-demand services is becoming increasingly hard to justify. Only as regards the transmission of contents (transmission facilities) there is a single regulation, the entire area of transmission being regulated in the TCA. The RTVA further ensures that sufficient frequencies are made available to the audiovisual media for distribution in a convergent environment.

Telecommunications services are defined in the TCA as the transmission of information for third parties by means of telecommunications techniques. There is no definition of media, neither in the TCA nor in the RTVA.

3 Broadcasting sector

Is broadcasting regulated separately from telecoms? If so, how?

In Switzerland, the broadcasting sector and content are regulated separately from the telecoms sector (see question 1).

Telecoms regulation

4 WTO Basic Telecommunications Agreement

Has your jurisdiction committed to the WTO Basic Telecommunications Agreement and, if so, with what exceptions?

The WTO Basic Telecommunications Agreement entered into force in Switzerland on 5 February 1998 without any exceptions or reservations.

5 Public/private ownership

What proportion of any telecoms operator is owned by the state or private enterprise?

According to the Federal Telecommunications Enterprise Act, the Swiss Confederation is obliged to hold both the majority of capital and the majority of votes of Swisscom AG, the Swiss incumbent telecoms operator. As of 31 December 2009, the Swiss Confederation owned 56.9 per cent of the shares in Swisscom, less than 3 per cent were Swisscom's own stock and the remainder, around 40 per cent, have been floated.

Regarding the ownership structure of Swisscom, there has been a proposal of the Swiss government to either completely sell the shares or to give up the majority stakeholding of the Swiss Confederation keeping a blocking majority. The government submitted its proposal to the Parliament in spring 2006 – which, however, refused it. The government is currently preparing a report on the further development of Swisscom, which is expected to be published in the second half of 2010.

6 Foreign ownership

Do foreign ownership restrictions apply to authorisation to provide telecoms services?

The authority may – subject to any international obligations to the contrary – prohibit foreign companies the provision of telecommunications services in Switzerland or refuse such company a licence for the use of the frequency spectrum, if no reciprocal rights are granted.

7 Operator exclusivity and limits on licence numbers

Are there any services granted exclusively to one operator or for which there are only a limited number of licences? If so, how long do such entitlements last?

There are no exclusive rights for telecommunications installations, services and infrastructure. The local loop or the 'last mile' between

the local telephone exchange and the customer's household connection to all providers is owned by the incumbent operator Swisscom. With the 2006 revision of the TCA, however, the local loop for all services has been unbundled. As far as high-speed access is concerned, this liberalisation is limited to four years, during which the alternative operators must develop their own infrastructure (see question 19).

8 Fixed, mobile and satellite services

Comparatively, how are fixed, mobile and satellite services regulated? Under what conditions may public telephone services be provided?

The regulation in Switzerland is technologically neutral and in general does not distinguish between fixed, mobile and satellite services; therefore, the general telecommunications law applies to fixed, mobile and satellite services.

Telecommunications service providers (TSP) are subject to a notification requirement. They must notify the OFCOM.

In addition, the provision of universal services and the utilisation of frequency spectrum (eg, mobile and uplinking satellite services) is subject to licences by the Federal Communications Commission (ComCom) or by the OFCOM if frequencies in a given spectrum band are not scarce.

On 21 June 2007, the ComCom designated Swisscom as licensee for universal services for a period of 10 years. The licence regulates the responsibility of the licensee and sets the methods for the calculation of the costs of the universal services if the licensee claims a financial compensation. Swisscom has refrained from applying for financial compensation for the first five years. However, it may ask for such compensation for the following years. The ComCom would then examine a potential application and determine the compensation based on the effective costs.

The aim of the universal services is to ensure that a basic offer of essential telecommunications services is available in all regions of the country for the whole population. These services have to be affordable, reliable and of a certain quality. The universal services include public telephone service, data transmission service, access to emergency services, an adequate provision of public telephones (public call boxes) and special services for disabled people. The universal service in Switzerland also incorporates a broadband internet connection with a minimum transmission speed of 600/100 kbit/s.

9 Satellite facilities and submarine cables

In addition to the requirements under question 8, do other rules apply to the establishment and operation of satellite earth station facilities and the landing of submarine cables?

Satellite facilities are defined as telecommunications installations and subject to the general rules of the TCA (see question 8). If the satellite earth station is used for uplinking purposes, a licence for the use of the radio frequency spectrum is required. However, downlinking is not regulated.

Since Switzerland is a landlocked country, there are no specific rules applicable to the landing of submarine cables.

10 Radio frequency (RF) requirements

For wireless services, are radio frequency (RF) licences required in addition to telecoms services authorisations and are they available on a competitive or non-competitive basis? How are RF licences allocated? Do RF licences restrict the use of the licensed spectrum?

The provision of telecoms services using the radio spectrum requires a radio communications licence. If there are not enough frequencies for all existing and potential future interested parties, the frequencies will be awarded by means of a public tender by the ComCom.

If there are enough frequencies for the desired telecommunications services for all present and foreseeable future interested parties, the licence will be granted on request by the OFCOM.

In order to partially or fully transfer the licence, approval of the ComCom is required.

11 Spectrum trading

Is licensed RF spectrum tradable?

Depending on the type of TSP, different rules on the trading and returning of allocated radio frequency spectrum apply.

In the case of TSPs other than broadcasters of radio and television programme services, the licence can only be transferred in whole or part with the consent of the licensing authority, which according to the TCA is the ComCom. This also applies to the economic transfer of the licence. According to the TCA, an economic transfer occurs in the case of acquisition of control (in the meaning of the Federal Cartel Act (CartA)) of the licensee.

Regarding the transfer of licences granted to broadcasters of radio and television programme services, see question 34.

12 Next-generation mobile services

Is there any regulation for the roll-out of 3G, 3.5G or 4G mobile services?

Swiss regulations do not distinguish between the various telecommunications generations. Therefore, the general provisions of the TCA are applicable to third and fourth generation services.

The licensing authority, the ComCom, has the possibility to impose specific obligations to licensees when granting the licences. With respect to UMTS, for instance, the ComCom obliged the operators to cover 50 per cent of the Swiss population with UMTS service by the end of 2004. In addition, operators of UMTS networks that already have a GSM network have been required to offer national roaming to new UMTS operators that do not possess a GSM network. Thus, a new operator has the opportunity, via a roaming contract with an established GSM operator, to achieve good coverage right from the start.

13 Fees

What fees are payable for each type of authorisation?

TSPs will pay a fee that is to be used to finance the uncovered costs of the universal service.

Licensing fees are payable for radio communications licences. Administrative charges are payable for the enactments and services of the competent authority, in particular in connection with the registration and supervision of providers of telecommunications services, administration and decisions concerning access monitoring of the frequency spectrum, management, allocation and withdrawal of addressing resources, permission and control of telecommunications equipment.

The Federal Department of Environment, Transport, Energy and Communications (DETEC) sets the rates for the administrative charges in the Federal Ordinance on Administrative Charges in the Telecommunications Sector. The Ordinance regulates the radio communications licence and the administrative charges.

14 Authorisation timescale

Are licences or other authorisations required? How long does the licensing authority take to grant such licences or authorisations?

As licences for telecommunications services are abolished, only licences for radio communications and universal services are necessary. The TCA does not provide for a specific authorisation timescale for those licences.

15 Licence duration

What is the normal duration of licences?

According to the TCA, licences for radio communications and universal services are of limited duration.

On 21 June 2007, the ComCom assigned Swisscom as licensee for universal services. The duration of this licence is 10 years.

The duration of the radio communications licence depends on the expected lifetime of the technology. GSM licences, for example, were originally granted for 10 years and have been renewed for five years. UMTS licences have been granted for 15 years. The current GSM and UMTS licences contain a provision stating that, for a potential renewal, licence holders can request that the licence is renewed by the latest two years before it expires.

16 Modification and assignment of licence

How may licences be modified? Are licences assignable or able to be pledged as security for financing purposes?

The licensing authority may adapt the radio communications licence to changes in actual or legal circumstances or revoke it if the modification or revocation is necessary to protect important public interests. The licensee is adequately reimbursed if the transferred rights are revoked or substantially reduced.

The partial or full assignment of licences requires the approval of the licensing authority. In addition, the change of control in a licensee also requires approval.

17 Radio spectrum

Is there a regulatory framework for the assignment of unused radio spectrum (refarming)? Do RF licences generally specify the permitted use of the licensed spectrum or can RF licences for some spectrum leave the permitted use unrestricted?

There is no specific regulatory framework for the assignment of unused radio spectrum. The OFCOM is responsible for the management of the radio spectrum and establishes the National Frequency Allocation Plan that is approved by the Federal Council.

The ComCom has awarded the remaining frequencies to GSM operators. GSM operators have the possibility to submit proposals to the ComCom not only regarding distribution of new frequencies (unused frequencies) but also regarding the possible exchange of existing frequencies that are in use. For this refarming, the ComCom imposes conditions on refarming of GSM frequencies so that the frequency distribution remains equitable and the efficiency of frequency utilisation is improved.

Radio communications licences do specify the permitted use (eg, radio, TV, amateur radio).

18 Cable networks

Is ownership of cable networks, in particular by telecoms operators, restricted?

Apart from the restrictions on foreign ownership (see question 6 above), there are no specific restrictions regarding ownership of cable networks in Switzerland. However, providers of telecommunications services that have a dominant position have to provide access to other providers at cost-oriented prices. In addition, cable networks may get obliged to broadcast certain programme services over their network (as regards must-carry obligations, see question 39).

19 Local loop

Is there any specific rule regarding access to the local loop or local loop unbundling? What type of local loop is covered?

The TCA liberalised the last mile of the market-dominant TSP for all services. Prices for this access will be negotiated between the alternative provider and the market-dominant provider. If no agreement can

be reached within three months, the regulator (ComCom) decides on a cost-based price for access.

An alternative provider can choose between two forms of access to the last mile in order to offer their own services to customers:

- they can operate their own infrastructure in the exchanges of the market-dominant provider and can therefore offer fixed network telephony and broadband access (fully unbundled access); or
- an alternative TSP operates broadband services on the equipment of the market-dominant provider in the exchanges, while telephone services continue to be provided by the market-dominant provider (fast bitstream access). This arrangement is limited to four years. Within this period the alternative TSP must build its own infrastructure in the exchanges in order to subsequently migrate from fast bitstream access to fully unbundled access.

In each case, the alternative TSP must establish its own connections to the exchanges of the market dominant provider.

With regard to bitstream access, Swisscom declined to submit a price proposal to its competitors in March 2007. Swisscom took the view that it was not dominant on the relevant market. However, the ComCom – on the basis of a report of the Swiss Competition Commission (ComCo) – decided that Swisscom held a dominant position and obliged it to grant access to fast bitstream for the other providers. Swisscom has appealed this decision to the Federal Administrative Court, which confirmed the ComCom's decision.

20 Internet services

How are internet services, including voice over the internet, regulated?

Swiss telecommunications law is technologically neutral and does not contain any specific definition regarding internet services, including voice over the internet. Therefore, regulation of those services is based on telecommunications law. The RTVA defines its scope of application more precisely and provides explicitly that TV programme services that are broadcasted over the internet are covered by the law under certain circumstances (see question 41).

21 Internet service provision

Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers?

Switzerland has not adopted any rules precluding network service providers to discriminate regarding the different types and sources of data transmitted over their networks. According to public statements of the large internet service providers prioritisation of certain content for the purpose of network management occurs on a regular basis, in particular to avoid responsibility for illegal actions of its customers, to fight spam and viruses and to improve the network's quality. Such actions have been perceived as an intrusion into 'net neutrality' by some customers. However, unlike in the US and the European Union, the network neutrality controversy has not yet entered public debate in Switzerland.

22 Financing of broadband and NGA networks

Is there a government financial scheme to promote broadband penetration?

There is no federal scheme to promote broadband penetration. However, some local authorities are actively supporting the development of broadband networks. For example, the City of Zurich has assigned financial means to its own electric utility to build an area-wide fibre optic network.

Furthermore, the licence for universal services obliges Swisscom to provide a broadband internet connection with at least a 600/100 kbit/s transmission speed to all households in addition to analogue and digital telephone connections.

23 Interconnection and access

How is interconnection regulated? Can the regulator intervene to resolve disputes between operators? Are wholesale (interconnect) prices controlled and, if so, how? What are the basic interconnect tariffs? Are wholesale access services regulated, and, if so, which and how?

According to the TCA, TSPs holding a dominant position must provide access to other providers in a transparent and non-discriminatory manner at cost-based prices.

If providers cannot reach an agreement on the applicable conditions within three months, the party asking for interconnection may request the ComCom to set the conditions. The ComCom has in particular to take account of the conditions promoting effective competition as well as the effects of its decision on competing arrangements.

On 17 December 2007, the ComCom decided that in the years 2004 to 2006, Swisscom had charged its contractual partners excessively high prices for various interconnection services. According to the ComCom, Swisscom is allowed to charge competitors only the actual cost incurred by the required services. The decision led to a reduction by an average of approximately 15 to 20 per cent for the interconnection services. Various similar decisions have been rendered by the ComCom since then.

24 Mobile virtual network operator (MVNO) traffic

Are any mobile network operators expressly obliged to carry MVNO traffic?

Swiss telecommunications law does not provide for any explicit obligation for mobile network operators to carry MVNO traffic. The relevant licences allow them to grant access to third parties but do not oblige them to do so.

25 Mobile call termination

Does the originating calling party or the receiving party pay for the charges to terminate a call on mobile networks? Is call termination regulated, and, if so, how?

In Switzerland, the originating calling party pays for the charges to terminate a call on mobile networks.

There is no specific regulation with respect to calls to mobile networks. However, as call termination requires the interconnection of different networks, network operators will contractually agree upon interconnection rates. Call termination is only regulated ex post – ie, the regulating authority (ComCom) can only interfere if the party seeking interconnection requests the authority to regulate such rates. So far, the parties have always contractually agreed upon mobile termination rates.

26 International mobile roaming

Are wholesale and retail charges for international mobile roaming regulated?

There is no regulation regarding the charges for international mobile roaming.

The Secretariat of the Competition Commission (ComCo Secretariat) has contacted the Swiss mobile telephony providers in the course of a market observation due to the new regulation in the European Union concerning the charges for international roaming. Thereafter, negotiations between Swiss and European providers concerning roaming charges took place. The ComCo Secretariat observed that the Swiss providers reacted to the lower charges in Europe by also reducing their charges.

27 Retail tariffs

Are retail tariffs regulated? If so, which operators' tariffs are regulated and how?

With respect to universal service, the Federal Council has the obligation to ensure that charges do not depend upon distance. It periodically fixes upper limits for the prices of the universal service. There is no regulation with respect to other tariffs.

The tariffs that apply to end consumers in the telecommunications market are regularly being observed by the federal price surveillance officer.

28 Customer terms and conditions

Must customer terms and conditions be filed with, or approved by, the regulator or other body? Are customer terms and conditions subject to specific rules?

Regarding customer terms and conditions there is no approval or examination needed from a regulator or any other body.

29 Number portability

Is number portability across networks possible? If so, is it obligatory?

The numbering scheme under the National Numbering Plan allows number portability between TSPs offering the same category of telecommunications services. Within such categories, TSPs are obliged to grant number portability. The relevant categories are:

- public telephone services (such as fixed net services);
- mobile telephony; and
- non-geographic services (such as premium-rate services).

TSPs that are required to grant number portability must bear their own costs. However, a TSP that passes a number to another one can demand that the latter contributes to administrative costs. The costs of transmitting a passed-on number to its destination are regulated in interconnection contracts between the TSPs. If there is no agreement, the rules of interconnection apply by analogy. The new TSP can pass part of the costs of number portability to the subscriber.

30 Universal service obligations and financing

Are there any universal service obligations? How is provision of these services financed?

There is no obligation to provide a universal service. The ComCom awards one or more universal service licences to TSPs wishing to provide a universal service for the whole population in all parts of the country. Universal service licences are put out to tender and awarded on the basis of a competition based on specific criteria (such as the applicant's technical capability, financial soundness and ability to comply with the law and the licence conditions). In 2007, the ComCom renewed Swisscom's universal service licence for a 10-year term starting in 2008.

Universal service includes:

- Public telephone services;
- Public call boxes;
- Directory and enquiry services;
- Emergency calls; and
- Specific services for the disabled.

If it is clear before the granting of the licence that even with efficient management it will not be possible to cover the costs of the provision of the universal service in a given area, the licensee shall be entitled to financial compensation.

31 Changes to telecoms law

Are any major changes planned to the telecoms laws?

The Federal Parliament has instructed the Federal Council to present a report on developments in the Swiss telecommunications market, the experiences with the recently revised TCA and need for legislation on this until mid-2010. The report shall discuss, inter alia, an amendment of the current access regulation, the method of cost calculation for regulated access, the separation of net and services, target achievement of the liberalisation, the need for regulation of the fibre optic network and the protection of consumers and young people.

32 Next-generation networks

How are next-generation networks (NGN) regulated?

The Swiss legislation on telecommunications is technologically neutral and does not contain any specific definitions referring to next generation networks. Therefore they are, in principle, subject to the provisions of the TCA.

33 Structural or functional separation

Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

There is no legal basis for requiring structural separation between an operator's network and service activities. However, some competitors of Swisscom have required a structural separation between Swisscom's network and its service activities.

Currently, the separation of network and services is being discussed with regard to the construction of fibre optic networks. The Federal Council has been asked by the Federal Parliament to discuss this issue in a more general manner in its report on developments in the telecommunication sector (see question 31).

Media regulation**34 Ownership restrictions**

Is the ownership or control of broadcasters restricted? May foreign investors participate in broadcasting activities in your jurisdiction?

Licences for broadcasting may be refused to foreign natural persons with their domicile in Switzerland, companies with foreign control or Swiss companies with foreign participations, provided that the respective foreign state does not grant reciprocal rights to Swiss citizens or Swiss companies.

In addition, the licence granted to broadcasters of radio and television programme services can only be transferred with approval of the licensing authority. The licensing authority examines whether the licence requirements are also met after the transfer. Economic transfer of the licence (ie, the transfer of more than 20 per cent of the share capital of the licensee) is also deemed to be such a transfer.

35 Cross-ownership

Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

The RTVA provides that a media corporation may not receive more than two radio and two television licences. In addition, the participation of the Swiss Broadcasting Corporation (SBC) in other companies broadcasting radio or television programmes requires the approval of the DETEC.

36 Licensing requirements

What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

Broadcasters of programme services are in principle required to obtain a licence. However, broadcasters that request neither splitting revenue nor guaranteed wireless terrestrial distribution can operate their service without a licence. The only requirement is prior notification to the OFCOM. Also, broadcasters of programme services of minor editorial importance (such as programme services that can be received by fewer than 1,000 people at the same time) do not fall under the scope of the RTVA and do not need a licence or registration. The SBC is subject to a special licence with an extensive mandate.

The Federal Council is the licensing authority for the SBC. With respect to the other licences, the licensing competence has been delegated to the DETEC (see question 43). If the broadcaster of a radio programme service is granted a licence under the RTVA, it is at the same time granted a licence under the TCA for use of the frequency spectrum (no separate application is needed). Cable TV operators are under a duty to broadcast in the respective coverage area TV programme services of broadcasters that have been granted a licence. Licences are awarded by public tender. To be awarded a licence, the applicant must:

- be able to fulfil the mandate;
- possess sound financial standing;
- be transparent about its owners;
- maintain a separation of editorial and economic activity; and
- have residence or registered offices in Switzerland.

If there are several candidates for one licence, preference is given to the applicant that is best able to fulfil the performance mandate. If several candidates are equivalent, the applicant which best enhances diversity of opinion and offerings is given preference. Often, independent applicants (ie, those not belonging to a media corporation that already possesses other licences) are deemed to be better able to fulfil this criterion by the DETEC.

The fee per year for a broadcasting licence amounts to 0.5 per cent of the gross advertising revenue that exceeds 500,000 Swiss francs. Furthermore, administrative charges will incur in relation to the radio and TV licence as well as to the telecommunications licence. These charges are calculated on the basis of time spent. A reduced hourly rate applies to the granting, amending or cancelling of a licence for the broadcasting of a radio or television programme service as well as for the radio communications licence.

37 Foreign programmes and local content requirements

Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content?

Broadcasters may be granted a licence for national and language region-specific programmes. These licences may contain obligations with respect to the portion of own productions and Swiss productions, in particular Swiss films.

Local and regional providers of radio and television programme services must primarily take the particular characteristics of their service area into account. They must contribute to the forming of opinion on topics of local and regional social life and to the promotion of the cultural life in the service area. These licences will, therefore, contain specific obligations regarding local and regional content.

38 Advertising

How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

Swiss law provides for both rules on advertising in general and specific rules for advertising in broadcast media.

The Federal Act against Unfair Competition contains several general provisions on advertising. It provides in particular that any advertisement that is deceptive or that in any other way infringes the principle of good faith and which affects the relationship between competitors or between suppliers and customers is deemed unfair and unlawful. In addition, the advertisement industry has installed soft law rules and established the Commission on Integrity in Commercial Communication in 1966. The Commission is a respected monitoring organisation that handles complaints from both consumers and competitors. It bases its decision on its own guidelines.

Broadcast media advertising (form and content) is specifically regulated in the RTVA and the RTVO.

As regards form, advertising must be clearly separated from the editorial programmes and must be clearly identifiable as such. Therefore, the beginning and end of an advertising slot must be indicated by a clear visual or audible marker. An advertisement that lasts longer than a minute must be identified as such for reasons of transparency.

Whilst surreptitious advertising is always illegal, product placement may be allowed if it fits into the dramatisation of a programme and is clearly declared as sponsorship.

Regular radio and television programme staff are banned from appearing in advertisements. Local and regional broadcasters with limited financial resources are excluded from this restriction.

There are scheduling and airtime restrictions for radio and TV advertising. Depending on the type of programme (eg, cinematographic film, documentaries, news programmes, programmes with a religious content, series, programmes for children) different scheduling restrictions apply. More severe restrictions apply to the SBC. As regards airtime, advertising may account for a maximum of 15 per cent of the daily transmission time and a maximum of 20 per cent (12 minutes) within one hour. Again, more severe restrictions apply to the SBC.

The RTVO contains provisions on the use of new advertising forms such as split screen, interactive and virtual advertising (ie, the insertion of advertisements into an existing image by means of post-production).

As regards content, the RTVA prohibits advertising for certain groups of products and services on radio and television, including tobacco products, certain alcoholic beverages; therapeutic products and political parties. Advertising is also prohibited if it disparages religious or political convictions, is misleading or unfair, or encourages behaviour that is prejudicial to health, the environment or personal safety.

There is no specific regulation for online advertising, as traditional online content is usually not covered by the RTVA (see question 41 for exceptions). Therefore, online advertising is only subject to general advertising rules.

39 Must-carry obligations

Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

As regards must-carry obligations, the RTVA differentiates between broadcasting distribution networks that transmit content by wireless terrestrial broadcasting and by wire.

In case of wireless terrestrial broadcasting, the programme services of the SBC and the programme services of broadcasters which possess a licence with a performance mandate are entitled to access

the network. Broadcasters pay the owner of a radio communication licence cost-based compensation for the broadcasting.

In case of broadcasting by wire, in addition to the above mentioned programme services the Federal Council has specified the programme services of foreign broadcasters which are to be transmitted by wire because of their special contribution to education, cultural development or free opinion-forming. Furthermore, on application by a broadcaster and subject to certain conditions, the OFCOM can require a TSP for a specific period to provide broadcasting by wire of a programme service within a specific area. The RTVO provides for a maximum number of programme services that have to be broadcasted by wire free of charge.

40 Changes to the broadcasting laws

Are there any changes planned to the broadcasting laws? In particular, do the regulations relating to traditional broadcast activities also apply to broadcasting to mobile devices or are there specific rules for those services?

After a major revision, the amended RTVA entered into force on 1 April 2007. Furthermore, Switzerland's participation in the EU film development scheme MEDIA has been implemented into the act as of 1 February 2010. Currently, no major changes to broadcasting laws are envisaged.

41 Regulation of online content

How is the delivery of content online regulated?

The delivery of traditional online content (websites, newsgroups, weblogs, etc) is not specifically regulated. Of course, general laws such as criminal law, intellectual property rights, etc, do apply. Online content that meets the legal definition of a programme service, ie, content that is delivered as a continuous sequence of broadcasts that are transmitted at certain times only and addressed to the general public (such as IPTV and streaming media) falls, in principle, under the RTVA. However, programme services that can only be received simultaneously by 1,000 viewers or less (ie, offerings of minor editorial importance) as well as on-demand content are excluded from the RTVA. Therefore, most of today's online content is not regulated. Broadcasts which are subject to the RTVA have to abide by the same rules (eg, regarding advertisement) as broadcasts via traditional media (see question 38). While there is no licence required, the broadcasters have to inform the OFCOM of their programme service.

42 Digital switchover

When is the switchover from analogue to digital broadcasting required? How will radio frequencies freed up by the switchover be reallocated?

In Switzerland, the last analogue terrestrial TV programme services were disconnected in 2009. There is no specific timing required by law for the switchover from analogue to digital broadcasting of radio programme services. However, the OFCOM may grant financial help to licensed broadcasters to establish new broadcasting technologies, if there are insufficient resources in the relevant area. The necessary funds are generated by licensing and consumer fees.

According to the new National Frequency Allocation Plan, the frequency band from 790 to 862MHz that has been freed up due to the digitalisation of TV will be available for mobile services by 2015 at the latest. These frequencies promise to be particularly useful as they enable an excellent coverage of rural areas while having good building penetration.

Regulatory agencies
43 Regulatory agencies

Which body or bodies regulate the communications sector? Is the telecoms regulator separate from the broadcasting regulator?

The following authorities are competent for the communications and the broadcasting sector:

The OFCOM is concerned with questions related to telecommunications and broadcasting (radio and television). In this respect, the OFCOM fulfils all sovereign and regulatory tasks. It prepares the decisions of the Federal Council, the DETEC and the ComCom. It fulfils an advisory and coordinating function for the public and policymakers. It also guarantees that basic services will be provided in all parts of the country and for all sections of the population.

The Federal Communications Commission (ComCom) is an independent regulatory authority active in the telecommunications sector. The main activities and competencies of ComCom relate in particular to the granting of licences for the use of scarce radio communication frequencies, as well as the regulation of the terms of application of number portability and free choice of supplier. ComCom instructs the OFCOM with respect to the preparation of its business and the implementation of its decisions. Moreover, it has delegated some of its tasks to the OFCOM.

The broadcasting sector has mainly three authorities responsible for the granting of licences. The Federal Council is the licensing authority for the SBC. With respect to other licences, licensing competence has been delegated to the DETEC. The OFCOM puts the licences out for tender and consults interested groups.

The RTVA provides for an Independent Complaints Authority for Radio and Television which deals with complaints that relate to the editorial programme and rules on disputes on denied access to a programme.

44 Establishment of regulatory agencies

How is each regulator established and to what extent is it independent of network operators, service providers and government?

The OFCOM is a government agency and part of the DETEC.

The ComCom is the independent regulatory authority for the telecommunications market. It consists of seven members – who must be independent specialists – nominated by the Federal Council. However, it is not subject to any Federal Council or DETEC directives. The ComCom is independent from the administrative authorities and has its own secretariat. It informs the public of its activities and produces a report each year for the attention of the Federal Council. The ComCom is convoked by its president as required or upon request by a member. It may also take its decisions by way of circulation.

The Independent Complaint Authority for Radio and Television consists of nine independent members who are nominated by the Federal Council.

45 Appeal procedure

How can decisions of the regulators be challenged and on what bases?

In the telecommunications sector, the law provides for the following appeal procedures: Decisions of the ComCom can be appealed to the Federal Administrative Court on the basis of facts, law and procedure. Administrative decisions of the OFCOM may be appealed to the Federal Administrative Court on the basis of facts, law and procedure. Decisions of the Federal Administrative Court are further subject to administrative appeal to the Federal Supreme Court on the basis of law and procedure. An exception applies to decisions of the Federal Administrative Court regarding publicly tendered licences and disputes regarding access based on the rules on interconnection. These decisions are final and cannot be appealed to the Federal Supreme Court.

In the field of broadcasting, decisions of the OFCOM can be appealed to the Federal Administrative Court on the basis of facts, law and procedure. Decisions of the latter can be appealed to the Federal Supreme Court on the basis of law and procedure. The decision of the DETEC regarding the licences which have been subject to a public tender can be appealed to the Federal Administrative Court. By way of exception, this decision cannot be appealed to the Federal Supreme Court. The decision of the Federal Administrative Court is final. Decisions of the Independent Administrative Appeal Board can be appealed to the Federal Supreme Court.

46 Interception and data protection

Do any special rules require operators to assist government in certain conditions to intercept telecommunications messages? Explain the interaction between interception and data protection and privacy laws.

The procedure of interception and the obligation of operators to assist the government are regulated in the Federal Act on the Interception of Postal and Telecommunications Services (IPTS).

The Federal Office for the Interception of Postal and Telecommunication Services (IPTS Office) is responsible for the execution of interception measures and for the forwarding of requests of the law enforcement agencies to the telecommunications operators to take adequate measures. Interception measures are only permitted regarding certain severe criminal offences enlisted in the IPTS. They are only permitted under the condition that other measures have remained unsuccessful. Interception in accordance with the IPTS requires an order by the competent judge.

In relation to data protection and privacy laws, the law on interception is *lex specialis*. The interception measures with the restrictions described above (ie, only in case of severe criminal offences, only via an independent office and only with a judicial order) and the accompanying violation of data protection and privacy rights were deemed to be proportionate and in public interest by the legislator.

47 Data retention and disclosure obligations

What are the obligations for operators and service providers to retain customer data? What are the corresponding disclosure obligations? Will they be compensated for their efforts?

Telecommunications operators are obliged to retain data for the identification of users and data relating to communication and billing for six months. In addition, if an interception order has been placed, the operator has an obligation to retain the data of its customers for the duration of the order. Telecommunications operators disclose the retained data on request of the IPTS Office. Operators are compensated for their efforts according to an official tariff established by the Federal Council.

48 Unsolicited communications

Does the legislation prohibit unsolicited communications? Are there exceptions to the prohibition?

The TCA provides for a prohibition of spam and an obligation for all TSPs to fight against spam. Mass mailing of e-mails is not per se prohibited. However, in the case of electronic advertising mailings, it will be necessary to provide proof of the explicit consent of all recipients (opt-in principle).

For advertising calls, the OTS applies. All subscribers listed in a directory are able to explicitly state that no advertising from a third party is desired and that their data shall not be passed on for the purpose of direct marketing (opt-out principle).

Update and trends

Until recently, the OFCOM was of the view that TV received via internet signals is not an alternative to traditional TV reception methods. The OFCOM has now changed its view, in particular as broadband internet access allows for high-quality TV reception. This adjustment of the OFCOM's practice has several implications – eg, regarding the duty to pay reception fees, the duty to broadcast coupled services such as teletext, dolby digital or multiple sound channels, and the restriction of the broadcasting of local programme services to their respective reception area. Thereby the RTVA does in many respects not account for the technological change.

The building and extension of the fibre optic network and the connection of households thereto has recently become a political

issue when several TSPs and utilities began to plan the building of networks. Such parallel networks would lead to considerably higher costs and, thus, obstruct the proliferation of this new technology. As there is no legal basis for regulation of the building and operation of the optic fibre network, the ComCom organised a round table. Its goal is to coordinate the building of a single network with four fibres. Access to the fibres shall be granted on a non-discriminatory basis. Also, working groups for the technical standardisation processes (eg, sockets, or access points to the transportation network) and regarding contracts between house owners and optic fibre network operators have been installed.

Competition and merger control**49 Competition and telecoms and broadcasting regulation**

What is the scope of the general competition authority and the sectoral regulators in the telecoms and broadcasting sectors? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The authorities in the field of telecoms and media on the one hand, and the ComCo on the other, have parallel competencies. However, regarding specific questions related to competition law, the authorities in the field of telecoms and media are obliged to consult the ComCo. In addition, it lays in the competence of the latter to ensure and to maintain actual competition and to keep the market open. Thus, there is a close collaboration between the authorities to avoid conflicts in jurisdiction, particularly concerning issues such as reviewing price-fixing arrangements, mergers and strategic alliance as well as the conduct of those market participants with a dominant position. Ultimately, all problems related to any aspect of competition law are subject to the survey and jurisdiction of the ComCo.

50 Competition law in the telecoms and broadcasting sectors

Are anti-competitive practices in these sectors controlled by regulation or general competition law? Which regulator controls these practices?

Anti-competitive practices in the telecoms and broadcasting sectors are controlled by general competition law, which is enforced by the ComCo.

51 Jurisdictional thresholds for review

What are the jurisdictional thresholds and substantive tests for regulatory or competition law review of telecoms sector mergers, acquisitions and joint ventures? Do these differ for transactions in the broadcasting sector?

In the telecoms and the broadcasting sectors, the general competition law rules on mergers apply. The test applied to mergers is based on turnover. Two turnover thresholds must be reached cumulatively: for the last business year prior to the merger, the enterprises concerned must have reported an aggregate turnover of at least 2 billion Swiss francs worldwide or an aggregate turnover in Switzerland of at least 500 million Swiss francs, and at least two of the enterprises involved in the transaction must have reported individual turnovers in Switzerland of at least 100 million Swiss francs. Turnover is calculated on a consolidated basis but exclusive of intra-group business.

In addition, once the ComCo has established that a specific enterprise holds a dominant market position, every merger transaction involving that enterprise in the market in which it holds a dominant position is subject to the notification requirement, irrespective of any thresholds. The ComCo does not publish a list of such enterprises held to be dominant.

With respect to Swisscom, the incumbent telecoms operator, the ComCo established that it held a dominant market position on the markets for telephone network and services (in 1997) and on the market for vocal call termination on mobile telephone networks (in 2007). Therefore, Swisscom's acquisitions in the relevant markets and in adjacent, upstream or downstream markets are subject to a merger filing.

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52 Merger control authorities

Which regulatory or competition authorities are responsible for the review of mergers, acquisitions and joint ventures in the telecoms and broadcasting sectors?

The federal authority which enforces the merger control provisions of the CartA is the ComCo. The ComCo consists of 12 members, a majority of whom must be independent experts. The cases are prepared and processed by the staff of the ComCom Secretariat.

Furthermore, the transfer of broadcasting and telecommunications licences are subject to authorisation of the licensing authority (see question 11 regarding telecommunications licences and question 34 regarding broadcasting licences).

53 Procedure and timescale

What are the procedures and associated timescales for review and approval of telecoms and broadcasting mergers, acquisitions and joint ventures?

The ComCo is required to notify the enterprises within one month after it has received the complete notification whether or not it intends to initiate an investigation (phase I of the procedure). If within this period no notification is made by the ComCo, the merger may be completed. In practice, the one-month period can be shortened in less complex filings if, prior to the formal notification, the draft filing is submitted to the ComCo for review, thus enabling the ComCo to communicate its position before the expiry of phase I. If the ComCo decides to initiate an investigation, it must be completed within a period of four months (phase II of the procedure).

In parallel, the transfer of either a telecommunications or broadcasting licence has to be approved by the competent authorities. However, the licensing authorities are not bound to a specific timescale.

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