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THE TECHNOLOGY,  
MEDIA AND  
TELECOMMUNICATIONS  
REVIEW

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SEVENTH EDITION

EDITOR  
JOHN P JANKA

LAW BUSINESS RESEARCH

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MEDIA AND  
TELECOMMUNICATIONS  
REVIEW

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Seventh Edition

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# EDITOR'S PREFACE

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This fully updated seventh edition of *The Technology, Media and Telecommunications Review* provides an overview of evolving legal constructs in 28 jurisdictions around the world. It is intended as a business-focused framework for both start-ups and established companies, as well as an overview for those interested in examining evolving law and policy in the rapidly changing TMT sector.

Broadband connectivity and wireless services continue to drive law and policy in this sector. The disruptive effect of new technologies and new ways of communicating creates challenges around the world as regulators seek to facilitate the deployment of state-of-the-art communications infrastructure to all citizens and also to use the limited radio spectrum more efficiently than before. At the same time, technological innovation makes it commercially practical to use large segments of 'higher' parts of the radio spectrum for the first time. Moreover, the global nature of TMT companies compels them to address these issues in different ways than before.

A host of new demands, such as the developing 'Internet of Things,' the need for broadband service to aeroplanes, vessels, motor vehicles and trains, and the general desire for faster and better mobile broadband service no matter where we go, create pressures on the existing spectrum environment. Regulators are being forced to both (1) 'reform' existing spectrum bands, so that new services and technologies can access spectrum previously set aside for businesses that either never developed or no longer have the same spectrum needs, and (2) facilitate spectrum sharing between different services in ways previously not contemplated. Many important issues are being studied as part of the preparation for the next World Radio-communication Conference to be held in 2019. No doubt, this conference will lead to changes in long-standing radio spectrum allocations that have not kept up with advances in technology, and it should also address the flexible ways that new technologies allow many different services to co-exist in the same segment of spectrum.

Legacy terrestrial telecommunications networks designed primarily for voice are being upgraded to support the broadband applications of tomorrow that will extend economic benefits, educational opportunities and medical services throughout the world. As a result, many governments are investing in or subsidising broadband networks to ensure that their citizens can participate in the global economy, and have universal access to the vital

information, entertainment and educational services now delivered over broadband. Many governments are re-evaluating how to regulate broadband providers, whose networks have become essential to almost every citizen. Convergence, vertical integration and consolidation also lead to increased focus on competition and, in some cases, to changes in the government bodies responsible for monitoring and managing competition in the TMT sector. Similarly, many global companies now are able to focus their regulatory activities outside their traditional home, and in jurisdictions that provide the most accommodating terms and conditions.

Changes in the TMT ecosystem, including increased opportunities to distribute video content over broadband networks, have led to policy focuses on issues such as 'network neutrality' – the goal of providing some type of stability for the provision of the important communications services on which almost everyone relies, while also addressing the opportunities for mischief that can arise when market forces work unchecked. While the stated goals of that policy focus are laudable, the way in which resulting law and regulation are implemented has profound effects on the balance of power in the sector, and also raises important questions about who should bear the burden of expanding broadband networks to accommodate the capacity strains created by content providers and to facilitate their new businesses.

The following chapters describe these types of developments around the world, as well as the developing liberalisation of foreign ownership restrictions, efforts to ensure consumer privacy and data protection, and measures to ensure national security and facilitate law enforcement. Many tensions exist among the policy goals that underlie the resulting changes in the law. Moreover, cultural and political considerations often drive different responses at the national and the regional level, even though the global TMT marketplace creates a common set of issues.

I would like to take the opportunity to thank all of the contributors for their insightful contributions to this publication and I hope you will find this global survey a useful starting point in your review and analysis of these fascinating developments in the TMT sector.

**John P Janka**

Latham & Watkins LLP

Washington, DC

October 2016

## Chapter 25

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# SWITZERLAND

*András Gurovits and Clara-Ann Gordon<sup>1</sup>*

### I OVERVIEW

Conditions on the Swiss telecommunications market are quite stable. While in the fixed broadband market the traditional telecom operators, as well as cable TV providers and public utilities, are pushing forward development and deployment of broadband networks, the mobile telecommunications market is still dominated by three mobile operators: Swisscom, Sunrise and Salt.

In the media sector the approval by the competition as well as media supervisory authorities of the joint venture between the Swiss Broadcasting Corporation SRG SSR, Swisscom and Ringier in the field of joint marketing of advertising content has attracted wide public attention and caused criticism by market players as well as economic and legal experts.

On the legislative side, no significant changes have been observed during the past year, except for a revision of the Swiss Federal Act on the Surveillance of Mail and Telecom Traffic (BÜPF) was adopted on 18 March 2016. A referendum has not been launched, thus the provisions of the revised BÜPF will come into force on 1 January 2017. Further, a revision of the telecommunications laws as proposed by the Federal Council is under discussion. At present it is open whether and when the law may be changed in accordance with the proposed amendments.

### II REGULATION

#### i The regulators

The relevant regulatory framework for telecommunications services in Switzerland is set forth mainly in the Swiss Federal Telecommunications Act (TCA) and associated regulations such as the Swiss Federal Ordinance on Telecommunication Services (OTS), the Swiss Ordinance on Telecommunication Installations, the Swiss Federal Act on the Surveillance of Postal and

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<sup>1</sup> András Gurovits and Clara-Ann Gordon are partners at Niederer Kraft & Frey Ltd.

Telecommunications Traffic (BÜPF) and its implementing ordinance (VÜPF), the RTVA and its related ordinance (RTVO), as well as, in respect of antitrust matters, in the Swiss Cartel Act (CartA).

The Federal Communications Commission (ComCom) is the regulatory authority in the telecommunications market, and currently has seven members. The Federal Council elects the members, who must all be specialists in the field.<sup>2</sup> Despite being elected by the Federal Council, the members of ComCom are independent of directives of the Federal Council. The tasks of ComCom include, *inter alia*, the granting of licences for the use of radio frequencies, the award of universal service licences and the setting out of access conditions if the telecommunications service providers fail to reach an agreement. ComCom produces annual reports about its activities for the attention of the Federal Council. ComCom may seek the assistance of the Federal Office of Communications (OFCOM).<sup>3</sup>

OFCOM, in particular, ensures the compliance of market participants with the law and their telecommunications licences, and is competent to issue those telecommunications licences in respect of which ComCom is not competent. If OFCOM detects infringements of the telecommunications law, it shall intervene and order corrective measures that may include restriction, suspension or withdrawal of a licence (or propose such measure to ComCom if ComCom is the licensing authority).<sup>4</sup>

The Swiss Competition Commission (ComCo) is the Swiss regulator in antitrust matters in accordance with the CartA. ComCom may have to consult with ComCo and seek its opinion on potential effects on the telecommunications markets if the question of (potential) market dominance becomes relevant for ComCom in its application of the TCA. This may, in particular, be the case in connection with the determination by ComCom of the terms of interconnection and access agreements if the providers are unable to reach an agreement by themselves, as well in connection with the grant of radio telecommunications licences that, according to the TCA, must not eliminate or significantly restrict effective competition. Moreover, ComCo may come into play in the telecommunications markets in cases of unlawful restraints of competition, unlawful practices of dominant undertakings or in cases of concentrations of undertakings if the relevant statutory turnover thresholds are met.<sup>5</sup>

## ii Regulated activities

In Switzerland, anyone who wishes to use the radio frequency spectrum must obtain a licence.<sup>6</sup> Any licence applicant must have the necessary technical capacities; and undertake to comply with the applicable legislation, in particular the TCA and the RTVA, the relevant implementing ordinances as well as the licence conditions.<sup>7</sup> While ComCom is the licensing

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2 Article 56 of the TCA.

3 Article 57 of the TCA.

4 Article 58 of the TCA.

5 If in the financial year preceding the concentration the undertakings concerned together reported a worldwide turnover of at least 2 billion Swiss francs, or a turnover in Switzerland of at least 500 million Swiss francs, and at least two of the undertakings concerned each reported a turnover in Switzerland of at least 100 million Swiss francs.

6 Article 22, paragraph 1 of the TCA.

7 Article 23, paragraph 1 of the TCA.

authority for nationwide radio communications licences, OFCOM is competent in respect of the grant of other licences of somewhat lesser importance, such as point-to-point frame relay licences.

A licence can only be granted if sufficient frequencies are available under the national frequency allocation plan. A radio communications licence shall, as a rule, be granted on the basis of a public invitation to tender if enough frequencies are not available to meet all applicants' present and future needs.<sup>8</sup> This is usually the case in respect of nationwide radio communication licences. The licence grant procedure shall respect the principles of objectivity, non-discrimination and transparency, and shall ensure the confidentiality of all information provided by the applicants.<sup>9</sup> If more applicants participate than licences are available, the process is usually conducted by means of an auction procedure, although it would also be possible for the authorities to launch a 'beauty contest', where the specific qualitative and quantitative criteria of the applicants would be assessed and measured.

A ComCom licence is also required to provide a universal service.<sup>10</sup> In respect of the grant of such licence, an invitation to tender shall also be issued, and this tender procedure shall also be in line with the principles of objectivity, non-discrimination and transparency. However, if it is clear from the outset that the tender will not proceed under competitive conditions, or if no suitable candidates are available, ComCom may appoint one or more undertakings as providers of the relevant universal services.<sup>11</sup>

Otherwise, the regulation of the Swiss telecommunications market is rather liberal. The TCA only requires a provider that intends to offer telecommunications services in Switzerland to notify OFCOM.<sup>12</sup> The OTS provides a number of clarifications of, and exceptions to, such duty of notification. Exempt from the duty to notify OFCOM are, *inter alia*, foreign providers of international telecommunications services that use other providers (having notified their services to OFCOM) to terminate their connections in Switzerland.<sup>13</sup>

The radio and televisions market is subject to more intense regulation. The RTVA, for instance, requires anyone who intends to broadcast a Swiss programme to notify OFCOM, and to obtain the relevant licence<sup>14</sup> issued by the Federal Department on the Environment, Transport, Energy and Communications (UVEK).<sup>15</sup> In addition, the law imposes on broadcasters a number of restrictions in terms of content and advertising<sup>16</sup> as well as fee-splitting and coverage areas.<sup>17</sup> Moreover, licensed broadcasters have to pay an annual licence fee.<sup>18</sup>

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8 Article 24, paragraph 1 of the TCA.

9 Article 24, paragraph 2 of the TCA.

10 Article 14, paragraph 1 of the TCA.

11 Article 14, paragraphs 3 and 4 of the TCA.

12 Article 4, paragraph 1 of the TCA.

13 Article 3 of the OTS.

14 Article 3 of the RTVA.

15 Article 45 of the RTVA.

16 Article 4 et seq. and Article 9 et seq. of the RTVA.

17 Article 38 et seq. of the RTVA.

18 Article 22 of the RTVA.

**iii Ownership and market access restrictions**

Swiss telecommunications law is, as a rule, liberal, and it does not impose high entry barriers. As already explained, the only formality to be fulfilled by telecommunications service providers is the notification of OFCOM. Only those who intend to provide a universal service or to use the frequency spectrum require a licence.

Swiss telecommunications law does not, as a rule, preferentially treat Swiss entities over foreign telecommunications providers. Ownership restrictions apply in respect of mobile telecommunications licences in that the granting of such licences may not eliminate or materially restrict competition,<sup>19</sup> which means, in practical terms, that one and the same operator cannot (directly or indirectly) hold more than one licence entitling it to operate a nationwide mobile telecommunications network. Consequently, any application by an operator for a second nationwide mobile telecommunications licence would have to be disregarded, and should two providers that each hold such licence merge, they would have to return one licence.

According to the Federal Telecommunications Operator Act (TUG), the Swiss Confederation must hold a majority stock in the incumbent, Swisscom,<sup>20</sup> which is the successor of the former PTT Telecom. This is a somewhat hotly disputed statutory provision, as many market players consider that the fact that the Swiss Confederation is still the majority owner of the incumbent increases the risk of its giving preferential treatment to Swisscom over competitors that are completely privately held.

The RTVA provides that any licence applicant must, as a rule, be resident or domiciled in Switzerland. No provider shall hold more than two television licences and two radio licences. In addition, in the absence of any international obligations to the contrary, any operator controlled from abroad or with foreign participation may be refused a licence if the corresponding foreign state does not grant reciprocal treatment.<sup>21</sup> Moreover, the RTVA sets out specific statutory provisions for the Swiss Broadcasting Corporation (SRG SSR), which is the national radio and television broadcaster. SRG SSR shall fulfil a constitutional mandate in the field of radio and television and provide a service for the Swiss community.<sup>22</sup>

**iv Transfers of control and assignments**

According to the TCA, every transfer of a licence requires the consent of the licensing authority. A consent of the licensing authority must also be sought in the case of an economic transfer of a licence (i.e., in the case of a change of control in the licence holder).<sup>23</sup> The ComCom's consent is required in the case of a transfer of a universal licence and a nationwide radio communications licence, while a transfer of other radio licences must be approved by OFCOM.

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19 Article 23, paragraph 4 of the TCS.

20 Article 6, paragraph 1 of the TUG.

21 Article 44 of the RTVA.

22 Articles 23 and 24 of the RTVA.

23 Article 24d of the TCA.

A transfer of a radio or television licence under the RTVA requires the consent of the UVEK.<sup>24</sup> A consent is also needed in the case of an economic transfer of the licence, which is, under the RTVA, deemed to be given if more than 20 per cent of stock in the licence holder is transferred.

Clearance may also be needed under the CartA if the relevant turnover thresholds are met. In addition, merger control clearance is also needed, irrespective of the turnover of the undertakings concerned, if one of the undertakings concerned has been held, in a final decision pursuant to proceedings under the CartA, to be dominant in a market in Switzerland, and if the concentration concerns either that market or an adjacent or upstream or downstream market.<sup>25</sup>

### III TELECOMMUNICATIONS AND INTERNET ACCESS

#### i Internet and internet protocol regulation

Under Swiss law, a telecommunications service means the transmission of information for third parties by means of telecommunications techniques (i.e., by sending or receiving information, through fixed or mobile networks, by means of electrical, magnetic or optical signals or other electromagnetic signals).<sup>26</sup> Internet services, in particular VoIP services, thus qualify as telecommunications services, and are subject to regulation in accordance with the statutory provisions of the TCA and the pertaining implementing ordinances.

Against this background, providers of telecommunications services over the internet are, for instance, required, like other providers:

- a* to make the relevant notification to OFCOM;
- b* to have the required technical capabilities for the provision of the services in question;
- c* to comply with the provisions of the TCA and the pertaining ordinances, to ensure price transparency;
- d* to respect specific pricing conditions for value-added services;
- e* to ensure the confidentiality of the communications of their subscribers; and
- f* to ensure access to emergency services.

In respect of the latter, however, the law foresees some relief for VoIP providers in that correct routing of emergency calls, if not technically possible for every location, must be ensured only for calls from the main location identified in the subscription contract.<sup>27</sup>

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24 Article 48 of the RTVA.

25 Article 9, paragraph of the CartA.

26 Article 3 of the TCA.

27 Article 30, paragraph 1 of the OTS.

**ii Universal service**

The universal service licence, which is valid until the end of 2017 was awarded to Swisscom by ComCom. The universal service comprises, *inter alia*, the public telephone service, access to emergency call services and the data transmission service.<sup>28</sup> The various universal services are subject to price regulation and may not exceed the prices set out in the OTS.<sup>29</sup>

At the choice of the subscriber, the universal service provider must provide a fixed network termination point that includes a voice channel, a telephone number, an entry in the public telephone service directory and broadband internet access with a guaranteed transmission speed of 2000/200kbit/s.<sup>30</sup>

The state does not subsidise the development of broadband infrastructure such as FTTH, such development being pushed forward by the market players. Apart from the traditional telecommunications and cable TV providers, public utilities have also entered the broadband infrastructure market. According to the Federal Office for Statistics, as at June 2015, 51 out of 100 households had subscribed to broadband services, which exceeds the OECD average of 29 out of 100 households. The number of broadband subscriptions grew from 157,000 in 2001 to 4,138,950<sup>31</sup> in 2015.

**iii Restrictions on the provision of service**

As discussed above, the universal licence holder is bound by statutory maximum prices.<sup>32</sup> Likewise, value-added services are subject to certain statutory price ceilings.<sup>33</sup> Other than that, retail prices are not regulated in the Swiss telecommunications market. Providers are, however, obliged to ensure price transparency. They must, in particular, inform a caller if, in the case of a call between customers of different mobile telecommunications providers, higher prices are charged than for calls to the same provider's customers. The same duty of information applies if customers are charged higher prices for calls to numbers in company-wide telecommunications networks than for calls to numbers with geographical codes.<sup>34</sup> These duties do not apply in the case of value-added services, international calls and international roaming.

At the wholesale level, providers of telecommunications services having a dominant position in the market must provide other providers access to their network and services in a transparent and non-discriminatory manner at cost-oriented prices. The forms of access to be granted include:

- a* fully unbundled access to the local loop;
- b* fast bitstream access for four years;
- c* rebilling for fixed network local loops;
- d* interconnection;

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28 Article 15, paragraph 1 of the OTS.

29 Article 22 of the OTS.

30 Article 16, paragraph 2 of the OTS.

31 Federal Office of Statistics, Internet – High-Speed Internet, accessible at [www.bfs.admin.ch/bfs/portal/de/index/themen/16/03/key/ind16.indicator.30107.160204.html?open=1,2#2](http://www.bfs.admin.ch/bfs/portal/de/index/themen/16/03/key/ind16.indicator.30107.160204.html?open=1,2#2), accessed on 18 September 2016.

32 As per Article 22 of the OTS.

33 As per Article 39 and 39a of the OTS.

34 Article 10 of the OTS.

- e* leased lines; and
- f* access to cable ducts, provided sufficient capacity is available.

On the other hand, there is no obligation to ensure access in relation to the broadcasting of radio and television programme services.<sup>35</sup> Interconnection services to be provided in accordance with Swiss law include:

- a* origination, termination and transit of calls;
- b* identification of the calling line, identification of the connected line and suppression of this information;
- c* access to value-added services; and
- d* the physical connection between the telecommunication installations of different providers as required for the connection of the services.<sup>36</sup>

Non-discrimination means that the dominant provider must not treat other providers less favourably than its own business units, subsidiaries or other partners, and that the difference between the access prices offered by the dominant provider and its end customer prices would allow another (comparable and efficient) provider to achieve cost-covering revenues.<sup>37</sup>

Determination of a cost-oriented price is a rather complex matter. The OTS provides detailed guidance.<sup>38</sup> The underlying principle is that the dominant provider shall ensure that its calculation of the access price is based on the costs that an efficient provider would incur, on a forward-looking basis. Such costs shall correspond to the replacement costs of modern equivalent assets. In order to determine such costs, the long-term additional costs of the network components used, as well as the long-term additional costs caused by the access services (the LRICs), shall be taken into account. The dominant provider may then add, on top, a premium calculated as a proportional share of the relevant joint and common costs (the constant mark-up) as well as a return, at a rate customary in the market, on the capital used for investments.<sup>39</sup> The OTS also foresees a certain price floor.<sup>40</sup>

If telecommunications services providers do not agree within three months on the access conditions, ComCom shall determine the conditions at the request of one party and based on the proposal made by OFCOM. ComCom shall, in particular, take into account those conditions that would promote effective competition, as well as the effects of its decision on competition in the market.<sup>41</sup>

With few exceptions, prices are not regulated in Switzerland. (Mobile) telecommunications operators are generally free to determine their prices, including wholesale (such as mobile termination rates (MTRs)) and retail prices. Particularly, MTR and international roaming prices have given rise to discussions and calls for regulatory intervention. However, to date, the regulatory authorities have not intervened in respect of MTR, as the view prevails that the reductions of MTR over time as determined by operators

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35 Article 11 of the TCA.

36 Article 61 of the OTS.

37 Article 52 of the OTS.

38 Articles 54 to 54c of the OTS.

39 Article 54 of the OTS.

40 Ibid.

41 Article 11a of the TCA.

have so far resulted in lower retail prices, thus meaning that regulatory intervention has not been necessary. However, the TCA would allow ComCom, based on a request from an operator, to regulate MTR (or other types of interconnection or access) on a cost basis if another operator is held to be dominant in the relevant market. Since the Swiss Competition Commission (WEKO) has already found that the nationwide mobile networks of each operator are to be seen as a distinct product market where every operator has a market share of 100 per cent, it cannot be excluded that, in future, the authorities will hold the mobile operators to be dominant and oblige them to interconnect, in particular, to offer MTR at regulated cost-based prices. As regards international roaming, some developments are underway that are discussed in Section VI, *infra*.

#### iv Security

Chapter 7 of the TCA is about telecommunications security and data protection. The basic rule is that no one who provides (or has provided) a telecommunications service may disclose to a third party information relating to its subscribers' communications or enable a third party to do so.<sup>42</sup> This basic rule is complemented by a number of further provisions regulating the secrecy obligations in more detail, such as rules on unfair mass advertising, use of location data, outsourcing of data processing, caller line identification, the use of traffic data, and protection against unauthorised interception and interference.<sup>43</sup> In addition, the provisions under the Data Protection Act that aim to protect personal data of individuals and legal entities apply.

The protection of minors is dealt with in the OTS. The pertaining rules provide that telecommunications service providers shall prevent access by persons under 16 years (provided their age is known to the provider) to value-added services, as well as SMS and MMS services with erotic or pornographic content. To determine whether access shall be prevented, providers of mobile telecommunications services shall, upon conclusion of a new telecommunications services contract or the sale of telecommunications equipment, record the age of the principal user if he or she is less than 16 years of age; and request, in the case of doubt, the production of a valid passport or other identity card allowing the age of the user to be assessed.<sup>44</sup>

Surveillance of telecommunications traffic is subject to the BÜPF and the VÜPF. The BÜPF may apply in cases of criminal investigations, in the context of the Federal Act on International Judicial Assistance in Criminal Matters as well as in the context of a search for a missing person. It applies to all telecommunications service providers (holding a licence or being obliged to notify their services) as well as internet providers. It entitles the competent authority to order a wide range of measures that may facilitate the relevant investigation or search.<sup>45</sup> The revised BÜPF, which will come into force on 1 January 2017, introduces the following main changes:

- a Extention of scope of BÜPF: the revised law will apply to a much higher number of service providers (TSPs). In particular, providers of derived communication services that permit one-way or multiple-way communication (e.g., email services, chatrooms,

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42 Article 43 of the TCA.

43 Articles 45a to 45c and 46 of the TCA.

44 Article 41 of the OTS.

45 See, in particular, Articles 13 to 15 of the BÜPF.

- providers of platforms, etc.) shall be subject to the revised statute and also individuals and companies that open their access to telecommunication networks to third parties, for example by means of WLAN-access.
- b* Establishment of centralised data processing system: instead of today's system of physical transmission on a data storage device from the Surveillance Office to the prosecution authority.
  - c* Duty to disclose information about telecommunication service: broader and specific information about telecommunication services customers must be collected and stored until six months after termination of business relationship.
  - d* Surveillance duties for TSPs: stricter surveillance duties have been introduced. Upon request by the Surveillance Office TSPs must disclose the content of specific telecommunication and so-called telecommunication marginal data. Also here a retention period of six months applies.
  - e* Surveillance duties for other companies and individuals: non-TSPs have to comply with limited duties, but must tolerate surveillance measures and, upon request, permit access to their data processing systems.
  - f* Non-compliance and sanctions: a fine of up to 100,000 Swiss francs has been introduced for non-compliance with various provisions of the revised BÜPF.

Swiss law provides specific rules for services in extraordinary circumstances and restrictions on telecommunications traffic in such circumstances. In particular, telecommunications services providers may be ordered to provide, in such circumstances, specific services to cover the telecommunications needs of the armed forces, civil defence, police, rescue services and civilian authorities, including services under the universal service, high-speed data transmission, leased lines and pager services.<sup>46</sup> Further, the Federal Council or the UVEK, respectively, may order the surveillance, restriction or interruption of telecommunications services if an extraordinary situation or vital national interests so require.<sup>47</sup>

No specific law is in force for the combating of and protection against cyberattacks. Under current legislation, rather, various provisions can be found in the different laws that can be seen as (also) addressing, at least indirectly, the cybercrime issue. The TCA, for instance, requires that telecommunications services must be of high quality, competitive in the international context and reliable. In addition, the Data Protection Act requires that personal data (of both individuals and legal entities) be protected by appropriate measures. It is up to providers to ensure compliance with these legal requirements, thus providing a certain level of protection against unauthorised access to and use of telecommunications data. The Swiss Federal Council, however, acknowledges that cyberattacks are a serious threat to the entire Swiss society and that the current legislation is insufficient to cope with the relevant risks. Therefore, in June 2012 it launched a national strategy for the protection of Switzerland against cyber risks (NCS),<sup>48</sup> proposing a set of measures aimed at implementing and harmonising measures against cyber risks covering areas such as research and development, ongoing analysis of the relevant threats and risks, education, internet governance and

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46 Article 47 of the TCA and Article 90 of the OTS.

47 Article 48 of the TCA and Article 94 et seq. of the OTS.

48 National Strategy to protect Switzerland against Cyber Risks: [www.news.admin.ch/NSBSubscriber/message/attachments/27333.pdf](http://www.news.admin.ch/NSBSubscriber/message/attachments/27333.pdf), last accessed on 18 September 2016.

international cooperation, crisis management and revision of the statutory framework. In respect of the latter, the strategy paper does not propose the enacting of a uniform law against cyber risks, but rather the adaptation of the existing laws with a specific view on cybercrimes. On 15 May 2013, the Federal Council approved the implementation plan prepared by the NCS coordination unit.<sup>49</sup> The initial goal was to issue a first draft of proposed legislative measures by the end of 2014. This goal, however, could not be met.

## IV SPECTRUM POLICY

### i Overview

The Swiss frequency spectrum is managed by OFCOM, which takes appropriate measures to ensure that the spectrum is used efficiently and without interference. OFCOM shall further ensure equitable access on the basis of the national frequency allocation plan, which is subject to approval by the Federal Council.<sup>50</sup>

As of 1 January 2016, OFCOM published its updated frequency spectrum strategy, which is part of the national frequency allocation plan.<sup>51</sup> The goal of the paper is to discuss how the frequency spectrum might be used by radio services in the near and distant future, and analyses aspects such as:

- a* the availability of the frequency band for commercial and non-commercial applications;
- b* allocation of the frequency band to one specific mobile service or to multiple services;
- c* the requirement to obtain a licence for the utilisation of the frequency band;
- d* harmonisation of the frequency band; and
- e* the availability of frequency ranges for civil or military usage.

The Swiss frequency spectrum strategy identifies a number of strategic moves. The overall strategic step in respect of frequency management is a move away from the 'command and control' principle towards market-controlled instruments, with the aim of meeting the expectations of market players that future use of frequency will provide the greatest possible flexibility. In respect of public mobile telecommunications, Switzerland shall harmonise the frequency bands as per pan-European standards in order to keep pace with technical developments such as the introduction of LTE-advanced versions (allowing for, e.g., data transfer rates per sector up to 1GBit/s in the downlink and 500MBit/s in the uplink), as well as the strategic performance targets for the long-term development of UMTS through to the fourth generation (International Mobile Telecommunications-Advanced) as developed by the standardisation organisation 3GPP. Another strategic measure encompasses the harmonisation of civil and military applications with the long-term goal of ensuring joint

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49 Implementation Plan regarding the national strategy to protect Switzerland against Cyber Risks: [www.isb.admin.ch/isb/en/home/themen/cyber\\_risiken\\_ncs/umsetzungsplan.html](http://www.isb.admin.ch/isb/en/home/themen/cyber_risiken_ncs/umsetzungsplan.html), last accessed on 18 September 2016

50 Article 25 of the TCA.

51 Swiss Radio Spectrum Strategy, accessible at [www.bakom.admin.ch/dam/bakom/de/dokumente/fp/frequenzen/nationaler\\_frequenzzuweisungsplan2016.pdf.download.pdf/nationaler\\_frequenzzuweisungsplan2016.pdf](http://www.bakom.admin.ch/dam/bakom/de/dokumente/fp/frequenzen/nationaler_frequenzzuweisungsplan2016.pdf.download.pdf/nationaler_frequenzzuweisungsplan2016.pdf), last accessed on 18 September 2016.

use of the frequency ranges by civil and military users. In respect of satellite services, the Swiss frequency spectrum strategy paper recognises that in the medium and long term, no additional bands for commercial satellite services will be needed.

**ii Spectrum auctions and fees**

As a rule, the use of radio telecommunications licences is subject to a fee imposed by the licensing authority. The fee shall be calculated on the basis of:

- a* the frequency range allocated, the class of frequency and the value of the frequencies;
- b* the bandwidth allocated;
- c* the territorial scope; and
- d* the temporal scope.

If the licence is granted by way of an auction, the licence fee shall correspond to the amount of the bid, less administrative charges for the invitation to tender and the granting of the licence. The licensing authority may determine a minimum bid. In addition, the licence holder is subject to administrative charges that shall cover the costs of the competent authority for its decisions and services, for example, in connection with:

- a* the registration and surveillance of providers;
- b* decisions concerning access, interoperability or the joint use of installations;
- c* the granting, surveillance, amendment and cancellation of universal service licences and radio telecommunications licences; and
- d* the management, assignment and revocation of addressing resources.<sup>52</sup>

The most recent auction for mobile radio frequencies took place between 6 February 2012 and 22 February 2012. The three mobile operators, Swisscom, Orange (rebranded to Salt) and Sunrise, took part. The proceeds of the auction amounted to 996 million Swiss francs. The auction, which was conducted by OFCOM on behalf of ComCom, targeted the then-free mobile radio frequencies, those that became available by 2014 and those that will become available by 2017, including those of the digital dividend (former broadcasting frequencies). The newly acquired frequencies shall enable operators to meet the rapidly growing demand for mobile broadband services and to expand their networks using the latest mobile radio technologies, such as LTE. The auction lasted 13 days and was conducted using an electronic auction system allowing for secure bidding over the internet.<sup>53</sup>

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52 Articles 39 and 40 of the TCA.

53 See the ComCom press release dated 23 February 2012: [www.comcom.admin.ch/aktuell/00429/00636/00712/index.html?lang=en&msg-id=43520](http://www.comcom.admin.ch/aktuell/00429/00636/00712/index.html?lang=en&msg-id=43520), last accessed on 18 September 2016.

## V MEDIA

### i Restrictions on the provision of service

Transmission of information by means of telecommunications techniques, including the transmission of radio and television programme services, is regulated under the TCA.<sup>54</sup> Content, on the other hand, is subject to regulation by the RTVA. Supervision under the RTVA is split between OFCOM and the Independent Complaints Authority (ICA).

While OFCOM ensures that the RTVA (including its implementing ordinances), and the relevant licence terms and international treaties are complied with, the ICA shall deal with complaints about the content of programmes.<sup>55</sup> The RTVA, however, provides that the ICA may not undertake any supervisory measures regarding production and preparation of programme services, thus not allowing any kind of censorship. Likewise, the ICA is not permitted to order provisional measures (such measures potentially being available through requests for protective measures before the state courts). Further, the ICA does not act *ex officio*, and becomes active only upon complaints having been lodged against radio and television programmes.<sup>56</sup>

### ii Digital switchover

Legislation in Switzerland favours switchover from analogue to digital content. The must-carry obligations for specific programmes were abolished as per the end of 2014, and in respect of one specific programme as per 21 March 2015.<sup>57</sup> Further, the RTVA does not oblige cable network operators and other telecommunication services providers to offer, in parallel, digital and analogue techniques. Telecommunications providers with mere digital offerings (such as Swisscom TV) are not obliged to also make an analogue offering. To further the provision of digital content, cable network operators are also permitted to focus exclusively on digital programmes, provided, however, the cable network operators make a basic digital offering that is comparable with the analogue offering and does not cause extra cost for subscribers.<sup>58</sup>

According to a presentation made by representatives of the national Swiss broadcaster SRG SSR and representatives of private radio stations, the industry plans to phase out FM radio broadcasting by 2024. By 2024, all radio programme services in Switzerland shall be broadcast only digitally, and mainly on DAB+ platforms.<sup>59</sup>

The shift to digital transmission in Switzerland is thus ongoing, and a continual increase in the quality and variety of providers' offerings is expected.

54 Article 2 of the TCA.

55 Article 86, paragraph 1 of the RTVA.

56 Article 86, paragraphs 2, 4 and 5 of the RTVA.

57 Article 8a of the Ordinance of UVEK on Radio and Television in conjunction with Article 54, paragraph 1-bis of the RTVO.

58 See also the OFCOM press release on must-carry obligations dated 13 May 2013: [www.bakom.admin.ch/bakom/en/homepage/electronic-media/technology/broadcasting-by-wire/the-must-carry-obligation.html](http://www.bakom.admin.ch/bakom/en/homepage/electronic-media/technology/broadcasting-by-wire/the-must-carry-obligation.html), last accessed on 18 September 2016.

59 OCFOM press release, dated 1 December 2014: [www.bakom.admin.ch/bakom/en/homepage/electronic-media/technology/digital-transmission/digital-radio-plans-phase-out-of-fm.html](http://www.bakom.admin.ch/bakom/en/homepage/electronic-media/technology/digital-transmission/digital-radio-plans-phase-out-of-fm.html), last accessed on 18 September 2016.

**iii Internet-delivered video content**

Use of digital techniques enables providers to deliver and further develop customised services such as VOD and time-shifting and replay services that, due to the availability of broadband internet at affordable prices in nearly all of Switzerland, are accessible by the vast majority of the Swiss users. While in times of traditional analogue broadcast of radio and television programmes consumers were dependent on fixed schedules and the content provided by providers, the new techniques allow a shift towards individualised consumption of radio and television content.

**iv Mobile services**

The growing demand for mobile media services has resulted, in particular, in the acquisition of additional bandwidth by the three mobile network operators in the auction procedure of February 2012 (see Section IV.ii, *supra*) as well as in the Swiss Radio Spectrum Strategy (see Section IV.i, *supra*). The rollout of more sophisticated networks using new generation protocols such as LTE enables providers to provide mobile services carrying broadband content.

**VI THE YEAR IN REVIEW**

**i Market developments**

Swisscom, SRG SSR and private media undertaking Ringier announced a joint venture for the joint marketing of advertising content. The planned concentration was notified with WEKO for merger control purposes. On 10 September 2015, WEKO announced that it would open a second phase investigation in accordance with the CartA as it established, after a first assessment, indications that the planned concentration could create or strengthen the dominant market position of the parties concerned. On 16 December 2015, WEKO issued its decision according to which it approved the concentration. It argued that while the collaboration between these three important market players would create a strong new undertaking, it would still not eliminate effective competition so that according to applicable law the concentration has to be approved. On the same day, OFCOM, however, issued an interim order in accordance with the RTVA preventing SRG SSR from entering the market and exploiting new advertising activities such as targeted advertising under the joint venture. On 28 February 2016 DETEC then gave green light for the joint venture to move on also from a media law perspective. However, in its decision of the same date, OFCOM maintained its position that the current SRG SSR license would not allow SRG SSR to broadcast targeted advertising in its programmes and that the law would first have to be changed before SRG SSR could be permitted to engage in such kind of advertising.

The joint venture and its approval by the regulatory authorities caused wide coverage in the media and led to strong criticism from market players as well as economic and legal experts. The joint venture raised, in particular, concerns as to the participation of undertakings owned by, and under the control of, the Swiss Confederation in liberalised markets. While SRG SSR is generating its income from mandatory reception fees that every Swiss household has to pay, Swisscom can essentially benefit from a parent guarantee from the state, given that its majority stock is held by the Swiss Confederation. Moreover, in a set-up where state-owned undertakings participate in the markets, the state itself is operating in various functions – as owner, regulatory or supervising body and customer, thus triggering complex

governance structures and issues. Despite such concerns, the joint venture was approved by the competition and supervisory authorities. It will now be OFCOM's task to closely monitor future developments and market effects of the joint venture. Should it detect serious negative effects of the joint venture on the SRG SSR services or on those of other media undertakings it would have the competence of intervention in accordance with the applicable rules of the RTVG.

In the field of domain name administration it is worth noting that the SWITCH foundation continues to be the registrar for the '.ch' domain for the next five years. It won the public tender process launched by OFCOM in April 2016.

## ii Legislation

On 19 November 2014, the Swiss Federal Council issued a report on recent developments in the Swiss telecommunications market and on challenges for the Swiss legislator resulting from such developments. The Federal Council proposes a number of revisions to the TCA. UVEK was to prepare a draft amendment to the TCA by the end of 2015. The draft was published as part of a public consultation process where the cantons, the political parties and further interested undertakings were invited to submit their comments. A total of 153 commentaries were submitted, which are being reviewed by UVEK and the Federal Council. At present, it is not possible to predict if and when the new law will become effective.

The Federal Council's proposed amendments to the TCA regard the following topics:

- a* definition of the term 'telecommunications services provider' and the notification duties of the providers;
- b* improvement of the net infrastructure;
- c* safeguarding of services diversity;
- d* international roaming;
- e* protection of consumers and young people; and
- f* security of telecommunications equipment and installations.

Under the report, the term 'telecommunications services provider' is proposed to be defined more widely so as to also cover those providers who use the internet for new business proposals and business models that would otherwise not be subject to regulation. On the other hand, the current duty of telecommunications services providers to notify themselves to the regulator would be abolished, as the supervision of providers by the regulator would be strengthened.

In respect of the net infrastructure, it is proposed that ComCom shall have the competence to intervene *ex officio* if it becomes aware of an apparent violation of the access regime. This change of the law, if enacted, would be a significant restriction of the current primacy of party negotiation and party agreement, pursuant to which ComCom shall intervene only if so requested by a party. According to the Federal Council, this change will, in particular, allow for intervention in the context of interconnection rates for 058 numbers and for MTR. The report also promotes the improvement of access conditions to the broadband infrastructure and proposes implementation of rules for access to cable ducts and passive physical infrastructure. The Federal Council outlines that this goal should not be achieved by introducing price limits (although it seems not to fully exclude such option), but rather by providing the regulator with a 'toolbox' that allows it to properly intervene in this field (without determining price limits). In respect of mobile networks, the Federal Council intends to achieve a more flexible usage of the spectrum that is available to operators, as

well as improvements in respect of the joint use of the infrastructure by the operators. The revised law shall, pursuant to the report, also provide basic rules and principles regarding the administration and use of the internet domain names, in particular of the top-level domain ‘.ch’. Finally, the Federal Council proposes that the supervision of providers in respect of the availability of their networks and their services should be strengthened, and that the Federal Council shall have the power to request operators to implement measures that increase the resilience of their network infrastructure.

Regarding services diversity, the report proposes rules protecting fair competition at both the wholesale and consumer levels. In particular, the report promotes the right of consumers to obtain de-bundled services and to delete their own personal data in the case of a change of social media platform. In respect of net neutrality, the report follows a conservative approach for the time being, proposing that operators shall have the duty to notify their customers if certain types of content are treated differently, thus increasing transparency in this area. Further measures are reserved for the future should this become necessary. Finally, the liability of operators (which is currently dealt with by a separate legislative initiative) shall be strengthened, and the relevant rules shall be put in force if the decision-making process is sufficiently advanced. Such rules would include the duty of an operator to block unlawful content if so requested by the authorities.

In respect of international roaming, the report concludes that international roaming prices of Swiss operators are still higher than they are in the rest of Europe. For the time being, however, the Federal Council does not recommend that price limits be determined by the authorities. It rather proposes that billing shall be based on seconds, thus resulting in lower charges. In addition, local ‘break-outs’, where mobile customers can choose an alternative provider when roaming abroad, may be regulated if this topic becomes relevant for customers and if operators will not implement appropriate measures on their own initiative. The report provides that if these measures do not result in a dynamic change in the roaming tariffs, further measures will be considered and possibly implemented in the future.

The report further proposed that the new law should contain rules that allow increased protection against unfair practices in telemarketing and to restrict, for example, spoofing. In respect of protection of young people, the new law shall provide for a duty of providers to advise customers on protective measures.

The report also proposes new statutory provisions on technical measures for equipment and installations to ensure conformity with the relevant EU directives. Further, the monitoring and intervention rights of the authorities shall be strengthened to allow for more efficient measures against unlawful practices, such as the use of jammers, and for the prevention of their use for illegal purposes.

Finally, according to the report, the Swiss Confederation shall remain the majority shareholder in Swisscom. The Federal Council thus continues to allow the conflict arising from the fact that, on the one hand, it is the majority shareholder of the largest provider in the Swiss telecommunications market and, on the other, that it is the legislator, regulator and supervising authority of such market.

Further the revised Swiss Federal Act on the Surveillance of Mail and Telecom Traffic (BÜPF) was adopted on 18 March 2016. A referendum has not been launched, thus the provisions of the revised BÜPF will come into force on 1 January 2017.

## VII CONCLUSIONS AND OUTLOOK

The Swiss telecommunications market may be deemed liberal. The law does not provide for high entry barriers for service providers, except in the mobile telecommunications sector where, due to the scarcity of frequency spectrum, a licence is needed to use frequencies and operate mobile networks. Notwithstanding liberalisation, the incumbent, Swisscom, has been successful in maintaining a uniquely strong position, and in particular in the mobile sector where it still owns a market share of around 60 per cent. This uniquely strong market position may be maintained at least in the mid term, as the legislator has no plans to implement legislative measures that may strengthen competitive pressure on Swisscom.

The proposed joint venture between SRG SSR, Swisscom and Ringier was by far the most important transaction in the Swiss telecommunications market during 2015 and 2016. This joint venture was scrutinised by WEKO and the media regulatory authorities, both from a competition and media law perspective. The joint venture, albeit quite heavily criticised by market players as well as economic and legal experts, was approved and the green light was given at the end of February 2016.

MTR and international roaming pricing systems remain two heavily debated issues. The current law does not allow *ex officio* or *ex ante* intervention by the regulator. The revision of the TCA, which the Federal Council initiated by issuing its report on the telecommunications market at the end 2014, does not foresee any material change to the current MTR and national roaming pricing systems. The legislator continues to prefer refraining from further intervention in this field, and to allow the market to determine prices and relevant conditions. It will be interesting to see whether the expectations of the legislator will be met in this regard, and whether prices will reach levels seen in other Member States without any specific legislative moves.

## Appendix 1

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Clara-Ann Gordon is specialised in the areas of TMT/outsourcing, data privacy, internal investigations/e-discovery and compliance. She regularly advises clients in the above areas on contractual, governance/compliance and other legal matters, represents clients in transactions and before the competent regulatory and investigating authorities as well as before state courts, arbitral tribunals and in mediation proceedings, renders opinions on critical regulatory and contract law topics in the said industry-specific areas.

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