

Telecoms & Media 2021

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Telecoms & Media 2021

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Lexology Getting The Deal Through is delighted to publish the 22nd edition of *Telecoms & Media*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Alexander Brown and David Trapp of Simmons & Simmons LLP, for their continued assistance with this volume.



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COMMUNICATIONS POLICY

Regulatory and institutional structure

- 1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The telecommunications sector in Switzerland is regulated at the federal level, the main sources of law being:

- the Federal Act on Telecommunications (TCA) of 30 April 1997, with a first partial revision introduced in 2007, as last amended on 1 January 2021; and
- the Federal Ordinance on Telecommunications Services (OTS) of 9 March 2007, as last amended on 1 January 2021.

The TCA regulates the transmission of information through telecommunications techniques, including the transmission of radio and television programme services. Its main purpose is to ensure that a range of cost-effective, high-quality telecommunications services are available in Switzerland that are competitive both on a national and international level. The OTS contains detailed rules that implement the provisions of the TCA.

Within this regulatory framework, the Federal Communications Commission (ComCom) acts as the independent licensing and market regulatory authority for the communications sector. Its main activities and competencies relate, in particular, to the granting of licences for the use of radio communication frequencies as well as the regulation of the terms of application of number portability and free choice of supplier. ComCom instructs the Federal Office of Communications (OFCOM) concerning the preparation of its business and the implementation of its decisions. Moreover, it has delegated some of its tasks to OFCOM.

Certain foreign ownership restrictions may apply. In the absence of any international commitments to the contrary, ComCom or OFCOM, as the case may be, may prohibit undertakings incorporated under foreign law from using radio frequencies or addressing resources (as defined in the TCA) in Switzerland unless reciprocal rights are granted. Under the same conditions, they can be refused to be granted a licence or can be prohibited from transferring a licence.

Authorisation/licensing regime

- 2 | Describe the authorisation or licensing regime.

Under the revised TCA that came into force on 1 January 2021, the general notification obligation for telecommunications service providers concerning their telecommunications services has been eliminated. Therefore, to the benefit of telecommunication service providers such as over-the-top services including Voice over Internet Protocol or Internet Protocol television services, the frequency spectrum may be used freely under the TCA within the limits of the applicable regulations. Further, the revised TCA provides for a legal basis for frequency sharing and trading.

As an exception, registration is still required where the use of certain addressing elements and radio frequencies require a licence.

Under the applicable regulatory framework, licences are still mandatory for the use of mobile radio frequencies for the provision of telecommunication services and the provision of universal services. Frequency licences are issued either by criteria competition or, more commonly, by frequency auction. Importantly, in the absence of detailed principles for the granting of mobile radio frequency licences, the authorities have considerable discretion in setting the allocation or auction rules respectively. However, the authorities have to exercise their discretion dutifully – that is, in line with the constitutional principles and the legal purpose of the TCA. Importantly, the general rules on public procurement do not apply. Licences are granted only if, having regard to the national frequency allocation plan, enough frequencies are available.

Special rules apply if the broadcaster of a radio programme service is granted a licence under the Federal Act on Radio and Television (RTVA) of 24 March 2006, as last amended on 1 January 2021.

Such licences can be acquired only by a person that has the necessary technical capacities and, if required, the relevant proficiency certificate. Also, such a person has to commit itself to comply with the applicable legislation, in particular, the TCA, the RTVA, their implementing provisions and the licence conditions. Depending on the kind of licence required, eligibility, documentary and procedural requirements vary. Certain foreign ownership restrictions may apply.

Applications and notifications can be submitted online via OFCOM's website.

According to the TCA, licences for radio communication and universal services are of limited duration. In 2012, licences for frequency spectrum were allocated in a public-tender procedure. In early 2019, additional frequencies, particularly for the introduction of the next-generation network 5G, were auctioned. All licences are issued in a technology neutral manner. The licences allocated in 2012 will expire at the end of 2028 and the licences allocated in 2019 will expire at the end of 2028 or 2033, respectively. The universal service licence for Swisscom was renewed for 2018 to 2022 (ie, five years).

Concerning fees, the licensing authority charges administration and licence fees for radio communication licences. No licence fee is charged on radio licences for the distribution of licenced radio and television programmes under the RTVA. Additionally, the Federal Council may exempt certain governmental and non-governmental organisations from paying the licence fee provided they do not perform telecommunications services and make rational use of the frequency spectrum.

The Federal Ordinance on Telecommunications Fees issued by the Federal Council lays down the radio licence and administrative charges in the field of telecommunications law.

The timeframes for obtaining a licence or authorisation depend on the telecommunications services to be provided. If a mere registration applies without the granting of a licence, such notification can be effected via the internet within a very short period (ie, within hours).

Flexibility in spectrum use

3 | Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

Radio communication licences do specify the permitted use (eg, radio, television, amateur radio) and different rules on the trading and returning of allocated radio frequency spectrum apply. Under the TCA, frequency sharing and trading is legal subject to the following requirements. Licences can be transferred, in whole or in part. However, such transfers require the prior consent of the licensing authority. The authority may only refuse such consent if either the licence requirements are not complied with or the efficient use of frequencies free from interference is not guaranteed. Further, the licensing authority may permit exceptions from the requirement of consent for individual frequency bands if it is anticipated that the efficient use of frequencies free from interference will be guaranteed and if effective competition is neither eliminated nor seriously restricted. Advance notice must be given to the licensing authority of transfers that do not require consent.

If the licence has been granted by ComCom, the transfer rules as described previously also apply by analogy to the economic transfer of a licence, which occurs in the case of 'acquisition of control', as defined in the Federal Cartel Act.

Where holders of licences granted by the ComCom make joint use of components of radio communications networks, they must give advance notice of this to ComCom and the joint use of frequencies requires its prior consent.

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

Ex-ante regulatory obligations

4 | Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

In principle, the telecommunications regulation in Switzerland is based on ex-post regulation.

Structural or functional separation

5 | 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?

No legal basis for a structural separation between an operator's network and service activities exists, and the introduction of such a legal basis is currently not contemplated.

Universal service obligations and financing

6 | Outline any universal service obligations. How is provision of these services financed?

ComCom awards one or more universal service licence to telecommunications service providers wishing to provide a universal service for the whole population in all parts of Switzerland. In principle, there is no obligation to provide a universal service. However, if no provider applies for a universal service licence, ComCom may appoint one or more provider as a universal service provider. The licence may only be transferred to a third party, whole or in part, with ComCom's approval.

Universal service licences are put out to tender and awarded based on a criteria competition. The Swiss laws on public procurement do not apply. Any person wishing to obtain a universal service licence must:

- have the necessary technical capacities;
- furnish convincing proof that the universal service can be offered, particularly concerning finance and the operation of the service for the entire duration of the licence;
- state what financial compensation will be required for doing so;
- undertake to comply with the applicable legislation, in particular, the TCA and its implementing provisions and the licence conditions; and
- undertake to comply with the applicable labour laws and to guarantee customary working conditions.

For universal service licences, the Federal Council decides on quality criteria, periodically reviews the universal service catalogue, and fixes upper limits for the prices of the services of the universal service that apply uniformly for the entire licence area. The universal service criteria are determined based on market developments – that is, on new needs and technological progress.

From 1 January 2020, universal service includes:

- public telephone services;
- access to the internet with a minimum data transmission rate of 10/1Mbps;
- services for the hearing impaired; and
- directory and operator services for the visually impaired and people with limited mobility.

To date, new technologies such as fibre optic or mobile phone services are not included in the universal service.

On 19 May 2017, ComCom decided that the universal service concerning telecommunications will continue to be provided by Swisscom, and awarded the licence to Swisscom for the period 2018 to 2022 (ie, five years).

If it is shown before the licence is granted that it will not be possible to cover the costs of the provision of the universal service in a given area even with efficient management, the licensee is entitled to financial compensation. The compensation would be financed by levying a fee on all telecommunications service providers. To date, no such compensation has been awarded.

Number allocation and portability

7 | Describe the number allocation scheme and number portability regime in your jurisdiction.

The Federal Council shall issue regulations on the management of addressing resources, and, in particular, on:

- their allocation, use, blocking, transfer and withdrawal;
- the issuing of numbering plans;
- the delegation of management to third parties, the termination of the delegated activity and the supervision of the same;
- sub-allocation; and
- number portability.

OFCOM shall manage the addressing resources that must be managed at the national level. In special cases, OFCOM may delegate the management of certain addressing resources to third parties, in principle by tender.

The numbering scheme under the national numbering plan allows number portability between telecommunications service providers offering the same category of telecommunications services. Within such categories, telecommunications service providers shall ensure number portability.

Telecommunications service providers that are required to ensure number portability must bear their own costs. However, a telecommunications service provider that passes a number to another can demand

that the latter contributes to the administrative costs. The costs of transmitting a passed-on number to its destination are to be defined in interconnection agreements between the telecommunications service providers. If there is no agreement, the procedural rules of interconnection apply by analogy. The new telecommunications service providers can pass part of the costs of number portability to the subscriber. To grant fast number portability, donor service providers are required to confirm number porting applications to the recipient service providers within one working day.

The TCA regulates the management of internet domains separately. In principle, as for addressing resources in general, OFCOM shall manage internet domains if the Swiss Confederation is responsible for their management.

Customer terms and conditions

8 | Are customer terms and conditions in the communications sector subject to specific rules?

The market for end-customer prices is, in general, not subject to ex ante price regulation. However, there exist few exemptions to this rule. According to the TCA, the Federal Council shall periodically fix upper limits for the prices of the services of the universal service. In the area of international roaming, the Federal Council can issue regulations to avoid disproportionately high end-user tariffs and take measures to promote competition, inter alia, by the setting of price ceilings. The same applies to value-added services to prevent abuses.

Accordingly, agreements with end users are not subject to specific telecommunications regulation. However, agreements and the conclusion of such agreements must adhere to mandatory Swiss law. The starting point for any query concerning the conclusion and dissolution of a contract, as well as faults of performances, is the Swiss Code of Obligations (CO). Particularly relevant in a consumer protection context are also:

- article 8 of the Federal Act Against Unfair Competition (UCA) of 19 December 1986, as last amended on 1 January 2021, which prohibits the use of abusive general terms and conditions; and
- articles 40a et seq of the CO and the Federal Consumer Credit Act, which govern the consumer's right to withdraw from a contract within 14 days under certain conditions.

Also, how prices for telecommunications services and, in particular, value-added services are announced in writing and advertising for such services are set out in the Ordinance on the Disclosure of Prices and specific provisions concerning customer data retention and security apply.

Net neutrality

9 | Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

Within the framework of the recent TCA revision, an open internet was a central concern. Since 1 January 2021, network neutrality is regulated by law, with some exceptions.

Providers of internet access must transmit information without making any technical or economic distinction between senders, receivers, content, services, service classes, protocols, applications, programmes or terminals. They may transfer information differently only if this is necessary to:

- comply with a legal requirement or a court ruling;
- ensure the integrity or security of the network or the services provided over it or of the terminals connected;

- comply with an express customer request; or
- to combat temporary and exceptional network congestion; in doing so, equivalent forms of data traffic shall be treated equally.

Further, in the case of special services, it is possible to design offers flexibly to meet the quality requirements of customers and as long as this does not degrade the quality of the internet connection. These are services offered in addition to the internet connection that is transmitted via the same network, for example, internet-based telephony (eg, VoIP) or television services (eg, IPTV).

An essential element of the fundamental net neutrality obligation is also that the corresponding providers must inform their customers and the public if they treat information differently during transmission, either technically or economically.

Platform regulation

10 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

No specific legislation or regulation exists. Even though the Federal Council has, in principle, identified the need for clarification concerning platform regulation in the recent TCA revision, this issue is not specifically addressed in the revised TCA.

Next-Generation-Access (NGA) networks

11 | Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

Swiss legislation on telecommunications is, as a rule, technology-neutral and does not contain any specific definitions referring to next-generation access networks. Accordingly, these are, in principle, subject to the provisions of the TCA.

There is no federal scheme to promote broadband penetration. Aside from Swiss telecommunications providers, some local authorities actively support 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 and the responsible department in the canton of Grisons wants to advance the development of ultra-high broadband in its area. Further, because of the rather stagnant expansion of fibre-to-the-home or high-bandwidth networks, respectively, in recent years and the considerable regional disparities of the current network coverage within and between cantons, the canton of Ticino submitted a legislative initiative at the federal level in April 2016. The initiative aims at guaranteeing dense high-speed broadband coverage throughout Switzerland and calls on the Swiss Confederation to intervene actively within the framework of its powers in those areas in which the high-speed broadband networks are not being implemented by the telecommunications service providers. In this context, direct financing or a redefinition of the universal service are being considered and proposed as instruments. The deadline for drafting a bill was extended by two years in February 2021, ie, until the summer session of 2023.

Further, the holder of the universal service licence, currently the incumbent operator Swisscom, is, inter alia, obliged to provide a broadband internet connection with at least a 10/1Mbps transmission speed to all households in Switzerland, in addition to the telephone connections.

Data protection

12 | Is there a specific data protection regime applicable to the communications sector?

According to article 43 of the TCA, telecommunications service providers are subject to a general confidentiality obligation. Thus, they are not allowed to disclose to a third party any information relating to a subscriber's communications or provide anyone else the opportunity to do so. However, the Federal Act on the Surveillance of Post and Telecommunications and its related ordinance set out the rules and procedure concerning the interception of communications and access to consumer communications data by the competent authorities.

Subscribers must be granted access to the data on which invoices are based, in particular, the addressing resources, the times when calls were made and when payments are due. Moreover, anyone requiring this data to trace nuisance calls or unfair mass advertising must be informed of the name and address of the subscribers whose lines were used for such calls.

Under the TCA, telecommunications service providers may process customer location data only for the provision of telecommunications services and for charging purposes. The processing of data for other services requires the prior consent of customers or anonymous processing.

Also, the Federal Act on Data Protection (FADP) of 19 June 1992, as last amended 1 March 2019, applies. The FADP aims to protect the privacy and the fundamental rights of (natural and legal) persons when their data is processed by private persons or federal bodies.

Anyone who processes personal data must not unlawfully breach the privacy of the data subjects in doing so. In particular, he or she must not process personal data in contradiction to the principles of the FADP, process data pertaining to a person against that person's express wish without justification or disclose sensitive personal data or personality profiles to third parties without justification.

The principles of the FADP are, among others, that personal data may only be processed lawfully, that its processing must be carried out in good faith and must be proportionate and that the purpose of its processing must be evident to the data subject. The Swiss parliament adopted a total revision of the FADP on 25 September 2020. The adaptation of the implementing provisions in the ordinances to the FADP is ongoing and the new law is not in force to date.

Cybersecurity

13 | Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

In 2012, the Federal Council approved the 'National strategy for the protection of Switzerland against cyber risks' (NCS), which specifies the various risks that originate from cyberspace, identifies weaknesses and describes how Switzerland is going to proceed in this matter. The NCS is reflected in the Federal Act on the Intelligence Service, allowing the Federal Police to monitor the internet proactively.

In 2018, the Federal Council adopted the new national strategy for the protection of Switzerland against cyber risks (second NCS) for the period 2018 to 2022, containing a total of 28 measures regarding cyber risks. To support the general public and businesses against cyber risks and improve the security of its own systems, on 30 January 2019, the Federal Council decided to set up a competence centre for cybersecurity, the National Cyber Security Centre. The core of the centre is made up of the Reporting and Analysis Centre for Information Assurance and is being designed to take on the following tasks:

- provision of a national contact point for questions on cyber risks and reporting cyber incidents;

- operation of the national Computer Emergency Response Team (GovCERT) as a technical expertise hub;
- operational incident management in the event of serious cyber incidents;
- office of the Federal Cyber Security Delegate;
- federal information and communications technology security unit;
- operation of a pool of experts to support the specialist offices in developing and implementing cybersecurity standards;
- cooperation with scientific and research bodies; and
- international specialist cooperation.

In December 2019, the Federal Council approved the report 'Options for critical infrastructure reporting duties in the case of serious security incidents', which describes the core issues concerning the introduction of reporting duties and describes possible models for their implementation. At the end of 2020, the Federal Council confirmed its intention to introduce a general obligation to report cyber-attacks. The Federal Department of Finance (FDF) must prepare a corresponding consultation draft by the end of 2021. This should regulate which of the critical infrastructures such as energy, food, health, security technology, telecommunications and water supply must report which incidents precisely and within what timeframe. Additionally, a central reporting office shall be created.

Under the TCA, which came into force on 1 January 2021, telecommunications providers are required to combat cyber-attacks, defined exclusively as manipulations through telecommunications transmissions, such as the distribution of malicious software or the impairment of web services (distributed denial-of-service attacks). Physical access and backdoors in hardware and software are not covered. To combat cyber-attacks or to protect the installations, telecommunications service providers are authorised to reroute or prevent connections and suppress information. If these precautions defeat their purpose, the Federal Council is also empowered to issue further regulations to protect the security of information and telecommunications infrastructures and services, in particular, concerning the availability and operation of installations or ensuring redundant infrastructures and the reporting of faults.

Big data

14 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

The FADP and the TCA contain provisions regarding the issue of data protection. The respective provisions, in principle, also apply to big data. However, because most databases contain 'anonymised' and, therefore, theoretically not personally identifiable information as regulated in the FADP and the TCA, addressing legal issues with big data remains a legal area with many uncertainties.

The Swiss parliament adopted a total revision of the FADP on 25 September 2020. Changes in particular relate to the area of information, documentation and notification obligations, automated decisions and criminal penalties. The adaptation of the implementing provisions in the ordinances to the FADP is ongoing and the new law is not in force to date.

Data localisation

15 | Are there any laws or regulations that require data to be stored locally in the jurisdiction?

The FADP aims to protect the private sphere of (natural and legal) persons regarding data processing carried out in Switzerland. Concerning the transfer of data abroad, strict obligations apply. Certain data transmissions abroad must be announced to the Federal Data Protection and Information Commissioner. Further, sector-specific regulation may stipulate additional requirements or even prohibit the transfer of data abroad.

Key trends and expected changes

16 | Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

The spread of the internet has profoundly transformed the telecommunications landscape, including in Switzerland. It has undergone extremely rapid developments in recent years. Against this background, the Federal Council has recognised the need for a revision of the TCA and issued a dispatch in that regard on 6 September 2017. After several deliberations, the Swiss parliament approved the TCA that, largely, entered into force on 1 January 2021. The revised TCA has thus already incorporated the latest developments and trends in the Swiss communications regulation.

With the revision of the TCA, amendments to the UCA of 19 December 1986, as last amended on 1 January 2021, were implemented to strengthen consumer protection. In particular, stricter regulations apply to advertising calls. Targeting conduct such as spoofing (ie, a scam strategy that includes disguised communication), advertisers are now obliged to use and also display telephone numbers in advertising calls that are entered into the telephone directory and that they are entitled to use (article 3, paragraph 1, letter v of the UCA). Also, not only those who make such unfair advertising calls themselves but also those who make use of the information obtained from such calls are acting unfairly under the revised regulation and could be prosecuted (article 3 paragraph 1 letter w of the UCA). Moreover, from 1 July 2021, unfair advertising calls will also be covered by the obligation to combat spam (article 45a of the TCA). Another important point of the revision is contained in article 26a of the UCA and deals with the revocation or blocking of domain names and telephone numbers. Accordingly, responsible public prosecutor's offices and courts may revoke or block domain names and telephone numbers in the case of criminal offences under article 23 in conjunction with article 3 or article 24 of the UCA (violation of the obligation to disclose prices to consumers including the Ordinance on Price Indication (PIO) (in German only)) respectively, to prevent new violations of domain names or telephone numbers. They may do so regardless of the criminal liability of a particular person connected therewith. Accordingly, these amendments are far-reaching and could entail consequences under both civil and criminal law. Telecommunications service providers should therefore review their compliance measures and processes concerning the new rules where necessary.

Finally, against the background of the rapidly developing, technology driven markets of the data economy and ever-closer integration and conversion of communication channels, the need for further revisions of the existing regulation is likely to become apparent in the near future.

MEDIA

Regulatory and institutional structure

17 | Summarise the regulatory framework for the media sector in your jurisdiction.

In Switzerland, apart from the communications sector, regulation of the media sector is also dealt with at a federal level, the main sources of law being:

- the Federal Act on Radio and Television (RTVA) of 24 March 2006, as last amended on 1 January 2021; and
- the Federal Ordinance on Radio and Television (RTVO) of 9 March 2007, as last amended on 1 January 2021, and related decrees.

The RTVA regulates the broadcasting, processing, transmission and reception of radio and television programme services.

The broadcasting sector has three main authorities responsible for the granting of licences. The Federal Council is the licensing authority for the Swiss Broadcasting Company (SBC). Concerning other licences, the licensing competence has been delegated to the Federal Department of the Environment, Transport, Energy and Communications (DETEC). The Federal Office of Communications (OFCOM) puts the licences out for tender and consults interested groups.

OFCOM further fulfils all sovereign and regulatory tasks related to the telecommunications and broadcasting (radio and television) sectors. 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 Media Commission advises the Federal Council and the Federal Administration concerning media issues. It is operational since August 2013 and currently consists of 15 representatives from various areas of the Swiss media sector.

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

Ownership restrictions

18 | Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

Certain foreign ownership restrictions may apply. In the absence of any international commitments to the contrary, licences for broadcasting may be refused to natural persons without Swiss citizenship, to companies with foreign control or Swiss companies with foreign participation unless reciprocal rights to Swiss citizens or Swiss companies are granted.

Also, the licence granted to broadcasters of radio and television programme services may only be transferred with prior approval of the licensing authority. The latter examines whether the licence requirements are also met after the transfer. The economic transfer of the licence (ie, the transfer of more than 20 per cent of the share capital of the voting rights or, where applicable, the participating capital of the licensee) is also deemed to constitute such a transfer.

Concerning cross-ownership, the RTVA provides that – except for the SBC – a media corporation may not receive more than two radio and two television licences. Also, the participation of the SBC in other companies that are broadcasting radio or television programmes requires the approval of DETEC.

Licensing requirements

19 | 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 a share of fees nor guaranteed wireless terrestrial distribution can operate their service without a licence upon a mere prior notification to OFCOM. Also, broadcasters of programme services of minor editorial importance (eg, programme services that can only be received by fewer than 1,000 devices at the same time) do not fall under the scope of the RTVA and, hence, need neither a licence nor a registration.

The Federal Council is the licensing authority for the SBC that is subject to a special licence with an extensive mandate.

Concerning the other licences, the licensing competence has been delegated to DETEC. A broadcaster of a radio programme service that has obtained a licence under the RTVA is not required to apply separately for a licence under the Federal Act on Telecommunications (TCA) for use of the frequency spectrum. Such licence is deemed to be granted at the same time in parallel. Cable television operators are under a duty to broadcast in the respective coverage area television programme services of broadcasters that have been granted a licence. Licences are awarded by way of 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;
- guarantee that it complies with the applicable labour laws and customary working conditions, the applicable law and, in particular, the obligations and conditions associated with the licence;
- maintain a separation of editorial and economic activity; and
- have residence or registered offices in Switzerland.

Except for the SBC, the number of licences a broadcaster and its group companies may acquire is limited to a maximum of two television and two radio licences. In the case of several applicants for one licence, the one that is best able to fulfil the performance mandate shall be preferred. In the case of equivalent candidates, the one that best promotes diversity of opinion and offerings shall be preferred. In practice, DETEC often deems independent applicants that do not belong to a media group that already possesses other broadcasting licences to be better able to fulfil this criterion.

The annual fee for a broadcasting licence amounts to 0.5 per cent of the gross advertising revenue that exceeds 500,000 Swiss francs. Further, administrative charges will incur concerning the radio and television licence as well as to the telecommunications licence. These charges are calculated based on 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 communication licence.

Foreign programmes and local content requirements

20 | Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

Like all programmes, foreign-produced programmes must comply with the minimum requirements for programme service content. In particular, to respect the fundamental rights, they must respect human dignity and be neither discriminatory nor contribute to racial hatred, endanger public morals or glorify or trivialise violence.

Further, broadcasters of a national or regional-language programme service window in a foreign television programme service that broadcasts films may be obliged to spend at least 4 per cent of their gross revenue on the purchase, production or co-production of Swiss films or pay a corresponding support fee not exceeding 4 per cent if they meet certain requirements.

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

Local and regional providers of radio and television programme services must primarily consider the particular characteristics of their service area. They must contribute to the forming of opinion on topics of local and regional social life and the promotion of cultural life in the service area. Therefore, the respective licences contain specific

obligations regarding local and regional content. Traditional online as well as traditional mobile content providers are in principle not subject to this regime.

Advertising

21 | 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 (UCA) of 19 December 1986, as last amended on 1 January 2021, contains several general provisions on advertising. It provides, in particular, that any advertisement that is deceptive or in any other way infringes the principle of good faith and affects the relationship between competitors or between suppliers and customers is deemed unfair and unlawful. Also, the advertisement industry has installed soft law rules and established the Commission on Integrity in Commercial Communication. Such commission is a respected monitoring organisation that handles complaints from both consumers and competitors. It bases its decision on its own guidelines.

In addition to these general regulations, broadcast media advertising (form and content) is subject to the specific sector regulation as provided in the RTVA and RTVO.

Regarding the form of advertising, it must be clearly separated from the editorial programmes and clearly identifiable as such. In particular, both the beginning and end of an advertising slot must be indicated by a clear visual or acoustic marker. An advertisement that lasts longer than a minute must be clearly identified as such for reasons of transparency.

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

The broadcasters' regular editorial employees are prohibited from appearing in advertising programmes. Local and regional broadcasters with limited financial resources are exempt from this restriction.

Further, there are scheduling and airtime restrictions for radio and television advertising. Depending on the type of programme (eg, cinematographic film, documentaries, news programmes, programmes with religious content, series or children's programmes), different scheduling restrictions apply. Stricter restrictions apply to the SBC. As regards advertising transmission time, advertising, in general, may not account for more than 20 per cent (ie, 12 minutes) of one hour's transmission time, subject to exemptions for non-licensed radio programme services and non-licensed television programme services that cannot be received outside of Switzerland.

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

In terms of 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 beliefs, is misleading or unfair or encourages behaviour that is detrimental to health, the environment or personal safety. Less restrictive rules apply to private broadcasters, in particular, concerning commercial breaks and product placement.

There is no specific regulation for online advertising as traditional online content is, in principle, not covered by the RTVA. Therefore, subject to certain exceptions, online advertising is only subject to the general advertising rules of the UCA.

Must-carry obligations

- 22 | 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?

Concerning must-carry obligations, the RTVA distinguishes between broadcasting distribution networks that transmit content via wireless terrestrial broadcasting and wire.

In the case of wireless terrestrial broadcasting, the programme services of the SBC and the programme services of broadcasters that hold a licence with a performance mandate are entitled to access the network. Broadcasters pay the owner of a radio communication licence a cost-based compensation for the broadcasting.

In the case of transmission by wire, in addition to the above-mentioned programme services, the Federal Council has defined the programme services of foreign broadcasters that are to be transmitted by wire because of their special contribution to education, cultural development or free formation of opinion. In addition, OFCOM may, at the request of a broadcaster and under certain conditions, require a telecommunications service provider for a certain period to provide broadcasting by wire of a programme service within a specific area. The RTVO provides for a maximum number of programme services to be broadcast free of charge by wire.

Regulation of new media content

- 23 | Is new media content and its delivery regulated differently from traditional broadcast media? How?

No specific rules or regulations exist concerning the provision of traditional online content (websites, newsgroups and blogs, etc). However, general laws such as the UCA, the Federal Criminal Code and the laws that protect intellectual property rights, etc, 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 Internet Protocol television and streaming media) is, in principle, covered by the RTVA, apart from offerings of minor editorial importance (ie, programme services that can only be received simultaneously by fewer than 1,000 devices) and on-demand content that is also excluded from the RTVA. Consequently, most of today's online content is not regulated. Broadcasts that are subject to the RTVA, however, must abide by the same rules (eg, regarding advertisement) as broadcasts via traditional media. Although no licence is required, the broadcasters must inform OFCOM about their programme service.

Digital switchover

- 24 | When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

From 1 January 2015, must-carry obligations regarding analogue terrestrial television programme services were finally abolished and switched from analogue to digital television broadcasting. No specific timing is required by law for the switchover from analogue to digital broadcasting concerning the broadcasting of radio programme services. However, in spring 2013, the radio industry, together with OFCOM, set up the Digital Migration Working Group, which is made up of representatives of the industry and public authorities. Accordingly, it planned to gradually replace analogue FM reception with digital radio from 2020 onwards with completion by 2024 at the latest. Today, the SBC and most private radio stations broadcast their programme services via DAB+ in parallel with FM; some even broadcast exclusively in digital. To establish

new broadcasting technologies and, in particular, to alleviate a possible financial burden from such a parallel setup, OFCOM may provide financial help to licensed broadcasters in the case of insufficient resources in the relevant area. The necessary funds are generated by licensing and consumer fees.

Digital formats

- 25 | Does regulation restrict how broadcasters can use their spectrum?

In Switzerland, no specific rules for digital formats exist. Digital broadcasting is subject to the general rules of Swiss law. Digital formats that meet 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) are, in principle, covered by the RTVA.

Media plurality

- 26 | Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

Except for the SBC, the number of licences a broadcaster and its group companies may acquire is limited to a maximum of two television and two radio licences.

Also, there are measures against media concentration once a licence has been granted. However, these measures are only applicable if an undertaking abuses its dominant position. In such cases, DETEC consults the Swiss Competition Commission (COMCO). If the report of COMCO ascertains that a dominant undertaking jeopardises diversity of opinion and offerings as a result of an abuse of its dominant position, DETEC may demand that the undertaking concerned:

- ensures diversity by measures such as granting broadcasting time for third parties or cooperating with other participants in the market;
- takes measures against corporate journalism, such as issuing editorial statutes to ensure editorial freedom; or
- adapts its business and organisational structure (if the other measures are clearly insufficient).

Key trends and expected changes

- 27 | Provide a summary of key emerging trends and hot topics in media regulation in your country.

For some time now, Swiss media companies have faced a challenging time with declining revenues. Among others, this development has mainly been driven by online media or digitalisation, respectively. The consequences are job cuts, the merging of editorial offices and a decline in media diversity, which is particularly evident on a regional level. The covid-19 pandemic aggravated this development. Recent concentrations in the media sector in Switzerland confirm a clear trend towards consolidation in this sector.

Due to this development and the special importance of the media for democracy, the Swiss parliament passed motions to provide emergency financial aid amounting to 57.5 million Swiss francs. The Federal Council adopted two corresponding emergency ordinances on 20 May 2020 with a supporting package for all media genres.

On one hand, private radio and television broadcasters were directly supported with 30 million Swiss francs from the radio and television levy. Aside from direct financial contributions, the Swiss Confederation also committed to cover the costs of the Keystone-SDA news agency for six months, which are charged to electronic media. A maximum of

10 million Swiss francs was made available for this purpose, which is also taken from the radio and television levy. In the print sector, on the other hand, an expansion of the existing indirect press subsidy has been implemented. Already subsidised subscribed daily and weekly newspapers of the regional and local press were delivered free of charge in the daily channel of the post office for six months from 1 June 2020. Some 12.5 million Swiss francs from the general state budget was earmarked for this measure. Further, from 1 June 2020, the Swiss Confederation temporarily contributed to the costs of daily delivery of subscribed daily and weekly newspapers with a total circulation of more than 40,000 copies per issue. These titles were not eligible for subsidies according to the initial regulation. They also benefited temporarily from a delivery discount in the amount of the current regular reduction of 27 centimes per copy. A maximum of 5 million Swiss francs was assigned to this measure.

The ordinances were initially limited until 30 November 2020. On 11 November 2020, however, the Federal Council decided to extend the transitional measures until 30 June 2021 in the print-media sector and until 31 December 2021 for the coverage of the Keystone-SDA news agency costs charged to the electronic media.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The authorities regulating the telecommunications sector are the Federal Communications Commission (ComCom) and the Federal Office of Communications (OFCOM). ComCom is the independent licensing and market regulatory authority for the communications sector. Its main activities and competencies relate, in particular, to the granting of licences for the use of radio communication frequencies as well as the regulation of the terms of application of number portability and free choice of supplier. ComCom instructs OFCOM concerning the preparation of its business and the implementation of its decisions. OFCOM itself is part of the Federal Department of the Environment, Transport, Energy and Communications (DETEC) and acts as the supervisory authority in the communications sector. There is no strict line to draw between the competencies of OFCOM and ComCom as the latter has delegated some of its competencies to OFCOM.

The authorities regulating the media sectors are the Federal Council, DETEC and OFCOM. Further, there are the Federal Media Commission with advisory tasks and the Independent Complaints Authority for Radio and Television.

Also, anticompetitive practices and mergers in the telecommunications and media sector are subject to general competition law provisions enforced by the Swiss Competition Commission (COMCO). The cases are prepared and processed by COMCO's Secretariat. In merger notification scenarios, provided that the notification thresholds of the Federal Cartel Act are met, the notifying parties require both clearance from COMCO and approval of the transfer of mobile radio frequency licences by the licensing authority. Moreover, concerning specific questions related to the conditions of competition or the market position respectively, the telecommunications regulators are required to consult with COMCO. Thus, there is close collaboration between the authorities to avoid jurisdictional conflicts, particularly concerning issues such as reviewing price-fixing arrangements, mergers and strategic alliances as well as the behaviour of dominant market players

Appeal procedure

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

In the telecommunications and media sector, the law provides for the following appeal procedures: Decisions of ComCom, OFCOM, DETEC and COMCO as well as, to a limited extent, its interim procedural decisions, can be appealed to the Federal Administrative Tribunal. The scope of judicial reviews is extensive. An appeal can be lodged on the following grounds:

- wrongful application of the law;
- the facts established by the authorities were incomplete or wrong; or
- the decision was unreasonable (a claim that is, however, rarely invoked in practice).

Accordingly, the appeal before the Federal Administrative Tribunal is a full-merits appeal on both the findings of facts and law. However, in practice, the Federal Administrative Tribunal grants the previous instances a significant margin of technical discretion.

Decisions of the Independent Complaints Authority for Radio and Television can be appealed directly to the Federal Supreme Court.

The judgments of the Federal Administrative Tribunal and, to a limited extent, interim procedural decisions may be challenged before the Federal Supreme Court based on law and procedure within 30 days of the notification of the decision. An exception applies to decisions of the Federal Administrative Court regarding publicly tendered licences and disputes regarding access based on interconnection rules. These decisions are final and binding and cannot be appealed to the Federal Supreme Court. In proceedings before the Federal Supreme Court, judicial review is limited to legal claims (ie, the flawed application of the law or a violation of fundamental rights outlined in the Swiss Federal Constitution, the European Convention on Human Rights or other international treaties). The claim that a decision was unreasonable is fully excluded and claims concerning the finding of facts are limited to cases of arbitrariness.

In addition to the possibility of a request for reconsideration from the deciding authority (no actual appeal), regarding decisions by COMCO, the parties involved may at any time during and after appeal procedures request the Federal Council to exceptionally authorise specific behaviour or to clear a blocked merger for compelling public interest reasons. To date, such authorisation has never been granted.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

In previous years, COMCO has reviewed a series of concentrations in the telecommunications and media sector, most of them in phase I. In October 2020, COMCO granted unconditional clearance to the acquisition of Sunrise Communications Group Ltd by Liberty Global plc in phase I. The clearance decision mainly relied on the in-depth phase II examination of the contemplated reverse acquisition of certain Liberty Global assets including UPC Switzerland LLC by Sunrise Communications Group Ltd in the previous year. In that examination, COMCO, in particular, assessed and eventually excluded a collective dominant position of Sunrise and Swisscom.

Concerning behavioural cases, with the decision of 16 November 2020, COMCO imposed fines on several suppliers of network components for illegal price-fixing agreements when submitting offers for components used for data transmission via optical fibre by major customers. On 7 September 2021, COMCO has found that UPC is dominant in the

live broadcasting of Swiss ice hockey championship matches on pay-TV and that it abused this position by refusing to broadcast these games to Swisscom as a television platform operator. UPC holds extensive exclusive rights to broadcast Swiss ice hockey content on pay-TV for the 2017–18 to 2021–22 seasons. These exclusive rights created a dominant position in this market. Consequently, COMCO obliged UPC to offer all requesting television platforms in Switzerland either the raw signal of these championship matches or the transit of the UPC Mysports programme content (containing the relevant ice hockey content) on non-discriminatory terms. On 9 December 2019, the Federal Supreme Court issued a leading case concerning price-squeezing concerning the Swiss telecommunications market. In this decision, the Federal Supreme Court upheld the decision of the Federal Administrative Tribunal with a fine of about 186 million Swiss francs on Swisscom, the incumbent Swiss telecommunications operator, for a price squeeze in the asymmetric digital subscriber line market.

Regarding legislative changes, the Swiss government is currently analysing whether Switzerland should modernise its merger-control regime and switch from the currently applied creation or strengthening of a dominant-position test to the significant impediment of an effective-competition test as applied, inter alia, in the European Union. The Federal Council, therefore, instructed the Federal Department of Economics, Education and Research in February 2020 to prepare a consultation draft. The government believes that this change of test for merger proceedings would have both a medium- and long-term positive effect on competition in Switzerland. The consultation is expected to be opened in the second half of 2021.

Coronavirus

31 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The covid-19 pandemic has aggravated the challenging time Swiss media companies face in recent times with declining revenues. Due to the special importance of the media for democracy, the Swiss parliament passed motions to provide emergency financial aid amounting to 57.5 million Swiss francs. The Federal Council adopted two corresponding emergency ordinances on 20 May 2020 with a supporting package for all media genres.

On one hand, private radio and television broadcasters were directly supported with 30 million Swiss francs from the radio and television levy. Aside from direct financial contributions, the Swiss Confederation also committed to cover the costs of the Keystone-SDA news agency for six months, which are charged to the electronic media. A maximum of 10 million Swiss francs was made available for this purpose, which was also taken from the radio and television levy. In the print sector, on the other hand, an expansion of the existing indirect press subsidy has been implemented. Already subsidised subscribed daily and weekly newspapers of the regional and local press were delivered free of charge in the daily channel of the post office for six months from 1 June 2020. An amount of 12.5 million Swiss francs from the general state budget was earmarked for this measure. Further, from 1 June 2020, the Swiss Confederation temporarily contributed to the costs of daily delivery of subscribed daily and weekly newspapers with a total circulation of more than 40,000 copies per issue. These titles were not eligible for subsidies according to the initial regulation. They also benefited temporarily from a delivery discount in the amount of the current regular reduction of 27 centimes per copy. A maximum of 5 million Swiss francs was assigned to this measure.

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