

THE
TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

ELEVENTH EDITION

Editor
Matthew T Murchison

THE LAWREVIEWS

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MEDIA AND
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This article was first published in December 2020
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
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ISBN 978-1-83862-508-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ANANT LAW

CLEARY GOTTlieb STEEN & HAMILTON LLP

CMS RUSSIA

ELVINGER HOSS PRUSSEN

LATHAM & WATKINS LLP

LEE AND LI, ATTORNEYS-AT-LAW

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PREFACE

The Technology, Media and Telecommunications Review is now in its 11th edition, and I am excited to be taking the reins of this publication after a decade under the steady hand of long-time editor John Janka. This Review occupies a unique space in the literature on TMT issues. Rather than serving a traditional legal treatise, this publication aims to provide a practical, business-focused survey of law and policy in this arena, along with insights into how this legal and policy landscape continues to evolve from year to year. In the dynamic and ever-changing TMT sector, such perspective is vitally important. And the scope of this Review is global, now covering 20 jurisdictions.

Covid-19 shook the world in 2020, and its reverberations in the TMT sector have been profound. As the threat of infection has led to widespread lockdowns, the importance of connectivity has never been greater nor more obvious. For many businesses, remote working has become the rule rather than the exception. Many schools have switched to distance learning formats. Tele-health is on the rise as doctors check in on patients via videoconference. Even tasks as mundane as grocery shopping have shifted online. And broadband connectivity, where available, has made it all possible.

For policymakers, the experience of covid-19 has begun to reshape their understanding of the TMT arena and to refocus their policy goals. The sudden shift to remote working and distance learning has stress-tested broadband networks across the world – providing a ‘natural experiment’ for determining whether existing policies have yielded robust systems capable of handling substantial increases in internet traffic. In the European Union, officials called on video-streaming platforms to downgrade high-definition content temporarily to avoid overly straining broadband networks at the start of the pandemic. In the United States, meanwhile, policymakers touted that such measures were not necessary, and have attributed the apparent resilience of broadband networks in the country to deregulatory policies.

At the same time, the pandemic has prompted new initiatives to ensure, improve and expand broadband connectivity for consumers going forward. In various jurisdictions, policymakers are moving forward with subsidy programmes and other efforts to spur the deployment of advanced networks more deeply into unserved and underserved areas. Regulators also have taken steps to preserve internet access where it already exists, including by having service providers ‘pledge’ that they will not disconnect customers for non-payment in light of the pandemic, or by pursuing more prescriptive measures. In short, covid-19 has been part cautionary tale, part rallying cry, and its long-term impact on the TMT sector remains to be seen.

New technologies likewise have required new approaches and perspectives by policymakers. A notable example is the ongoing deployment of 5G wireless networks, as regulators continue to look for ways to facilitate such deployments. These initiatives take a

variety of forms, and frequently include efforts to free up more spectrum resources, including by adopting new rules for ‘sharing’ spectrum and by reallocating spectrum from one use to another. 5G spectrum was a significant focus of the World Radio-communication Conference (WRC) of the International Telecommunication Union (ITU), held in late 2019 in Sharm el-Sheikh, Egypt. And multiple jurisdictions have continued to auction off wireless licences in bands newly designated for 5G deployment, capitalising on service providers’ strong demand for expanded access for spectrum.

Another example is the planned deployment of multiple large satellite constellations in low-earth orbit to support new broadband services. The providers proposing these networks say they will greatly expand the availability of high-speed internet access service. At the same time, the sheer scale of the planned systems has raised fresh questions about how best to prevent accidental collisions and ensure equitable sharing of spectrum resources.

Even with so many newer issues swirling in the TMT sector, familiar topics have remained in the spotlight as well. Cue network neutrality, the principle that consumers should benefit from an ‘open internet’ where bits are transmitted in a non-discriminatory manner, without regard for their source, ownership or destination. The basic principle has been around for well over a decade, but policymakers are still sorting out how best to effectuate it without undermining investment and innovation in broadband services. In the United States, network neutrality has become a point of contention between the federal government, which has opted for a light-touch approach, and certain states that wish to impose bright-line prohibitions on internet service providers. In Europe, new guidelines and rulings have addressed internet service providers’ ‘zero rating’ plans, which exempt certain data from counting against a customer’s usage allowance. Regulators in Asia are grappling with similar policy questions. And this debate dovetails with efforts in some jurisdictions to increase oversight of the content moderation policies of social media companies and other online platforms.

The country-specific chapters that follow recap these and other developments in the TMT arena, including updates on privacy and data security, regulation of traditional video and voice services, and media ownership. On the issue of foreign ownership in particular, communications policymakers have increasingly incorporated national security considerations into their decision-making, as evidenced by recent actions in the United States against Chinese equipment manufacturers and service providers.

Our authors from around the globe have lent their considerable insight, analysis and experience to the preparation of their respective chapters. I hope readers will find this 11th edition of *The Technology, Media and Telecommunications Review* as helpful as I have found this publication year in and year out.

Matthew T Murchison

Latham & Watkins LLP

Washington, DC

November 2020

SWITZERLAND

Lukas Bühlmann, Michael Reinle and Damian George¹

I OVERVIEW

Switzerland's technology-neutral approach to regulation encourages digital services thereby allowing for ample room for development of technology-driven business models. In the past decades, the liberalisation of telecommunications services in Switzerland has been synchronised with that of the European Union, and the Swiss telecommunications market has developed positively. The current framework has helped developing potent and reliable communications networks, which serve as the backbone to existing and upcoming communication technologies. The disruptive effect of these new technologies (e.g., blockchain) respectively new ways of connecting people and devices (e.g., over-the-top services (OTT), internet of things) nevertheless creates challenges for regulators. Accounting for these developments, the parliament lately amended the regulatory framework. The revised Federal Telecommunications Act (TCA) should enter into force on 1 January 2021. The revised provisions will strengthen consumer protection as a main goal (for example, by implementing stricter provisions regarding telephone marketing, spoofing preventions, obligations of telecommunications service providers to prevent spam mails and calls, a right of the authorities to withdraw or block domain names and phone numbers in the event of non-compliance, transparency duties of telecommunications service providers regarding their service quality and intervention rights of the Federal Council regarding internet roaming). In addition, the revised TCA will expressly mention net neutrality.

Due to the constitutional public service mandate, broadcasting continues to be subject to stronger state regulation and control. Based on the assumption that a purely market-driven broadcasting landscape would not be able to provide the constitutionally required services, the Federal Act on Radio and Television (RTVA) creates a public service-oriented framework. Nevertheless, the convergence of electronic media as well as today's usage behaviour of consumers are challenging current broadcasting laws in many ways. Broadcasters and especially publishers struggle coping with digitisation. The Federal Council attempted to tackle these challenges by creating a new Federal Act on Electronic Media, which would have included non-linear media offerings as a possible public service. However, the proposal faced strong opposition from various stakeholders. The Federal Council retreated and merely sent a package of 'measures in favour of the media' into parliamentary consultation.

¹ Lukas Bühlmann and Michael Reinle are partners and Damian George is an associate at Meyerlustenberger Lachenal AG.

II REGULATION

i The regulators

Switzerland regulates the telecoms market on a federal level. The Federal Communication Commission (ComCom) is the main independent regulatory and licensing authority. It consists of seven independent specialists. Neither the Federal Council nor any Federal Department may intervene and affect its decisions.

ComCom is responsible for:

- a* granting licences to telecommunications services providers that wish to use the frequency spectrum;
- b* granting universal service licences;²
- c* laying down access conditions (unbundling, interconnection, leased lines, etc.) when service providers fail to reach an agreement;
- d* approval of national numbering plans;³
- e* fixing the terms of application of number portability and carrier selection; and
- f* decisions about supervisory measures and administrative sanctions.

In carrying out its tasks, ComCom may instruct and take account of the Federal Office of Communications (OFCOM). OFCOM handles questions pertaining to telecommunications and broadcasting (radio and television). It prepares the decisions of the Federal Council, the Swiss Federal Department for the Environment, Transport, Energy and Communication (DETEC) and ComCom. It is sometimes not easy to draw a strict line between OFCOM's and ComCom's tasks. OFCOM is responsible for:

- a* preparing the commercial transactions of ComCom, making the necessary applications and implementing its decisions;
- b* ensuring compliance of market participants with the law and their telecommunications licences;
- c* issuing those telecommunications licences in respect of which ComCom is not competent; and
- d* managing addressing resources in accordance with international standards.

OFCOM is obliged to take appropriate measures to ensure a sufficient supply of numbering elements and communication parameters. It hereby entrusted the administration and allocation of country-specific .ch and .li top-level domains to the SWITCH Foundation. SWITCH maintains Switzerland's Domain-Name Registry and allocates the domain names to individual users with private law contracts.

The broadcasting sector has three main authorities responsible for the granting of licences:

- a* the Federal Council is the licensing authority for the Swiss Broadcasting Corporation (SBC);

2 See more information about the universal service license granted to Swisscom: <https://www.bakom.admin.ch/bakom/en/homepage/telecommunication/the-universal-service-with-regard-to-telecommunications.html>.

3 See more information about the numbering plans: <https://www.bakom.admin.ch/bakom/en/homepage/telecommunication/numbering-and-telephony.html>.

- b* with respect to other licences, licensing competence has been delegated to the Swiss Federal Department for the Environment, Transport, Energy and Communications (DETEC); and
- c* OFCOM carries out supervision with regard to licensing and other regulatory requirements.

Other key authorities are the Independent Complaints Authority for Radio and Television (ICA), which deals with complaints relating to the editorial programme and rules on disputes over denied access to a programme, as well as the Federal Media Commission (FMEC), which advises the Federal Council and the Federal Administration in relation to media issues.

Next to the sector specific regulators mentioned above, several agencies with horizontal powers play a significant role in telecoms and media regulation.

In particular, the Federal Competition Commission (ComCo) has been actively involved in regulating telecoms infrastructure and the media market.⁴ Its tasks are combating harmful cartels, monitoring dominant companies for signs of anticompetitive conduct, enforcing merger control legislation and preventing the imposition of restraints of competition by the state. ComCo, as the competition authority specific to the telecommunication sector, consults ComCo on matters related to market dominance or general aspects of competition. ComCo seeks ComCo's and OFCOM's opinion on issues specific to telecommunications.

The Federal Price Inspectorate is competent to carry out price investigations concerning companies with market power and is consulted by public authorities, which decide on tariffs of a public or private company. If it detects price abuse, the Inspectorate primarily attempts to reach an amicable settlement with the company concerned, but may also prohibit an increase in prices or order a price reduction.

Lastly, the Federal Data Protection and Information Commissioner (FDPIC)⁵ is competent and active in regulating the privacy aspects of telephone and internet communication.

ii Main sources of law

The main sources of law for the telecoms sector are:

- a* the TCA (Federal Telecommunications Act) of 30 April 1997;
- b* the Ordinance on Telecommunications Services (OTS) of 9 March 2007;
- c* the Ordinance on the Use of the Radio Frequency Spectrum (OURFS) of 18 November 2020;
- d* the Ordinance on Addressing Resources in the Telecommunications Sector of 6 October 1997;
- e* the Ordinance on Internet domains (OID) of 5 November 2014;
- f* the Federal Act on the Surveillance of Post and Telecommunications (SPTA) of 18 March 2016; and
- g* the Ordinance on the Surveillance of Post and Telecommunications of 15 November 2017.

⁴ See more information about ComCo: <https://www.weko.admin.ch/weko/en/home.html?organization=710>.

⁵ See more information about the FDPIC: <https://www.edoeb.admin.ch/edoeb/en/home.html>.

Notably the TCA was partially revised in 2019 and the altered executing ordinances were published in November 2020.⁶ These amendments should enter into force on 1 January 2021. Relevant changes are highlighted hereinafter.

For the media sector the main sources of law are:

- a* the Federal Act on Radio and Television (RTVA) of 24 March 2006; and
- b* the Ordinance on Radio and Television (RTVO) of 9 March 2007.

iii Regulated activities

The TCA sets forth the conditions for the provision of telecommunications services. The following licence requirements still exist in Switzerland:

- a* a ComCom licence is required to provide a universal service;⁷ and
- b* telecommunications services providers need a ComCom licence to use the frequency spectrum.⁸

Until recently, all other providers of telecommunications services had to notify OFCOM, which would register them upon such notice.⁹ One major novelty of the revised TCA is the abolishment of this general notification duty. Pursuant to the revised Article 4 TCA only two registration requirements remain:

- a* telecommunications service providers that use frequencies for which a licence is mandatory must register with OFCOM;¹⁰ and
- b* furthermore, providers that use addressing resources that are administered on a national level must also register with OFCOM.¹¹

All providers must comply with the TCA, whether they have to register with OFCOM or not. In particular, radio frequencies cannot be used simultaneously and not all available frequencies suit each purposes. This is why the radio frequency spectrum may only be used in compliance with the detailed usage regulations set forth by the OURFS. With the revision of the TCA real-time transmission of speech by means of addressing elements provided for in a numbering plan (voice-over-ip, VoIP) is also explicitly regulated.¹²

With regard to media distribution, whoever wants to broadcast a programme service has to comply with the RTVA and its specific obligations. In principle, any person wishing to broadcast a programme service to the Swiss public must hold a licence.¹³ There are three different licences:

- a* the public broadcaster needs a public broadcasting license from the Swiss Federal Council;¹⁴ and

6 Press release of OFCOM of 18 November 2020 (full release available only in German, French, and Italian), <https://www.bakom.admin.ch/bakom/de/home/das-bakom/medieninformationen/medienmitteilungen.msg-id-81176.html>.

7 Article 14 TCA.

8 Article 22a TCA.

9 Article 4 old TCA.

10 Article 4 Paragraph 1 lit. a TCA.

11 Article 4 Paragraph 1 lit. b TCA.

12 Article 3 lit. *c bis* TCA; Article 28 et seq. OTS.

13 Article 3 RTVA.

14 Article 25 RTVA.

- b broadcasters of regional programmes can apply with DETEC for a fee-sharing licence.¹⁵ This licence sets forth among others the broadcasting region, means of broadcasting as well as organisational and operational requirements. As the name suggests, these broadcasters are compensated for their contribution to public service with a share of the broadcasting fees to be paid by the consumers; and
- c lastly, DETEC may award a licence for wireless terrestrial broadcasting of a programme service that takes account of local or regional particularities (licence with performance mandate, but without a share of fees).¹⁶

Broadcasters that request neither a share of fees nor a guaranteed wireless distribution can operate their service without a license. However, they must notify OFCOM in advance of their programme service.¹⁷

iv Ownership and market access restrictions

In general, there is no restriction of foreign ownership for telecommunications providers. Subject to international obligations to the contrary, the revised TCA, however, allows prohibiting foreign telecommunications providers the use of radio frequencies or addressing resources, if no reciprocal right is granted.¹⁸ Moreover, a registered office or branch office in Switzerland is required for value-added services.¹⁹

The granting of a radio communication license can be denied, if serious anticompetitive effects are expected.²⁰ Hence, one operator cannot (directly or indirectly) operate more than one nationwide mobile telecommunications network.

Media regulation is more protective. Any person wishing to obtain a broadcasting licence must be a natural person residing in Switzerland or a legal entity domiciled in Switzerland.²¹ In the absence of any international commitment to the contrary, broadcasting licenses may be refused to foreigners, companies with foreign control or Swiss companies with foreign participation, unless reciprocal rights are granted.²² Moreover, no broadcaster respectively no broadcasting company may hold more than two radio and two television licenses. The Swiss public broadcasting company is exempt from this restriction and the Federal Council can make further exceptions for new broadcasting technologies.²³ However, parliament is currently discussing an amendment to the RTVA as part of the measures in favour of the media, which would abolish this 2+2 licence restriction.

15 Article 38 RTVA.

16 Article 43 RTVA.

17 See Article 3 RTVA.

18 Article 5 TCA.

19 Article 12b TCA and Article 37 OTS.

20 Article 23 Paragraph 4 TCA.

21 Article 44 Paragraph 1 lit. f RTVA.

22 Article 44 Paragraph 2 RTVA

23 See Article 44 Paragraph 3 RTVA.

v Transfers of control and assignments

Transfer of a licence in part or as a whole to a third party requires the consent of the licensing authority. In the case of a transfer of a universal licence or a telecommunications service licence, ComCom's approval is required.²⁴ Approval can be refused only, if the acquirer does not meet licensing conditions or cannot guarantee an interference-free and efficient use of frequencies.²⁵ In the case that the license was granted by ComCom, this also applies to the economic transfer of the licence, for example a change of control in licensee.²⁶

The transfer of broadcasting licenses requires DETEC's consent. This also applies to the economic transfer of the licence. Pursuant to the RTVA, transferring more than 20 per cent of the licensee's stock qualifies as economic transfer.²⁷

III TELECOMMUNICATIONS & INTERNET ACCESS

i Internet and internet protocol regulation

According to Article 3 TCA, telecommunications service means transmission of information for third parties by means of telecommunications techniques. Transmission by means of telecommunications techniques is defined as sending or receiving of information, by lines or radio, by means of electrical, magnetic or optical signals or other electromagnetic signals. Despite these statutory definitions, it was unclear whether and to what extent over-the-top-services (OTT) qualify as regulated telecommunications services. When revising the TCA, the legislator clarified that OTT-services are regulated.²⁸

Internet service providers have the same duties as other telecommunications services providers, which are:

- a* complying with employment legislation and guaranteeing the working conditions that are customary in the sector; and
- b* offering an appropriate number of apprenticeships.²⁹

The technology-neutral TCA sets forth further obligations, but certain reliefs apply to VoIP providers specifically. They do not need to have a fixed pre-setting of another provider, namely no carrier preselection offer, since market conditions are not comparable to traditional telephony.³⁰ If providers of VOIP cannot guarantee correct routing of emergency calls for every location due to technical constraints, it is sufficient if correct routing is guaranteed for calls from the main location cited in the subscription contract.³¹

24 Article 24d Paragraph 2 TCA and Article 19a Paragraph 1 TCA.

25 Article 24d para 2 TCA.

26 Article 24d TCA.

27 Article 48 RTVA.

28 Federal Council, message on the revision of the Telecommunications Act, BBl 2017 6559, 6599 (available only in German, French, and Italian) <<https://www.admin.ch/opc/de/federal-gazette/2017/6559.pdf>>.

29 Article 6 TCA.

30 Article 34f OTS.

31 Article 30 OTS.

ii Universal service

ComCom awards one or more universal service licences to ensure that universal service is guaranteed for the whole population of Switzerland. Universal service licences are put out to tender as a competition based on criteria set forth in the OTS.³² The universal service comprises, *inter alia*, public telephone services, the public directory, data transmission services with a transmission speed of 10/1 Mbit/s as well as services for people with special needs.³³ However, the licensee may use the technology or technologies, which it deems the most appropriate to provide the service. In addition, the universal service licensee is not obliged to provide broadband access when another operator offers a comparable alternative offering on the market. The Federal Council fixes ceiling prices for the services forming part of the universal service in the OTS.³⁴ There is only one universal service licence in place, which was awarded to Swisscom.

The Federal Council does not subsidise investment in broadband infrastructure. OFCOM is nevertheless pushing the development of broadband services and adopted expert recommendations to increase respective investments. Moreover, cantons and municipalities actively support the development of broadband networks. For example, the city of Zurich funds its electric utility provider to build a fibre-optic network. Despite the financial support from the government being scarce, consumer demand for high-speed internet made several market players invest in broadband infrastructure over the past years. In 2019, a third of Swiss households were directly connected by a fibre-optic connection.³⁵

iii Restrictions on the provision of service

Until recently, a Code of Conduct upon which Switzerland's main providers agreed upon in 2014 solely governed content discrimination (net neutrality). This CoC explicitly allows the application of tailored prices to data traffic associated with particular applications (zero rating) as well as bandwidth throttling. When initiating the revision of the TCA in 2017, the Federal Council tried to follow this somewhat lenient approach. Following the National Council's Transport and Telecommunications Commission's call for action, however, parliament enacted a strict obligation to net neutrality: Under the revised TCA telecommunications service providers must transmit information without making a technical or economic distinction between senders, receivers, content, services, classes of service, protocols, applications, programmes or terminals. Nevertheless, there are few exceptions to the net neutrality rule, as follows:

- a* complying with laws or court orders;
- b* maintaining the integrity or security of the network, the services rendered via the network or the devices connected to the network;
- c* complying with the customer's express request; and
- d* combating temporary and exceptional network congestion in a non-discriminatory manner.³⁶

32 Article 12 OTS.

33 Article 15 OTS.

34 See Article 22 OTS.

35 See ComCom, Activity Report 2019, p. 2, <<https://www.comcom.admin.ch/comcom/en/Homepage/documentation/activity-report.html#>>.

36 Article 12e TCA.

Note that clauses in pre-formulated terms and conditions do not qualify as indications of the customer's express request.³⁷

Moreover, telecommunications service providers must combat spam. Pursuant to the revised TCA, telecommunications service providers are obliged to enable their customers free of charge to filter incoming advertising calls and spam messages.³⁸ They must, inter alia, provide customers upon request with peripheral information on advertising messages and advertising calls as well as addressing resources, names and addresses of the customers whose connections were used for unfair mass advertising.³⁹

At the wholesale level, providers of telecommunications services with a dominant position in the market must provide other registered providers access to their network and services in a transparent and non-discriminatory manner. Forms of access to be granted under the TCA include:

- a* fully unbundled access to the local loop to use the full frequency spectrum of the twisted metallic pair;
- b* interconnection;
- c* leased lines; and
- d* access to cable ducts, provided sufficient capacity is available.⁴⁰

If the providers of telecommunications services do not agree on the conditions of access within three months, ComCom will decide at the request of one of the parties and OFCOM.⁴¹ The OTS deals with the maximum access price. It provides detailed guidance on the rather complex calculation of these cost-oriented prices.⁴²

iv Privacy and data security

The main regulation governing privacy in Switzerland is the Federal Data Protection Act (FDPA). In order to harmonise the FDPA with international developments, in particular the European Union's General Data Protection Regulation (GDPR), Switzerland revised the FDPA in 2019. The revised FDPA will come in effect probably early 2022 and mirrors many of the provisions set out in the GDPR.

Whoever processes personal data must respect the processing principles: Lawfulness, good faith, proportionality, transparency, data adequacy and data security. However, non-compliance with the general principles may be justified in exceptional circumstances, for example, where the person concerned consented to the processing at hand.⁴³ Personal data may be transferred abroad only, if the destination country ensures an adequate level of data protection. The FDPIC publishes a respective list of countries. Similar to the GDPR, transmission of personal data to countries not having an adequate level of protection may take place, if adequate safeguards or exceptions set forth by the FDPA apply.⁴⁴

37 Article 10f OTS.

38 Article 45a TCA and Article 83 OTS.

39 Article 82 OTS.

40 Article 11 TCA.

41 Article 11a TCA.

42 Article 54 et seq. OTS.

43 Article 13 FDPA.

44 Article 6 FDPA.

Article 43 et seq. TCA set forth additional data protection and security rules in the telecoms sector. The obligation of communication secrecy prohibits any person who is or has been responsible for providing a telecommunications service from disclosing information relating to subscribers' communications or granting anyone an opportunity to do so.⁴⁵ Furthermore, providers of telecommunications services may process customer location data only for the purpose of providing telecommunications services and invoicing, except where the customer consented to other purposes or the data was anonymised beforehand.⁴⁶ Data stored on external equipment, in particular cookies, may be processed for providing telecommunications services and invoicing. The processing for other purposes is possible, if the customer is informed about the use of cookies and his right to opt-out.⁴⁷ Finally, the revised TCA and the Ordinance thereto will include provisions regarding the protection of children and adults.⁴⁸ The Federal Council may require the providers of internet access services to inform their customers about the options in the area of children and adult protection. In addition, there are provisions dealing with the prevention of illegal pornographic content.⁴⁹

The Federal Act on the Surveillance of Post and Telecommunications (SPTA) and its related ordinance govern governmental surveillance in cases of criminal investigations, in the context of judicial assistance in criminal matters as well as in the context of a search for missing persons.⁵⁰ The SPTA applies to telecommunications service providers, operators of internal networks, and providers of services based on telecommunications services (providers of derived communications services).⁵¹ The Federal Service for the Surveillance of Post and Telecommunications (the Service) may order and instruct these providers on how to carry out the surveillance of users, request them to take the necessary measures and supervises implementation. The scope of this cooperation is set out in detail in the SPTA. Telecommunications service providers, inter alia, must store peripheral data for six months and assist in real-time surveillance of communication content.⁵² Providers of derived communication services' cooperation duties are limited to tolerate the Service's surveillance by providing necessary access and information.⁵³ All providers bear the costs for providing the facilities needed for cooperation and only receive adequate compensation for individual surveillance measures.⁵⁴

Different statutes deal with cybersecurity and cybercrime matters as follows:

- a Any intrusion into a data processing system is a criminal offence.⁵⁵
- b The FDPA requires that all personal data be protected by appropriate measures from unauthorised access.⁵⁶
- c Telecommunications service providers are responsible to their customers for the secure operation of their networks. They must immediately inform OFCOM of faults in

45 Article 43 TCA.

46 Article 45b TCA.

47 Article 45c TCA.

48 Article 46a Paragraph 1 TCA.

49 Article 46a Paragraphs 2 and 3 TCA.

50 Article 1 SPTA.

51 Article 2 SPTA.

52 Article 21 SPTA and Article 26 SPTA.

53 Article 27 SPTA.

54 Article 38 SPTA.

55 Article 143 *bis* Criminal Code (CC).

56 Article 7 FDPA.

the operation of their networks affecting a relevant number of customers.⁵⁷ OFCOM publishes technical and administrative regulations for the security and availability of telecommunications infrastructures and services on its website in the section 'practical implementation'.⁵⁸ It can declare internationally harmonised technical safety standards to be binding.⁵⁹ ComCom supports the elaboration and application of security criteria (such as the EU tool box for secure 5G networks) that have to be applied by telecommunications service providers when selecting their suppliers. Nevertheless, while detailed cooperation duties of various stakeholders are set forth in the revised Ordinance on Telecommunications Installations, ComCom is not able to influence supplier or equipment selection or outsourcing decisions.

- d* The revised TCA includes a specific cyber-threat provision.⁶⁰ Telecommunications service providers have to fight against unauthorised manipulation of telecommunications equipment by means of telecommunications transmissions. They are entitled to reroute or prevent connections and suppress information in order to protect the equipment. To protect against hazards, prevent damage and minimise risks, the Federal Council may issue regulations on the security of information and of telecommunications infrastructures and services.
- e* With regard to internet security, SWITCH has the possibility of temporarily blocking domain names on reasonable suspicion that they are being used for phishing, malware or to support these activities. In addition, SWITCH is obliged to block domain names for 30 days at the request of an anti-cybercrime service recognised by OFCOM.⁶¹

IV SPECTRUM POLICY

i Development

Until recently, anyone who wished to use the Swiss radiofrequency spectrum needed a licence. The Swiss legislature wanted to foster innovation by removing administrative hurdles. Thus, the revised TCA marks a paradigm shift in the direction of more flexible spectrum use.⁶²

ii Flexible spectrum use

Under the revised TCA, the frequency spectrum shall be free to use in principle within the limits of specific statutory obligations.⁶³ Note that frequencies above 3000 GHz are exempt from the rules on frequency use altogether. For the other frequencies, OFCOM draws up the national frequency allocation plan, which allocates frequencies to one or more geographical areas (allotments). The frequencies are divided into two frequency classes: frequencies allocated to a limited number of users in a specific area of application (Class A) and frequencies

57 Article 96 OTS.

58 Article 48a TCA; OFCOM Ordinance on Telecommunications Services and Addressing Resources, Annex 1.

59 Article 96 OTS.

60 Article 48a TCA.

61 Article 15 and Article 15a OID.

62 Federal Council, message on the revision of the Telecommunications Act, BBl 2017 6559, 6599 (available only in German, French, and Italian) <<https://www.admin.ch/opc/de/federal-gazette/2017/6559.pdf>>.

63 Article 22 Paragraph TCA.

allocated to an unlimited number of users in a specific area of application (Class B).⁶⁴ The use of the spectrum can be made subject to a licence, a notification or certificate of proficiency,⁶⁵ but only for the following reasons:

- a* avoidance of radio interference;
- b* ensuring the technical quality of telecommunications services and other radio applications;
- c* ensuring the efficient use of the radio frequency spectrum; or
- d* in cases where other decrees or international treaties provide that the frequency spectrum may only be used with a permit issued by the competent authority.⁶⁶

Using the frequency for providing telecommunications services requires a ComCom licence.⁶⁷ Inter alia, merely notifying OFCOM is sufficient for spectrum use in connection with ocean and aerial navigation, GPS repeaters or ground probing radar.⁶⁸ The duty to obtain a certificate of proficiency can apply on top of the notification requirement. In addition, certain Class B frequencies are exempt from notification and proficiency obligations altogether.⁶⁹ Details as well as the proficiency requirements are specified in the OURFS.

iii Broadband and next-generation services spectrum use

As early as June 2018, ComCom launched the tender procedure to allocate an extensive bundle of mobile frequencies, creating the licence conditions for the development of 5G mobile radio networks. Salt, Sunrise, and Swisscom were able to acquire a wide range of new frequencies for a combined 380 million Swiss francs. Following the acquisition of the frequencies, Swisscom put its 5G network, which was to cover 90 per cent of the population by the end of 2019, into operation on 17 April 2019. Sunrise launched its 5G offer on 4 April 2019 and by December 2019 had already achieved coverage of 80 per cent of the population.⁷⁰

However, in developing their networks operators face some obstacles. Various civil movements fear that the new technology could have a negative impact on people and the environment and oppose the building of 5G antennas. As a result, planning permissions for new mobile communication antennas are currently being granted only hesitantly in some cantons. Mobile phone operators are also still awaiting the definitive recommendations of DETEC on how to measure the radiation emissions of the new adaptive antennas. The department promised the respective report by the end of 2021. Finally, the parliament of the canton of Geneva submitted a national initiative, demanding a national 5G and 4G+ moratorium. The initiative is currently pending in Federal Parliament.

64 Article 7 et seq. OURFS.

65 Article 22 Paragraph 2 TCA.

66 Article 22 Paragraph 3 TCA.

67 Article 22a TCA.

68 See Article 33 OURFS.

69 Article 8 OURFS.

70 See ComCom, Activity Report 2019, p. 5 et seq. <<https://www.comcom.admin.ch/comcom/en/Homepage/documentation/activity-report.html#>>.

iv Spectrum auctions and fees

Generally, ComCom grants licences following an open invitation to tender, if there are not enough frequencies available to meet all applicants' present and future needs.⁷¹ Any licence applicant must have the necessary technical capacities and undertake to comply with the applicable legislation, in particular the TCA and the RTVA, their respective implementing ordinances as well as the individual licence conditions.⁷²

The auction procedure, which can last several months, has to follow the principles of objectivity, non-discrimination, and transparency. Furthermore, it has to guarantee the confidential character of all information provided by applicants.⁷³ ComCom may specify a minimum bid, can demand securities for the fees and enjoys considerable discretion regarding other aspects of the procedure.⁷⁴ With regard to the 5G auction, for example, ComCom chose a comparatively simple, two-stage auction format (what is known as a 'clock auction'). This format made it possible for bidders to bid simultaneously for multiple blocks in all the frequency bands. However, five frequency blocks of 5MHz each in the 2,600MHz band and in the 700 and 1,400MHz ranges remained unsold and will be put out to tender again later.

Radio licence fees and administrative charges in the field of telecommunications law are governed by the Ordinance on Fees in the Telecommunications Sector. DETEC regulates the rates of the administrative charges. As a rule, fees are recurring, normally annually, and are collected in advance.⁷⁵ The radio license fee shall be calculated on the basis of the frequency range allocated, the class of frequency and the value of the frequencies, the bandwidth allocated as well as the territorial and temporal scope.⁷⁶

V MEDIA

i Regulation of media distribution generally

Please note that there is no specific legal framework dealing with emerging platforms. The Federal Council aimed to tackle challenges posed by the distribution of content over internet platforms by creating a new Federal Act on Electronic Media, which would have included non-linear media offerings as possible public service. The proposal was contested, and the Federal Council stepped back. This does not mean that internet platforms are not subject to legal requirements. Certain internet platforms may qualify as telecommunications service. The RTVA's distribution rules also apply to certain content distributed via the internet (such as webcasting and streaming services). Furthermore, content distributed by internet platforms is subject to some scrutiny by criminal law and unfair competition law.

Transmission of information by means of telecommunications techniques, including the transmission of radio and television programme services, is regulated under the TCA.⁷⁷ Content, on the other hand, is subject to regulation by the RTVA.

71 Article 22a Paragraph 2 TCA.

72 Article 23 TCA.

73 Article 24 TCA.

74 Article 24 OURFS.

75 Article 2 Ordinance on Fees in the Telecommunications Sector.

76 Article 39 TCA.

77 Article 2 TCA.

For broadcasting licences, OFCOM usually has to carry out an open invitation to tender.⁷⁸ The invitation includes at least the extent of the coverage area, the means of broadcasting, a description of the performance mandate, the annual share of the fees (if applicable), the term of the licence, and the criteria for the award.⁷⁹ To be awarded a broadcasting licence, the applicant must be able to fulfil its performance mandate, possess sound financial standing, be transparent regarding its owners, guarantee compliance with employment law regulations as well as the RTVA and the licence obligations. He also must separate editorial and economic activity and have registered offices in Switzerland.⁸⁰ Licensed broadcasters have to pay an annual fee.⁸¹ OFCOM carries out supervision under the RTVA with regard to licensing and other regulatory requirements.

Any form of censorship is forbidden. No one, not even a regulatory body, may instruct a broadcaster or demand that it broadcasts specific presentations and information.⁸² This does not mean that broadcasters enjoy unlimited autonomy. Radio and television programmes must respect fundamental rights, in particular human dignity. They may not discriminate, contribute to racial hatred, endanger public morals or glorify or trivialise violence. Facts are to be presented fairly and must be clearly separated from opinions, and licensed programmes must appropriately represent the variety of events and opinions.⁸³ By choosing an appropriate transmission time or other precautions, broadcaster must ensure that minors are not confronted with programmes that jeopardise their physical, mental, moral or social development.⁸⁴ Detailed rules apply with regard to advertising and sponsorship transparency. In particular, advertising is to be separated from editorial programmes (separation rule).⁸⁵

Complaints about the content of programmes may be submitted with the ICA.⁸⁶ The ICA acts as an *ex post* regulator; there is no need or possibility for broadcasters to obtain its permission or opinion beforehand. It also has no competence to order provisional measures, whereas such measures are available in ordinary state courts.

ii Internet-delivered video content

Since the Swiss legislature strives to keep laws technology-neutral, the RTVA's distribution rules also apply to content distributed via the internet (such as webcasting and streaming services). However, if contents are individually downloaded by the user and then consumed at will (genuine on-demand services, video on demand) this does not meet the RTVA's definition of programme. Hence, the offering of video on demand does not fall within the RTVA's scope of regulated activities.

Because ever more blockbuster series are distributed by streaming or Video on Demand services, the move to internet video distribution affects and disadvantages consumers who

78 Article 45 Paragraph 1 RTVA.

79 Article 43 RTVA.

80 Article 44 RTVA.

81 Article 22 RTVA.

82 Article 6 RTVA.

83 Article 4 RTVA.

84 Article 5 RTVA.

85 Article 11 et seqq. RTVA.

86 Article 83 RTVA.

cannot afford internet access. On the same time, one must add that internet access is not a major issue in Switzerland. The major issue are rather the subscription fees for the services, if at all.

The fees charged by internet services providers are generally dependent on the download and upload speed (the higher the speed, the higher the fees) and not on the content being transmitted. However, consumers are willing to pay for higher speed in order to facilitate the consumption of content via internet.

VI THE YEAR IN REVIEW

With the acquisition of UPC and its cable network infrastructure, Sunrise becomes the second largest telecommunications company in Switzerland. Whereas the ComCo had prohibited Sunrise's merger with Orange (now Salt) in 2010 because it expected the merger to have a negative impact on competition, it approved the acquisition of UPC unconditionally. It was decisive that the merged company will have a different offer structure compared to Swisscom, the largest provider.⁸⁷

End of last year the Federal Supreme Court upheld a 186 million Swiss franc fine issued by ComCo against Swisscom.⁸⁸ Between 2001 to 2007, the prices Swisscom set for broadband connectivity services were so high when compared to retail prices that internet service providers did not have a sufficient profit margin. This margin squeeze constituted an abuse of a dominant position. Based on this judgment, Sunrise is claiming damages of 350 million Swiss francs plus interest and has sued Swisscom in the Commercial Court of Berne.⁸⁹

Earlier this year the Service ordered the instant-messaging provider Threema to monitor peripheral communication data and to decrypt user messages. Threema successfully appealed the order with the Federal Administrative Court, which held that OTT-providers are not telecommunications services providers under the SPTA, but merely providers of services that are based on telecommunications services.⁹⁰ Because of this qualification, Threema is only subject to reduced monitoring and information obligations under the SPTA and the Service's order was declared invalid. However, the Service's appeal with the Federal Supreme Court is pending.

The Federal Supreme Court confirmed OFCOM's opinion that SRG's cross-promotion of television programmes in a radio show qualifies as advertising. It held that SRG had failed to comply with the separation rule by not separating this self-advertising with an acoustical signal.⁹¹

The partial revision of the TCA was the most significant change in the regulatory landscape. As mentioned, the revised provisions should enter into force on 1 January 2021. Major changes, for example, the revised frequency policy, were highlighted already. With an

87 ComCo, WEKO bewilligt Kauf von Sunrise, 30. October 2020 <<https://www.weko.admin.ch/weko/de/home/aktuell/medieninformationen/nsb-news.msg-id-80922.html>>.

88 Federal Supreme Court, judgment 2C_985/2015 of 9 December 2019.

89 Sunrise, press release, 15 May 2020, <https://e3.marco.ch/publish/sunrise/821_5129/20200515_PR_Schadenersatz_ADSL-Marktmissbrauch_EN.pdf>.

90 Federal Administrative Court, judgment A-550/2019 of 19 May 2020.

91 Federal Supreme Court, judgment 2C_529/2017 of 25 November 2019.

amendment to the Unfair Competition Act (UCA), the public prosecutor's office and courts are granted authority to revoke or block domain names or telephone numbers, if their users violated the UCA and these measures seem necessary to prevent future violations.⁹²

At the end of September 2020 parliament approved the revision of the Federal Data Protection Act (FDPA). Examples of important amendments are stricter (criminal) sanctions, extended information obligations, the obligation to create a processing directory and additional rights for the data subjects. The revised provisions will most likely enter into force at beginning of 2022.

Parliament significantly strengthened broadcaster's bargaining position with regard to Replay TV. Without the broadcaster's consent, telecommunications service providers offering Replay-TV may no longer make any changes to the linear television programme services.⁹³

Finally, the Federal Council's measures in favour of the media are currently subject to parliamentary debate. The package includes expanding the RTVA's existing general measures for promotion of Swiss media, the creation of a new federal law on the promotion of online media as well as promoting print journalism indirectly with fee reliefs for postal delivery.

VII CONCLUSIONS & OUTLOOK

The telecoms market was liberalised almost two decades ago, yet the former monopolist still enjoys a strong position in the market. However, competition has been picking up in recent years, and it will be interesting to see what impact the revised TCA will have. With regard to the media market, it is uncertain if parliament will take any action next year. Since the growing convergence of technologies will endure, more players will continue to challenge each other over content and digital advertising revenue. It is safe to say that digitalisation will remain the common challenge in regulating both media and telecoms.

92 Article 26a Unfair Competition Act.

93 Article 61a RTVA.

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ISBN 978-1-83862-508-5