

International **Comparative** Legal Guides



Telecoms, Media & Internet **2021**

A practical cross-border insight into telecoms, media and internet law

14th Edition

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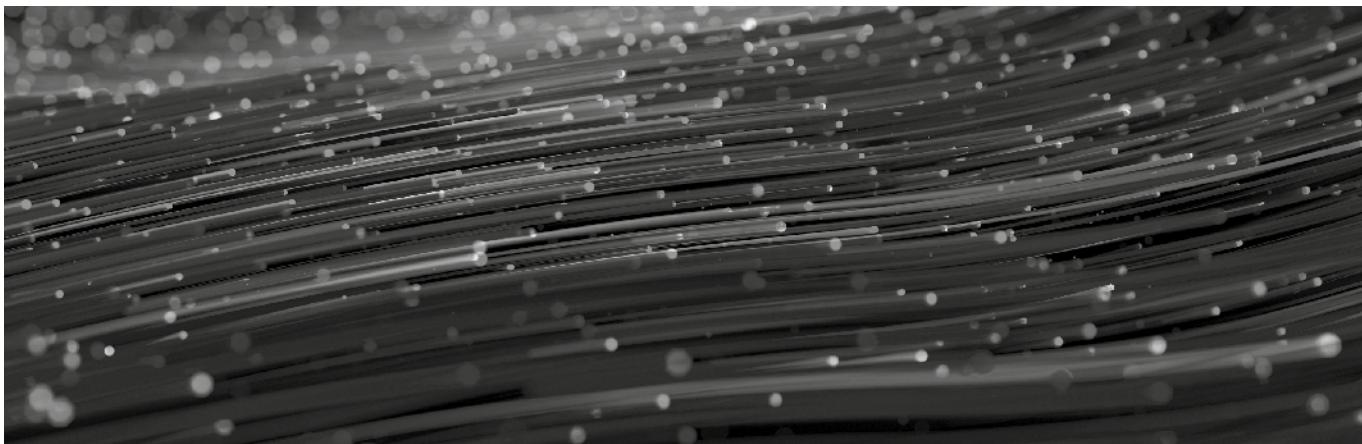
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1 Overview

1.1 Please describe the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction, in particular by reference to each sector's: (i) annual revenue; and (ii) 3–5 most significant market participants.

Switzerland has very high-performance, high-speed telecommunications infrastructure. The economy as a whole benefits from competition in infrastructure and services. With 46.5% of the population having fixed and mobile broadband access as of the end of 2019, Switzerland is consolidating its position at the top of the ranking of Organisation for Economic Co-operation and Development (OECD) countries.

At the end of 2019, the total operating revenue for fixed broadband communications was CHF 4,830 million (Var. 2018–19: -5.9%). In the mobile market, at the end of 2019, the total operating revenue for services on mobile networks was CHF 4,063 million (Var. 2018–19: -1.7), and for convergent service packages (fixed and mobile fixed network) CHF 2,161 million (Var. 2018–19: +11.6).

The *fixed broadband communications market* – including internet and digital TV – involves telecommunications operators as well as cable (CATV) operators. In terms of internet access, digital subscriber line (DSL) and fibre to the x (FTTx) providers still have a large advantage over CATV operators. At the end of 2019, just over 71% of users still had access to a telecom operator and 29% via lines of a cable operator.

Looking at the total number of broadband providers (CATV, DSL and FTTx), Swisscom is still far ahead of its main competitors with a market share of 50.9% at the end of 2019. All alternative telecoms operators together had a market share of 20.2% at the end of 2019. Sunrise accounted for 12.4% of this market share. UPC has a market share of 16.5% among cable operators, and the other CATV operators together account for 12.4%.

In the now saturated *mobile phone market*, the number of mobile phone customers declined in 2019 by just under 1% to just over 11,235,000 units. For a total population of 8.59 million, mobile penetration in Switzerland is at 131% at the end of 2019.

At the end of 2019, Swisscom held approximately 58% of the market share, with Sunrise at 21% and Salt at 16%. The percentages include the connections of virtual operators or resellers of services using the networks of Swisscom (M-Budget), Sunrise (Yallo, Lebara, Ortel) and Salt (Coop Mobile).

Swisscom's turnover in 2019 was around CHF 11.5 billion, thereby achieving the highest turnover of the three large Swiss mobile phone operators. Sunrise achieved a turnover of around CHF 1.9 billion and Salt CHF 1 billion.

The Swiss *digital TV market* is characterised by intensifying competition and a rapidly growing number of streaming platforms, but also by changing consumer habits (time-shifted television, use of multiple and, in particular mobile, devices, etc.). In this environment, CATV operators have been able to maintain their leading position. Although they have continued to lose customers in their core business year after year, they still held a market share of 53.6% at the end of 2019. In 2019, their customer base declined by 5% to about 2.12 million units.

The number of digital television subscribers on the fixed telephony network continued to increase in 2019, and the telecoms providers are now seriously competing with the CATV operators in this market segment. Although UPC managed to stem the massive migration of customers in recent years, it lost almost 71,000 subscribers (-6.6%) to digital TV in 2019, resulting in a market share of 25.6 %. Quickline, an association of several CATV operators, has a market share of 8.6% at the end of 2019. As regards telecoms operators, Swisscom has been able to build on its leading position: It gained 36,000 new customers in 2019 (+2.4%) and increased its market share to 39.3%. Sunrise, which was the last to enter this market in 2012, increased its market share to 7.1%.

1.2 List the most important legislation which applies to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction and any significant legislation on the horizon such as the regulation of online harms or artificial intelligence (please list the draft legislation and policy papers).

(a) Telecoms

The main law governing the transmission of information by means of telecommunications techniques is the Telecommunications Act (TCA). The TCA and the Ordinances based upon the TCA have recently undergone revision which will enter into force soon.

The aim of the TCA is to ensure that a range of cost-effective, high-quality, and nationally and internationally competitive telecommunications services is available to private individuals and the business community. The TCA shall, in particular: a) ensure that a reliable universal service is provided at affordable prices for the entire population in all parts of the country; b) ensure that telecommunications traffic is free from interference and respects personal and intellectual property rights; c) allow effective competition in the provision of telecommunications services; and d) protect users of telecommunications services from unfair mass advertising and from abuse associated with value-added services.

The core aims of the recent partial revision include the strengthening of consumer protection, the protection of children and young people, the principle of network neutrality, the restricted access to the “last mile” for fibre optic connections as well as the promotion of competition. Further, the Federal Act on Unfair Competition has been revised in order to tighten the requirements for telephone marketing, and to introduce the possibility for the public prosecutor’s office and courts to revoke or block domains and telephone numbers that have been used in violation of the Act on Unfair Competition or the Price Disclosure Ordinance (PBV).

On the basis of the TCA, several Ordinances have been enacted and will be revised partially: the Ordinance on Telecommunications Services; the Ordinance on Telecommunications Installations; the Ordinance on the Addressing Resources of Telecommunications Services (the standards relating to short numbers are to be modernised); the Ordinance on Frequency Management and Radio Licences, which will be completely revised to make technical adjustments; the Ordinance on Electromagnetic Compatibility; and the Ordinance on Fees in the Telecommunications Sector.

Further, the Federal Act on Surveillance of Post and Telecommunications (SPTA) and the respective Ordinance apply to communications services.

The only specific legislation pertaining exclusively to the internet is the Ordinance on Internet Domains containing provisions on the list of all domains (WHOIS database) and on combating cybercrime. The revised TCA contains provisions to ensure net neutrality (*cf.* question 6.3).

(b) Audio-visual media distribution

Audio-visual media distribution is governed by the Federal Act on Radio and Television (RTVA) and its respective Ordinance, which shall be replaced by a new Act on Electronic Media.

Further, general statutes such as the Federal Act on Data Protection (FADP), the Act on Unfair Competition, the Ordinance on Price Disclosure, the Code of Obligations and the Criminal Code apply to all sectors.

Currently, no specific regulations on the development or deployment of artificial intelligence are envisaged in Switzerland. The protection of personal data regime applicable to automated decisions under the revised Federal Data Protection Act will follow the principles under the EU General Data Protection Regulation (GDPR).

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors in your jurisdiction.

The Federal Communications Commission (ComCom), an independent commission with decision-making powers, is in charge of the regulation of the telecommunications market, of awarding the universal service licence, as well as radio communication licences for the use of the frequency spectrum, of determining access conditions and prices when telecommunications service providers (TSPs) cannot reach agreement, of the approval of the national numbering plans, and of the regulation of the methods of application of number portability and carrier selection.

The Federal Office of Communications (OFCOM) is part of the Federal Department of the Environment, Transport, Energy and Communications (DETEC), and acts as the supervisory authority in the communications sector. It is responsible for tasks relating to regulation and is the national authority in the areas of

telecommunications, broadcasting and post, ensuring, in particular, the quality of the universal service and the public service.

Disputes between customers and TSPs are reconciled by the Ombudscom, while the Independent Complaints Authority for Radio and Television (UBI) assesses complaints concerning radio and television programmes.

1.4 In relation to the: (a) telecoms, including internet; and (b) audio-visual media distribution sectors: (i) have they been liberalised?; and (ii) are they open to foreign investment including in relation to the supply of telecoms equipment? Are there any upper limits?

The market for telecommunications services has been liberalised for more than 20 years. Foreign TSPs are free to enter the Swiss market. Moreover, the development towards an IP-based network offered by new and/or foreign TSPs fuels competition. In general, there are no barriers; however, in the absence of any international obligations to the contrary, the ComCom may prohibit undertakings incorporated under foreign law from providing telecommunications services in Switzerland, unless reciprocal rights are granted. This will not change with the revision of the TCA. There are no upper limits.

2 Telecoms

General

2.1 Is your jurisdiction a member of the World Trade Organisation? Has your jurisdiction made commitments under the GATS regarding telecommunications and has your jurisdiction adopted and implemented the telecoms reference paper?

Switzerland joined the World Trade Organisation (WTO) on 1 July 1995. Switzerland has adopted the reference paper on regulatory principles and has made commitments regarding telecommunications under the General Agreement on Trade in Services (GATS).

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

The TCA regulates the transmission of information by means of telecommunications techniques.

Specific Ordinances contain more detailed regulation on topics such as the use of the radio spectrum, internet domain names or telecommunications installations (*cf.* question 1.2).

The revised TCA shall enter into force soon (*cf.* question 1.2).

2.3 Who are the regulatory and competition law authorities in your jurisdiction? How are their roles differentiated? Are they independent from the government?

The regulatory authority for telecommunications is the ComCom (*cf.* question 1.3).

The competition law authority is the Competition Commission (COMCO), subdivided into the Commission and the Secretariat of the Commission. The Commission monitors competition, has decision-making powers, provides its opinion on federal bills that influence competition, makes recommendations to other authorities, and provides them with expert reports. The Secretariat prepares the Commission’s business,

conducts investigations and advises governmental offices and undertakings on competition matters. Formally part of the Federal Department of Economic Affairs, Education and Research (EAER), the COMCO is independent of the administrative authorities.

In the field of telecommunications, both authorities have concurrent jurisdiction as regards their specific tasks.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Decisions of the ComCom can be appealed to the Federal Administrative Tribunal based on, *inter alia*, the violation of federal law including the exceeding or abuse of discretionary powers, and the incorrect or incomplete determination of the legally relevant facts of the case.

Decisions of the Administrative Tribunal can be further appealed to the Federal Supreme Court based on, *inter alia*, the violation of federal law and the manifestly incorrect determination of the legally relevant facts of the case. Decisions of the Federal Administrative Tribunal regarding licences granted by means of public tender proceedings, and disputes regarding access to facilities and services of providers with a dominant position, cannot be deferred to the Federal Supreme Court.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in your jurisdiction?

No general authorisation is required for the provision of telecommunication services as such. Under the current TCA, there is merely a notification duty which requires all TSPs to notify the OFCOM of the type of services provided, a description of interfaces and infrastructure, as well as corporate information. The OFCOM keeps a register of the providers. The revised TCA will limit the registration duty solely to TSPs using the radio communications frequency spectrum and addressing resources to provide their services.

Basic telecommunication services must be available to the entire Swiss population in all regions. To ensure that these are affordable, reliable, and of good quality, the ComCom grants a licence for providing universal service within a tender process. The universal services have been awarded to Swisscom, the incumbent provider, for a term of five years, beginning from 2018.

Mobile radio frequencies are subject to licences which are allocated by the ComCom (*cf.* question 2.7 and 3.2).

2.6 Please summarise the main requirements of your jurisdiction's general authorisation.

There is no general authorisation for the provision of telecommunication services in Switzerland.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded. Are there restrictions on the change of control of the licensee?

Under the revised TCA, the frequency spectrum shall, in principle, henceforth not be subject to a licence unless a specific Ordinance of the Federal Council provides for the contrary.

Under the current TCA, a licence needs to be obtained to use the radio communications frequency spectrum. The TCA itself does not impose a set duration for licences regarding the use of radio frequencies, but leaves this to the licensing authority. The mobile phone frequencies currently in use are covered by 16-year licences.

An auction for the allocation of new frequency bands for the introduction of a 5G network took place between January and February 2019. Thereby, Swisscom, Salt and Sunrise were assigned frequencies for 15 years, giving the operators long-term planning security to develop their networks.

Licences may be transferred in whole or in part to a third party only with the consent of the licensing authority. The same applies to an economic transfer.

2.8 Are there any particular licences or other requirements (for example, in relation to emergency services) in relation to VoIP services?

TSPs must offer a service which enables users to reach the relevant alarm centre in the event of danger to life, limb, health or property (emergency call service). TSPs must ensure routing and location identification for emergency calls. The Federal Council may, after weighing the interests of the population and providers and taking into account technical developments and international harmonisation, define exceptions and provide for the use of location functions of terminal equipment even without the express consent of the user. The Federal Council may extend the obligation to provide the emergency call service to other telecommunications services which are publicly available and widely used.

Public and Private Works

2.9 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

The TCA requires owners of land in public use to allow TSPs to use that land to install and operate lines, provided those installations do not interfere with the public use of the land. The authorisation procedure is simple and rapid. Compensation for the authorisation is limited to an administrative charge covering the costs; additional land use charges are prohibited. Under certain conditions, providers may be granted expropriation rights. As regards passive infrastructure, *cf.* question 2.13.

Access and Interconnection

2.10 How is wholesale interconnection and access mandated? How are wholesale interconnection or access disputes resolved?

The TCA requires providers with a dominant market position to provide access to other providers in a transparent and non-discriminatory manner, at cost-oriented prices. The same applies to universal services providers. The access required by the TCA currently covers interconnection as well as fully unbundled access to the local loop, rebilling for fixed network local loops, leased lines and access to cable ducts, provided these have sufficient capacity. The revised TCA does not extend the unbundling of "the last mile" and remains limited to copper lines.

If the providers in question are unable to negotiate an amicable settlement with regard to access conditions within

three months, the dispute may be brought before the ComCom, which decides based on a proposal made by the OFCOM.

Disputes relating to access contracts or decisions are subject to the jurisdiction of the civil courts.

2.11 Which operators are required to publish their standard interconnection contracts and/or prices?

Only providers with a dominant market position are obliged to disclose the conditions and prices for their access services and provide the OFCOM with a copy of their access contracts. Currently, this applies only to Swisscom. There is no publishing obligation; however, the contracts may be accessed by the public unless there is an overriding public or private interest.

Under the revised TCA, TSPs must ensure that their prices are transparent for customers. If they treat information during transmission in a technically or economically differentiated manner, they must inform the public of this. Further, TSPs are obliged to provide public information on the quality of the telecommunications services they offer. However, it is the Federal Council that determines what specific information providers are to publish.

2.12 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

Dominant TSPs must grant other TSPs access to their facilities and services in a transparent and non-discriminatory manner at cost-oriented prices as regards: 1) full unbundled access to the local loop using the full frequency spectrum of the twisted metallic pair; 2) the charging of fixed local loops; 3) interconnection; 4) leased lines; and 5) access to cable ducts, provided they have sufficient capacity. Dominant TSPs must inform on their conditions and prices separately for each of their individual access services.

If the TSPs cannot agree on the conditions of access within three months, the ComCom shall decide. The ComCom thereby takes into consideration conditions that shall promote effective competition and the effects of its decision on competitors in the market (cf. question 2.10).

2.13 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

Providers are not subject to any obligation regarding accounting separation, functional separation and/or legal separation.

2.14 Describe the regulation applicable to high-speed broadband networks. On what terms are passive infrastructure (ducts and poles), copper networks, cable TV and/or fibre networks required to be made available? Are there any incentives or 'regulatory holidays'?

The TCA is essentially technologically neutral and, accordingly, applies to high-speed broadband networks.

However, only owners of existing copper local loop access infrastructure with a dominant position in the market are obliged to fully unbundle access to the local loop in a transparent and non-discriminatory manner, at cost-oriented prices (cf. question 2.9). Broadcasting of radio and television programme services are explicitly exempted from this obligation.

At present, there are no incentives or regulatory holidays in force.

Price and Consumer Regulation

2.15 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

In principle, providers are free to determine the prices for fixed, mobile, or other services, including in particular roaming charges, which are relatively high in Switzerland.

Maximum charges apply, however, to certain telephony services provided by the universal services provider Swisscom, as well as value-added services.

With regard to international roaming, the Federal Council may, based upon the revised TCA, issue specific regulations to avoid disproportionately high retail tariffs and to take measures to promote competition. Such regulations and measures may include: the adoption of rules on billing; the obligation of mobile operators to enable their customers to use third-party roaming services abroad; setting maximum price limits based on international agreements; and obliging mobile operators to offer bundled products that include roaming services and options that enable roaming services to be used at fixed or reduced standard prices.

Lastly, the Federal Price Supervisor monitors price developments and prevents or eliminates the abusive increase and retention of prices based upon the Federal Price Supervision Act, and the COMCO takes measures against unlawful restraints of competition where retail prices are affected, based upon the Cartel Act of the COMCO.

2.16 Is the provision of electronic communications services to consumers subject to any special rules (such as universal service) and if so, in what principal respects?

Basic telecommunication services must be available to the entire Swiss population in all regions. To ensure that these are affordable, reliable, and of good quality, the ComCom grants a licence for providing universal service within a tender process (cf. question 2.5). TSPs are essentially free to determine the general terms and conditions applicable to consumers. However, such general terms and conditions need to comply with data protection law and are subject to limitations under the Federal Act on Unfair Competition. Further, TSPs must comply with the principle of secrecy of telecommunications as well as data retention obligations.

According to the TCA, TSPs must block the access to telephone and internet services for persons only in circumstances where they have provided false data or failed to provide the necessary documentation.

Numbering

2.17 How are telephone numbers and network identifying codes allocated and by whom?

The OFCOM assigns numbering, naming and addressing resources.

Technical management of the ".ch" domain is currently provided by SWITCH which maintains a registry. The registration of a domain name within the ".ch" domain may be requested from registrars who have concluded a contract with SWITCH. SWITCH itself is not allowed to allocate domain names.

Since autumn 2015, the registration of ".swiss" domain names has been possible upon validation of every application to the OFCOM, in accordance with the principles laid out in the Ordinance on Internet Domains.

2.18 Are there any special rules which govern the use of telephone numbers?

The national numbering plans apply. Furthermore, providers must ensure number portability and freedom of choice of providers (*cf.* question 2.20).

2.19 Are there any special rules relating to dynamic calling line identification presentation?

Anyone who makes advertising calls without displaying a telephone number which is listed in the telephone directory and which he is authorised to use, is in violation of the Federal Act on Unfair Competition.

2.20 Are there any obligations requiring number portability?

TSPs must ensure number portability and freedom of choice of providers regarding national and international connections. The ComCom fixes the detailed rules for implementation in light of technical developments and international harmonisation.

In order to speed up number porting, the ComCom has reduced the deadlines for the original TSP to arrange the number porting application for mobile numbers to the new provider within one working day, and for all other phone numbers within two working days at the latest. Further, the original TSP is obliged to agree to the porting even in the event of disputes with the customer.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

The TCA regulates the use of the radio communications frequency spectrum and the ComCom grants licences for its use.

3.2 How is the use of radio spectrum authorised in your jurisdiction? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative ‘beauty parades’, etc.?

The current revision of the TCA aims at a paradigm shift on this subject as the frequency spectrum shall, in principle, no longer be subject to a licence by the ComCom unless a specific Ordinance of the Federal Council provides for the contrary. The OFCOM registers TSPs who use radio frequencies for the provision of telecommunications services only if such TSPs require a licence.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions? Are there penalties for the unauthorised use of spectrum? If so, what are they?

The armed forces and civil defence do not require a licence. Further, the Federal Council and the OFCOM have provided exceptions for technical means of limited importance in specific Ordinances on frequency management and frequency licences.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

The amount of the licence fees is calculated on the basis of: the

frequency range allocated, the class of frequency and the value of the frequencies; the bandwidth allocated; the territorial scope; and the temporal scope. The Ordinance on Telecommunications Fees provides for different fees depending on the radio communication type (directional radio, wireless broadband, satellite transmission, etc.). However, according to the TCA, no licence fees are charged for broadcasting licensed radio or television programme services and the Federal Council may exempt specific institutions and private bodies, e.g. to perform duties of public interest.

In addition to the licence fees, administrative charges and reimbursement of expenses need to be paid to the ComCom for the grant or amendment of the licence, pursuant to the Ordinance on the Administrative Charges in the Telecommunications Sector.

If the radio communication licence is granted by auction (*cf.* question 3.2), the licence fee shall correspond to the amount of the bid, minus administrative charges for the invitation to tender and the granting of the licence.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

Licences may be transferred in whole or in part to a third party only with the consent of the licensing authority. The same applies to an economic transfer. A transfer due to a change of control is subject to approval by the licensing authority (*cf.* question 2.7).

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and, if so, on what conditions?

Licences may be transferred in whole or in part to a third party only with the authorisation of the licensing authority. The same applies to an economic transfer and shared use.

The licensing authority may provide for exemptions from the authorisation requirement for individual frequency bands if it is likely that interference-free and efficient use of the frequencies will continue to be ensured and if effective competition will not be eliminated or significantly impeded as a result. Transfers which do not require authorisation must be notified in advance to the licensing authority.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework for cybersecurity.

Switzerland does not have a specific comprehensive regulation on cybersecurity. Provisions of general statutes apply, such as the Swiss Criminal Code, the FADP, the TCA, etc.

On 19 April 2018, the Federal Council adopted the “National Strategy for the Protection of Switzerland against Cyber-risks (NCS)” for the period 2018–2022. The strategy builds on the results of the previous NCS adopted earlier in 2012, and aims at further developing it. The objective is to minimise cyber-risks.

The strategy encompasses new standardisation and regulations objectives, and lays the ground for discussions on minimal standards for cybersecurity and new notification duties for cyber-incidents. The discussions on a new Information Security Act applying to federal authorities are currently suspended.

The Swiss Financial Market Supervisory Authority (FINMA) has published a supervisory notice on the obligation for the banks, insurance companies and other institutions under its

supervision to report cyber-attacks. FINMA stipulates that relevant cyber-attacks must be reported within 72 hours after detection of the incident. Under the revised FADP (entry into force to be expected in 2022), data breaches must be reported to the Federal Data Protection Commissioner (FDPIC) as soon as possible only if there is a high risk of negative consequences for the data subjects concerned. Further, the data subjects must be informed of the data breach if this is required for their protection or the FDPIC requests such information.

4.2 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

The SPTA and the corresponding Ordinances form the basis for the surveillance of private communications by establishing the Post and Telecommunication Surveillance Service (PTSS), an independent service administratively affiliated to the Federal Department of Justice and Police, which conducts inquiries upon request by Swiss enforcement authorities and has the authority to give instructions to TSPs.

The scope of application of the SPTA is limited to surveillance measures ordered and executed: (i) within criminal proceedings; (ii) for the enforcement of international judicial assistance requests; (iii) for the search of missing persons or criminal fugitives; and (iv) for the enforcement of the Federal Intelligence Service Act (ISA).

Requirements and procedures for ordering surveillance measures are set out in (i) the Federal Code of Criminal Procedure (CCP) and the Military Criminal Procedure (MCP), (ii) the Federal Act on International Mutual Assistance in Criminal Matters (IMAC), (iii) the SPTA, and (iv) the ISA.

The SPTA further provides for a multitude of challenges to providers regarding data retention (*cf.* question 4.6), interfaces in order for the surveillance authorities to access user communications in real time, as well as information for the authorities on new services and products prior to going to market. The SPTA is complemented with provisions on the deployment of GovWare and international mobile subscriber identity-catchers (IMSI-catchers) pursuant to the CCP and the MCP.

4.3 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

According to the SPTA, TSPs shall at any time be able to monitor the telecommunications services they provide if the surveillance is standardised. The surveillance types which the TSPs are obliged to perform are set out in the Ordinance on Surveillance of Post and Telecommunications (OSPT), further standardised in the Ordinance on Implementation of the Surveillance of Post and Telecommunications (OI-SPT). These regulations provide detailed rules on traditional telephone calls, voice over internet protocol (VoIP) calls, emails, text and instant messenger, and all other forms of electronic communications such as chatting platforms.

If the surveillance is not standardised, TSPs must cooperate with the PTSS according to its instructions, and take all appropriate measures to ensure their implementation.

The PTSS can request TSPs to prove that they are able to implement the standardised surveillance in accordance with applicable law at their own expense, and instruct them to take technical and organisational measures to remedy deficiencies.

4.4 How does the state intercept communications for a particular individual?

As a general rule, enforcement authorities order the surveillance of post and telecommunications and notify the order to the PTSS, which then implements the order. TSPs must cooperate with and provide information to the PTSS, which in turn grants the enforcement authorities access to communications and information. The order needs to be approved by the supervisory authority. Depending on the procedure, the approval needs to be issued before or after the implementation of the order. The approval is of limited duration and needs to be renewed. Information collected without approval cannot be used in a proceeding and has to be destroyed.

Other measures, such as GovWare and IMSI-catchers, are not implemented by the PTSS.

4.5 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

According to the TCA, TSPs must comply with security requirements. The specific regulations provide for details on encryption.

Based on the SPTA, once a surveillance order has been issued, TSPs have the duty to disclose their encryption keys to the PTSS.

4.6 Are there any specific cybersecurity requirements on telecoms or cloud providers? (If so, please list the relevant legislation.)

Under the revised TCA, TSPs are obliged to combat cyber-attacks (Art. 48a para. 1 revTCA). Cyber-attacks are exclusively defined as manipulations through telecommunications transmissions, such as the distribution of malicious software or the impairment of web services (so-called DDoS attacks). Physical access and backdoors in hardware and software are not covered. In the event that the measures implemented by TSPs do not suffice, the Federal Council is granted the power to enact more detailed regulations.

There are no specific cybersecurity requirements applicable to cloud providers.

4.7 What data are telecoms or internet infrastructure operators obliged to retain and for how long?

Pursuant to the SPTA, providers are obliged to retain the data provided by the customer at the beginning of the customer relationship, including identification data, date of birth and profession, addressing resources, and services provided. Such data must be retained for the entire duration of the customer relationship as well as for six months after termination. Further, providers are obliged to maintain all peripheral communication data for six months. The OSPT lays down the details.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in your jurisdiction?

The broadcasting, processing, transmission and reception of radio and television programme services are regulated by the RTVA and, unless the RTVA provides to the contrary, by the TCA (*cf.* question 1.2).

The RTVA is technologically neutral and, thus, applies to any type of broadcasting, transmission, etc.

In principle, Swiss broadcasters must register with the OFCOM prior to any transmission. The national public broadcaster SRG SSR, as well as other broadcasters with a performance mandate (with or without fee-splitting), require a licence. This applies in particular to those broadcasters making use of VHF frequencies. In order to prevent media concentration, a broadcasting company may, as a rule, obtain a licence for two TV channels and two radio channels at most.

5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

There are additional rules applicable to content broadcast via television and radio, such as clear separation of advertising and editorial content, split-screen, interactive and digital advertising, ad breaks, limitation/prohibition of advertising for tobacco, alcohol, therapeutic products, political and religious content, etc.

Only licensed broadcasters as well as those who broadcast abroad are obliged to limit advertising time in line with EU Directives. Special provisions apply to SRG SSR TV programmes, and radio programmes of SRG SSR are not permitted to broadcast advertising.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

The SRG SSR holds a licence from the Federal Council and has a constitutional programme service mandate. It must, therefore, fulfil certain obligations regarding the quality, content and diversity of its programmes which are detailed in the licence and in the legislation. Further, there are regional licensed broadcasters with a performance mandate. Finally, broadcasters without a performance mandate must only notify the OFCOM and have, in comparison, more limited obligations.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Licences may be assigned upon prior approval by the DETEC. The same applies in the event that 20% of the share capital changes ownership. If the DETEC deems that the conditions for the licence may no longer be fulfilled after the assignment or change of control, the DETEC will not grant approval.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

To date, TSPs have not been held liable for any content carried over their networks.

In a leading case, which has been widely criticised, the Federal Supreme Court decided that a publisher of a newspaper had to remove illegal content uploaded by a third party to the blog hosted

by the publisher, stating that the publisher was accessorially liable without even being aware of the content (Decision of the Swiss Federal Supreme Court 5A_792/2011 of 13 January 2013).

However, in a landmark decision, the Federal Supreme Court held that access providers cannot be obliged to block copyright-infringing content unlawfully uploaded onto portals by third parties. Under the Swiss Copyright Act, consumption of content from an illegal source for personal use is permissible. The Federal Supreme Court held that access providers cannot be prohibited from providing the technical infrastructure for permissible acts by users. The Federal Court also denied that access providers are liable for participation (accessorial liability) in a copyright infringement by foreign portals, host providers or uploaders (Decision of the Swiss Federal Supreme Court 4A_433/2018 of 8 February 2019).

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. to provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

There are no statutory provisions obliging internet service providers (ISPs) to provide information, to inform customers, etc.

The self-regulatory "Code of Conduct Hosting" of the Swico, the trade association of the ICT and online industry, contains "notice and notice" and "notice and take down" procedures.

6.3 Are there any 'net neutrality' requirements? Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks?

The revision of the TCA introduced the net neutrality principle. The revised FMG now stipulates that TSPs are obliged to ensure net neutrality: TSPs must transmit information without making any technical or economic distinction between senders, receivers, content, services, classes of service, protocols, applications, programs or terminal equipment (Art. 12e para. 1 revTCA). However, the different transmission of information is permitted by way of exception, namely, if it is necessary to comply with the law or a court order, to ensure the integrity and security of the network or the terminal equipment connected to it, to comply with an express request from customers or to combat network congestion (Art. 12e para. 2 revTCA). In addition to access to the internet via the same connection, TSPs may offer other services that must be optimised for specific content, applications or services in order to meet the quality requirements of customers. However, these other services must not be used or offered as a substitute for internet access services, and they must not degrade the quality of internet access services (Art. 12e para. 3 revTCA). If an FDA treats information in a technically or economically different manner during transmission, it must inform customers and the public about this (Art. 12e para. 4 revTCA).

Prior to the revision of the TCA, the main network operators had concluded a "Code of Conduct on net neutrality" and established a conciliation board for disputes on net neutrality matters.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?

Under the partially revised TCA, ISPs are now obliged to block

access to pornographic content prohibited by the Swiss Criminal Code upon notice by the Federal Office of Police (Art. 46a para. 3 revTCA). Further, the ISPs must report suspected cases of criminal pornographic content back to the Federal Office of Police if they peruse such content by accident or have been informed of such content by third parties. However, ISPs are not obliged to systematically monitor their networks.

Within the revision of the TCA, the Federal Act on Unfair Competition has been partially amended to enable public prosecutors or courts to revoke or block domain names (and telephone numbers) in case of violations of the Federal Act on Unfair Competition; such blocking shall prevent new offences. Only “.ch” domain names can be blocked.

The new Federal Act on Gambling (Gambling Act) and the related Ordinances entered into force on 1 January 2019. It sets out statutory provisions which oblige TSPs to block access to online gambling offers which are not authorised in Switzerland.

Within the revision of the Copyright Act, a “stay down” obligation for hosting providers as regards copyright-infringing content has been introduced and entered into force in May 2020. Again, ISPs are not obliged to monitor content systematically.

Consumer virtual private network (VPN) services as such are neither regulated nor blocked.



Martina Arioli studied law, philosophy and political science at the University of Bern where she graduated in 1996 (*magna cum laude*), passing the bar in 1999 with excellence, and receiving an LL.M. from the London School of Economics and Political Science (LSE) in IP in 2001. She is registered with the Zurich Bar Registry and is admitted to practise in all of Switzerland. Martina Arioli has consistently been recognised as one of Switzerland's leading TMT lawyers since 2016 by *Who's Who Legal*, and as thought leader on data in 2020 and 2019. She has been listed as a "recognised practitioner" by *Chambers Europe* for TMT in 2020 and 2019. Arioli Law has been considered as one of the top law firms in Switzerland in the ranking by *Bilanz* since 2017. For almost a decade, she has chaired a prestigious annual conference on data protection in Switzerland.

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Arioli Law provides legal expertise with a straightforward, hands-on approach. Arioli Law is ranked as one of Switzerland's top law firms in TMT and IP by *Bilanz* and *Le Temps* and is listed by Leaders League for Technologies, Internet & Telecommunications – IT & Outsourcing. Martina Arioli established her law firm Arioli Law in 2013 in Zurich, after having worked for one of Switzerland's leading law firms as well as for a major Swiss bank and a major Swiss insurance company. Martina Arioli combines in-depth knowledge on complex contractual matters in outsourcing, information technology and telecoms projects with the experience of implementing such global projects as an in-house lawyer. Further, Arioli Law provides comprehensive advice to companies in the IT industry on software development, licensing, technology-related transactions, IP

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